

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22668
Docket Number CL-22626

Richard R. Kasher, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station Employes
(
(Minneapolis, Northfield and Southern Railway

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8629) that:

1. The Carrier violated the provisions of the Clerks' Agreement dated June 1, 1951, at Minneapolis, Minnesota, on March 29, 1977, when it refused to accept Ms. Jessalyn F. Anderson's bid application on BRAC Notice No. 826.

2. Carrier shall now be required to place Ms. Jessalyn F. Anderson on the position of Interline Clerk-Office of Manager Revenue Accounting and reimburse her for any loss of wages (including the difference in rate between her present position and the Interline Clerk position and any overtime to which she would have been entitled if she had been properly placed as Interline Clerk) which she may have suffered beginning on March 29, 1977, and continuing until Ms. Anderson is placed on the Interline Clerk position or until she can no longer, by virtue of her seniority, hold the position.

OPINION OF BOARD: Claimant entered the service of the Carrier and established a seniority date as of October 17, 1952. From that date until March of 1976, Claimant occupied the position of Switchboard Operator. The position of Switchboard Operator was abolished in March of 1976 at which time the Claimant exercised her seniority to a permanent position of General Office Clerk.

By notice dated March 21, 1977, the Carrier advertised an Interline Clerk's position as a temporary vacancy. Claimant bid on the position on March 25, 1977. On March 28, 1977 the Carrier's Manager Revenue Accounting interviewed the Claimant regarding her qualifications to fill the position. Apparently, no other bids were received and the Carrier was not satisfied that the Claimant possessed the ability and fitness to fill the position, thus the position was filled by appointment.

Claimant grieved the Carrier's denial of her bid and an unjust treatment hearing was held regarding the claim.

It is the Organization's position that the Carrier failed to hold a timely investigative hearing; that the investigative hearing was unjust, subjective and biased; that several rules of the Agreement were misapplied and violated; that the Claimant had the requisite ability and fitness to work the Interline Clerk position; and, that the Claimant was discriminated against since the position of Interline Clerk had been filled in the past by individuals with less or no more experience than the Claimant.

The Organization places heavy reliance on the language of Rule 13 which it says is controlling in this case. Rule 13 provides:

"Employees entitled to bulletined positions or exercising displacement rights will be allowed thirty (30) working days in which to qualify, and failing, shall retain all their seniority rights and may bid for any bulletined position but may not displace any regularly assigned employee.

When it is definitely determined, through hearing if desired, that the employee cannot qualify, he may be removed before the expiration of thirty (30) working days. An employee who fails to qualify on a temporary vacancy may immediately return to his regular position. Employees will be given full cooperation of department heads and others in their efforts to qualify."

The Organization contends that the word "entitled" gave the Claimant the right to be assigned to the position for, at least, the specified trial period. It is the Organization's position that the language of this Rule, when it says "entitled" as opposed to "awarded", gives employees rights to jobs upon which they may bid.

The Organization further argues that the trial transcript supports a finding that the Carrier conducted an unfair investigation by refusing the Organization's attempts to pursue lines of questioning concerning the allegation of discrimination.

The Carrier bases its position on Rule 3, "Promotion, Assignments and Displacements", which provides:

"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, except, however, that this provision shall not apply to the excepted positions.

(NOTE) The word 'sufficient' is intended to more clearly establish the right of the senior clerk or employee to bid in a new position or vacancy where two or more employees have adequate fitness and ability."

It is the Carrier's position that in matters of fitness and ability that it, the Carrier, is the sole judge of an employee's qualifications to fill an assignment. Once fitness and ability have been found to be lacking by the Carrier, the burden rests upon the Claimant to overcome that decision by substantial and competent proof. It is the Carrier's conclusion that Claimant did not have the fitness and ability required for the assignment and that she did not prove that she did have such fitness and ability.

Numerous cases on this Division of the Adjustment Board have sustained the Carrier's right to determine fitness and ability of its employees. Nearly all of those cases have restricted this right only to the extent that the Carrier's determination should not be arbitrary or capricious. In this case, the Organization argued throughout the progression of the claim that the Claimant had been arbitrarily disqualified, as other employees, including new hires, had been awarded and/or assigned the Interline Clerk position where they were less or no more qualified than the Claimant.

During the hearing the Organization sought to demonstrate that other employees had occupied the position of Interline Clerk who weren't efficient in operating the machines (calculator and typewriter) but who had been trained on the job. The officer conducting the investigation repeatedly refused to allow the Organization to pursue this line of questioning on the basis that the issue of how other incumbents had qualified for the position was irrelevant to the Claimant's qualifications. (It should be noted that Claimant was a qualified typist, but had no experience in operating the calculator. It should also be noted that witnesses at the investigation were knowledgeable regarding the qualifications of employees who had previously filled the position of Interline Clerk.)

The Carrier erred in refusing to allow the Organization to introduce evidence regarding the question of qualifications of others previously assigned to the position involved. As a result of this action, the Organization was restricted from developing any evidence which might have shown that the Carrier's disqualification of Claimant was arbitrary or capricious.

This finding does not indicate that the Carrier arbitrarily disqualified the Claimant, nor does it indicate that the Claimant did not have a right under Rule 13 to the position in question. We find that the Claimant was not afforded a full and fair hearing as contemplated by the Agreement. Therefore, the claim shall be sustained by paying Claimant for the duration of the temporary vacancy at the rate required by the Agreement.

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 claim be sustained to the extent stated in the Opinion.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 14th day of December 1979.