

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24268
Docket Number CL-24225

Martin F. Scheinman, Referee

PARTIES TO DISPUTE: { Brotherhood of Railway, Airline and Steamship Clerks,
Freight Handlers, Express and Station Employees
{ Missouri-Kansas-Texas Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9469)
that:

(1) Carrier violated Clerks' Agreement DP-451, including but not limited to Rules 6 and 16, when on January 17, 1980, it arbitrarily refused to assign Clerk Mary Lou French as senior applicant to the advertised vacancy on Steno Clerk position, Sales and Service Department, Houston, Texas.

(2) Carrier shall now be required to assign Claimant to the Position of Steno-Clerk, Sales and Service Department, Houston, Texas, that was advertised in vacancy bulletin No. 60, Seniority District No. 7, dated December 27, 1979.

OPINION OF BOARD: This claim arises from Carrier's failure to assign Claimant, M. L. French, to the position of Steno Clerk at Carrier's Houston, Texas Sales and Service Office in January 1980. On December 27, 1979, Carrier issued vacancy bulletin No. 60 wherein it advertised the position of Steno Clerk. Opposite the General Description of Duties, Carrier listed:

"Shorthand 100-120 WPM, typing 75-80 WPM, filing, handling correspondence, compiling reports and other assigned duties."

Two employees bid for the position - Claimant and Clerk P. A. Fehlker. Fehlker took a typing and shorthand test on January 14, 1980. Claimant, account of illness, was not able to take the test until January 17, 1980. Both applicants failed the test.

On January 16, 1980, Carrier awarded the position to Fehlker, effective January 17, 1980.

On January 18, 1980, Claimant requested the reasons why she was denied the position. On January 25, 1980, Carrier informed Claimant that her typing and shorthand speeds were below the minimums set forth in Carrier's bulletin. Thus, Carrier had concluded that Claimant did not have the sufficient fitness and ability to fill the Steno Clerk position.

As a result of Carrier's actions, the Organization filed this claim. It alleged that Carrier's failure to award the Steno Clerk position to Claimant violated the Agreement, particularly Rules 6, 16 and 34. Those Rules, in relevant part, provide:

"RULE 6 - PROMOTION, ASSIGNMENTS AND DISPLACEMENTS

Employees covered by these rules shall be in line for promotion. Promotion, assignments and displacements will be based upon seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail. The appointing officer shall be the judge of fitness and ability, subject to appeal as provided in Rule 34."

"RULE 16 - TIME IN WHICH TO QUALIFY

(a) Employees awarded bulletined positions or exercising displacements rights will be allowed sixty (60) working days in which to qualify and failing, shall retain all their seniority rights, may not displace any regularly assigned employee, except in the position from which the employee was advanced even though such position may then be held by a senior employee."

"RULE 34 - UNJUST TREATMENT

An employee who considers himself unjustly treated otherwise than covered by these rules, shall have the same right of investigation, appeal and representation as provided in Rule 27, 28, 29, 30 and 31, if written request which sets forth the employee's complaint is made to his immediate superior within sixty (60) days of cause of complaint."

The Organization contends that since neither Claimant nor Fehlker passed the qualifying test, their ability and fitness for the position were equal. Therefore, the Organization insists that as between these two applicants seniority should prevail and Claimant should be awarded the position. It notes that at a hearing on March 14, 1980, Carrier asserted that Fehlker received the position because she was "more qualified" than Claimant. However, the Organization maintains that nothing in the Agreement permits Carrier to award a position to a "more qualified" candidate. According to the Organization, Rule 6 clearly provides that where fitness and ability are sufficient, the senior applicant must be awarded the job.

The Organization argues that where the fitness and ability of all applicants are insufficient then Carrier should also award the position to the senior applicant, if it fills it at all. Otherwise, in the Organization's view, Carrier could simply set unreasonably high standards for any new position and then fill it with a junior applicant, in violation of the time honored principle of seniority.

In addition, the Organization argues that since neither applicant met the standards set forth in Carrier's Bulletin No. 60, the senior applicant - Claimant - should have been given the position and allowed sixty days to improve her speed and accuracy. In the Organization's view, this is the purpose of Rule 16(a) which provides for a sixty day trial period during which employees will be given the opportunity to qualify for the new positions.

Finally, the Organization contends that Claimant was unjustly treated when she was denied the Steno Clerk position. The Organization points out that Fehlker was awarded the job on January 16, 1980 before Claimant even took the qualifying exam. The Organization views this as indicating that Carrier intended to give Fehlker the position from the very beginning, thereby denying Claimant a fair opportunity to demonstrate her qualifications for the job. In addition, the Organization notes that H. M. Harris, Carrier's Sales Manager, failed to correct numerous errors made by Fehlker during her examination. If Harris had spotted these errors, he would have had to conclude that the fitness and ability of both applicants were, in fact, equal and that Claimant, as the senior applicant, should have been awarded the job.

For these reasons, the Organization asks that the claim be sustained. It seeks the assignment of Claimant to the position of Steno Clerk as advertised in Bulletin No. 60, dated December 27, 1979.

Carrier, on the other hand, contends that it was under no obligation to assign Claimant to the Steno Clerk position. It argues that under Rule 6, seniority governs only when fitness and ability are "sufficient". Since Claimant failed the exam, her fitness was not sufficient. Thus, Carrier concludes it did not have to award the position to Claimant under Rule 6.

In addition, Carrier insists that the sixty day trial period in Rule 16(a) is given only to successful bidders for vacancies. Since Claimant was denied the Steno-Clerk position, Rule 16(a) simply does not apply to her.

Finally, Carrier maintains that it treated Claimant fairly in this instance. It allowed her to take the exam even though she was ill when it was first scheduled. It gave her time to practice on the typewriter to be used. It allowed her to change chairs when she complained that the first one was uncomfortable.

Thus, in Carrier's view, it was neither arbitrary nor capricious when it denied her the position of Steno Clerk. Accordingly, it asks that the claim be denied.

Central to this dispute is the requirement of Rule 6 that seniority shall prevail where "ability and fitness (are) sufficient". This language is clear and unambiguous. Its meaning is manifest. It requires that sufficient ability and fitness are prerequisites to be ascertained before seniority can prevail. As our Board concluded in Award No. 20916 (quoting Award No. 16480):

"This Board has been petitioned to interpret and apply rules identical or similar to Rule 6 in a great number of disputes. In essence we have held in such cases that (1) the current possession of fitness and ability is an indispensible request that must be met before seniority rights become dominant."
(Emphasis supplied)

Here, Claimant clearly did not have the sufficient fitness and ability, as evidenced by her poor score on the typing and shorthand test. Thus, she simply may not invoke the seniority provisions of Rule 6.

While Claimant is not entitled, to the Steno-Clerk position under the clear language of Rule 6, we are constrained to comment on Carrier's sharp practice of denying a senior bidder a position where bidders do not possess sufficient fitness and ability. The intent of Rule 6 is to protect Carrier from senior unqualified applicants where junior qualified applicants exist. Here, however, both applicants were unqualified. Thus, while Claimant did not have sufficient ability so as to exercise her seniority rights, Carrier engaged in a sharp practice when it chose the junior applicant who like Claimant, was also unqualified. Surely, this is not the preferred procedure.

Nevertheless, this Board is restricted to interpreting the clear language of Rule 6. That language is specific and unambiguous. Under it Claimant may not invoke its seniority provision since she did not possess the sufficient fitness and ability required for the position.

In addition, Claimant is not entitled to a sixty day trial period as such is contemplated by Rule 16(a). That rule applies only to "employees (who are) awarded bulletined positions", and not to unsuccessful applicants for them. We have previously concluded that Rules similar to Rule 16(a) do not guarantee applicants a trial period to improve their skills so as to meet the minimum qualifications for a bulletined position. Rather, it is the Claimant's ability at the time he or she seeks the position that governs. See Award Nos. 21119, 18651.

Additionally, we conclude that Carrier did not treat Claimant unjustly in this case. Her exam was rescheduled to take into account her illness. The record reveals that Claimant was given an opportunity to practice on the typewriter and to change her seat before beginning the test. Even if the lighting conditions were not perfect, there is nothing in the record to suggest that Carrier acted in an arbitrary or capricious manner towards the Claimant. Accordingly, Carrier's actions did not violate the Agreement in this instance and the claim is 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

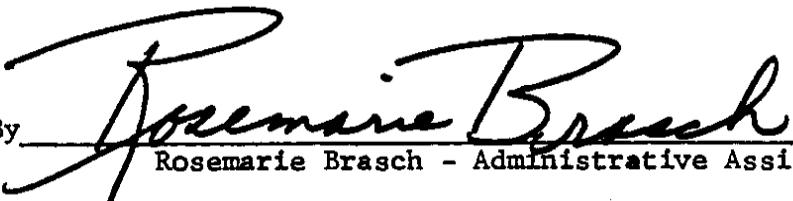
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 23rd day of March 1983.