

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21385
Docket Number CL-21131

James C. McBrearty, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and Station
(Employees
(
(Chicago, Milwaukee, St. Paul and Pacific
(Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7838) that:

1. Carrier violated and continues to violate the Clerks' Rules Agreement in Seniority District No. 55 when it unjustly treated employee Karen A. Volkman by failing to award her Secretary Position 23630 and in lieu thereof awarded the position to a junior employee.

2. Carrier shall now be required to assign employee K. A. Volkman to Secretary Position No. 23630 and give her a seniority date in District No. 55 as of April 8, 1974.

3. Carrier shall now be required to compensate employee K. A. Volkman the difference in rate of pay of Position 23630 and that of the position assigned to for each workday retroactive to April 8, 1974, and for all subsequent days until the violation is corrected, including continuing payment if the position is assigned permanently to the junior employee.

4. Carrier shall now be required to pay seven percent (7%) interest compounded annually on such difference in rate until such time as claimant is made whole.

OPINION OF BOARD: Claimant is regularly assigned to Stenographer Position No. 50240 in the Material Division, Seniority District No. 118, where she holds a clerical seniority date of March 16, 1970.

In its Bulletin No. 1, dated March 18, 1974, Carrier advertised a vacancy on Secretary Position 23630 in District No. 55 due to a maternity leave. Carrier determined that a shorthand speed of at least 80 WPM was required to perform the duties of this position. Claimant and four others submitted applications. All were given a shorthand test,

and three of the five passed the test. The position was awarded to the senior of the three who passed.

Although Claimant failed the test, she asserts that she should have been assigned to this temporary vacancy, because she was senior to the individual who was assigned.

Petitioner cites the following rules as being applicable to the instant case:

"RULE 7 -- PROMOTION

Employees covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.

NOTE: The word 'Sufficient' is intended to more clearly establish the right of the senior employee to the new position or vacancy where two or more employees have adequate fitness and ability.

RULE 8 -- TIME IN WHICH TO QUALIFY

(a) When an employee bids for and is assigned to a permanent vacancy or new position he will be allowed thirty (30) working days in which to qualify and will be given full cooperation of department heads and others in his efforts to do so. However, this will not prohibit an employee being removed prior to thirty (30) working days when manifestly incompetent. If an employee fails to qualify he shall retain all seniority rights but cannot displace a regularly assigned employee. He will be considered furloughed as of date of disqualification and if he desires to protect his seniority rights he must comply with the provisions of Rule 12(b).

(b) An employee voluntarily relinquishing his permanent position cannot displace a regularly assigned employee but will be considered furloughed as of date of relinquishment and, if he desires to protect his seniority rights, must comply with the provisions of Rule 12(b).

"The provisions of this Rule 8(b) apply only during the thirty (30) working day qualification period referred to in Rule 8(a) or in a case where the physical condition of an employee so changes as to make him physically unable to continue on the assignment. Exceptions may be made in meritorious cases.

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RULE 11 -- FILING APPLICATIONS--
OTHER SENIORITY DISTRICTS

Employees filing applications for positions bulletined on other seniority districts will, if they possess sufficient fitness and ability, be given preference on a seniority basis over non employees and/or employees not covered by these rules."

The Board finds that under Rule 7, an employee is not entitled to a position unless such employee has sufficient fitness and ability to fill the position. In this regard, the Board has consistently held that Carrier may use tests or examinations as being determinative of fitness and ability (Awards 18875, 18774, 18462, 17192, 15626, 14040, 7037, 5025, 5006, 4918 and 3273).

Furthermore, under the consistent decisions of this Board, Carrier's decision as to fitness and ability cannot be disturbed unless proved to have been made arbitrarily or capriciously. Such burden of proof rests squarely on the Claimant. (Awards 21246, 21243, 21119, 21009, 20964, 20569, 20361 19404 and 19129).

Claimant has not met this burden. A thorough and extensive review of the complete record developed on the property, as well as the arguments of the parties, reveals that Carrier's decision not to accept Claimant's application for the position was based on the fact that Claimant could not pass a speed test of 80 WPM. Consequently, Carrier's decision was neither arbitrary nor capricious, and the claim must be denied.

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

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1977.

