

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21246  
Docket Number CL-21058

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,  
( Freight Handlers, Express and Station Employees  
(  
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7737) that:

1. Carrier violated the Clerks' Agreement when it arbitrarily and capriciously refused to assign Mr. J. E. Williams to the position of Investigator-Senior #503. (Carrier's File 280-757).

2. Carrier shall now be required to assign Mr. J. E. Williams to Investigator-Senior position #503 and compensate him for eight (8) hours at Investigator-Senior rate of pay each day beginning September 12, 1973, and each work day thereafter until the violation is corrected. Claim is in addition to any other compensation received by Mr. Williams.

OPINION OF BOARD: A "Senior-Investigator" position was bulletined in the Freight Claims Department, which required:

"10. Major Duties To be responsible for the investigation and settlement with claimants and the distribution thereof between carriers on various types and classes of freight loss and damage claims. To perform such other similar or lower rated duties as may be assigned, properly coming within the rate of pay. Experience as Investigator-Junior is required. A written test is required." (underscoring supplied)

Claimant, a Station Accountant in the Freight Office (an office totally separate from the Freight Claims Dept.) with three years seniority, applied for the position, however, it was assigned to a "new employe".

The Carrier asserts that under Rules 4 and 6 of the Agreement, Claimant's "fitness and ability" were insufficient.

Rules 4 and 6 state in pertinent part:

"RULE 4. PROMOTION BASIS

(a) Employes covered by these rules shall be in line for promotion. Promotion, assignments and displacements under these rules shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.

NOTE 1: The word 'Sufficient' is intended to more clearly establish the prior rights of the senior of two or more employes

of the same seniority district having adequate fitness and ability for the position or vacancy sought in the exercise of seniority."

"RULE 6. VACANCIES AND NEW POSITIONS

\* \* \* \* \*

(d) Employees filing applications for positions bulletined on other districts or on other rosters will, if they possess sufficient fitness and ability, be given preference over non-employees."

Carrier based its judgment on the Claimant's written test score of 24-25% (passing 75%) and his experience with the Carrier during the three years of employment. Carrier maintains that Claimant's experience was in no way related to the "Investigator-Junior" experience required by the bulletin to perform sufficiently in the Senior Investigator position.

It is not disputed that the Carrier has the right to determine the employee's fitness and ability (see for example Awards 6028, 4485, 15002, 20658, and 15493). Claimant maintains, however, that Carrier's denial of his application was arbitrary and capricious, because he meets the stated requirements:

"Q. When and where did you acquire the qualification and fitness to perform the duties of investigator-senior in the freight claims office?

A. I feel that 3 years of railroad experience would enable me to at least learn with the background previously acquired to work the job although I do not have any freight claim experience at the present time. Also I might add that working as a station accountant I understand that part of the work as a station accountant also is connected with freight claim work such as OS&Ds which are practically the basis for some freight claims. (underscoring supplied)."

Moreover, according to the Organization, under Rule 7 the employee is guaranteed the right to demonstrate his ability:

"RULE 7. FAILURE TO QUALIFY

\* \* \* \* \*

(b) Employees who have been awarded bulletined positions, or employees whose exercise of seniority over junior employees has been approved, will be allowed 30 calendar days in which to qualify, except as provided for in Section (d) of this Rule.

\* \* \* \* \*

(e) Employees will be given full cooperation of department heads and others in their efforts to qualify."

Based on Rule 7, the Organization alleges the Claimant should be given the opportunity to demonstrate his competencies. But, Carrier notes that said rule is only applicable when a position has been assigned - and thus is not material to the instant case. This Board is not empowered to change or alter Agreements and therefore we are inclined to concur with Carrier's assertion that it need not allow a 30-day "trial period" for employees who have not been previously assigned.

The Organization maintains further that the test which the Carrier asserts the Claimant failed, is not a valid consideration as the Carrier refused to disclose the contents of the test. Numerous Awards cited in this case support the Carrier's right to administer a "reasonable test".

Award 5025 states in pertinent part:

"This Division of the Board has long recognized, that in the absence of anything in the agreement to the contrary, reasonable tests may be used by the Carrier to assist it in determining the fitness of an applicant. (See Awards 4918, 5006.)"

(Also see Awards 1593, 19144 and many others.) However the authority cited indicates that there must be grounds on which the Board can establish the test as reasonable. The Carrier has refused to provide the test. As a result, we have no valid basis for consideration of the test in the instant case, and in accordance with our Award 20658, we may not rest our conclusion solely on test results.

We feel that Carrier erred when it refused to provide the test, so that it could be properly assessed. But, that does not dispose of the dispute. Once we eliminate from consideration the test score - as we do in this case - we must consider the remainder of the record to ascertain if Carrier has supported its decision.

Award 20658 and others (see 19660 and 15494) hold:

"...when a Carrier makes a determination that an employee is not qualified, the burden shifts to the employee to demonstrate to the contrary. Accordingly, a close scrutiny of the record, as handled on the property, is appropriate to determine if Claimant has satisfied the above stated burden. (underscoring supplied)"

The Claimant testified that he had sufficient competency to learn the duties of the Senior Investigator:

"Q. Mr. Williams have you ever been assigned to any job in the Freight Claim Office?

A. No sir.

Q. Are you fully familiar with the job duties and requirements of an investigator-senior?

A. No sir, I am not. Usually a person who had never working in the freight claims couldn't possibly have, but I feel like to do have the ability to learn to work the job.

\* \* \* \* \*

Q. When you made application for the job of Investigator-Senior, No. 503, did you understand the major duties of this job?

A. I understood that there would be a period of time in which to learn or qualify if awarded the job. No sir, I was not aware of the general duties of the job..

\* \* \* \* \*

Q. Do you feel that given the time and cooperation that you can learn the job that you bid on in the freight claims department?

A. Yes sir."

We are mindful of the Organization's reliance upon sustaining Award 20561. Although we do not have before us the docket in that dispute, the Award shows that the factual circumstances there were significantly different than those presented in this dispute.

After a thorough and extensive review of the complete record developed on the property and the arguments of the parties, we are unable to find that Claimant has presented to us a sufficient showing to support his contention that he was qualified to hold the position for which he applied. Accordingly this claim is dismissed for failure to meet the burden of proof.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

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That the Claim be dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A. W. Paulos  
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1976.