NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25112
Docket Number CL-24991

Hyman Cohen, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, (Freight Handlers, Express and Station Employes (
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9735) that:

(a) Carrier violated the current Clerks' Agreement at Ft. Worth, Texas, on February 23, 1982, when it failed and/or refused to accept written application (bid) on Swing Job No. 6 per Northern Division Bulletin No. 42, and

(b) Mr. Johnson shall now be paid eight (8) hours' time and one-half rate of Swing Clerk Position No. 6 per day, plus all subsequent wage increases for each eight (8) hour shift on the position involved beginning February 23, 1982, and continuing each day thereafter until violation is terminated, and

(c) Mr. Johnson shall also be paid ten per cent (10%) per annum until claim is paid.

OPINION OF BOARD: On February 12, 1982, the Carrier advertised a permanent vacancy on Swing Job No. 6 at its facility located in Fort Worth, Texas. Swing Job No. 6 covers two (2) Car Clerk positions and a Train Order Towerman's position. The Claimant who had a seniority date of January 27, 1972 and was the regularly assigned occupant of Swing Job No. 2 submitted a timely bid for the position. However, the Carrier awarded the job to an employee who had less seniority than the Claimant.

Rule 8 provides in relevant part, that promotions "shall be based on seniority, fitness and ability; fitness and ability of applicants being sufficient, seniority shall prevail." Under Rule 8 an employe is required to have sufficient fitness and ability to fill the position. It is well recognized that it is the Carrier's prerogative to determine the fitness and ability of an employe for a position. The Carrier's determination will be sustained unless its determination is found to be arbitrary or capricious. Since the Carrier has determined that the Claimant lacks fitness and ability, the Organization is required to prove that the Carrier's action was arbitrary or capricious. Third Division Award No. 20361.

The critical issue raised by the instant dispute is whether the Carrier is attempting to treat "fitness and ability" and "qualified" as synonymous terms. It should be noted that Swing Job No. 6 includes work in the "Interlocking Plant" position as a Tower Operator. In this position the occupant is responsible for trains and/or switching of several crossings. The Board is convinced that this position is a difficult and potentially dangerous position. In light of the responsibilities of the Towerman position the Board is persuaded that the practice which has been in existence for many years, is to require the employe to satisfy several requirements before it is determined that the employe has the requisite ability and fitness. These requirements include: on-the-job training with a qualified Towerman; on the site (Interlocking Plan) operation test; passing of a written test; and Tower Operator experience.

Contrary to the assertion by the Organization, training and experiences are weighty factors in determining fitness and ability. See Third Division Award No. 5348. Other things being equal, the employe who has had experience can become a competent employe in a job vacancy faster than the employe who has had no such experience. In any event, the Board is of the view that experience is relevant to the requirement of Swing Job No. 6 and would demonstrate an employe's ability to perform the job. Fitness and ability has been stated in Third Division Award No. 5348 to mean "that the applicant must have such training, experience and character as to raise a reasonable probability that he would be able to perform all the duties of the position within a reasonable time. In this connection the Carrier is not required under the Agreement to give the Claimant a trial or break-in period. Since the Claimant did not satisfy the fitness and ability requirements of Swing Job No. 6, there is adequate evidentiary support for the Carrier to conclude that the Claimant would not be able to perform all the duties of the position within a reasonable time.

In addition, the Claimant made no effort to seek the guidance and assistance provided by the Carrier to become a qualified Tower Operator. He did not take the initiative to make use of on the site training at the Interlocking Plant or on the job training, with a qualified Towerman. Futhermore, at the time of bidding for the vacancy in question, the Claimant had not passed the tests which had been required of all employes on such positions. Accordingly, the Organization failed to prove that the Carrier's action was arbitrary or capricious. Thus, the Carrier did not violate Rule 8 of the Agreement when it awarded the Swing Job No. 6 to an employe who had less seniority than the Claimant.

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 Employes involved in this dispute are respectively Carrier and Employes 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: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 9th day of November 1984.

LABOR MEMBER'S DISSENT TO
AWARD NO. 25112, DOCKET NO. CL-24991
(REFEREE COHEN)

In this instance we are faced with a question which has arisen countless times before this Board regarding promotions, assignments and displacements which shall be based on seniority, fitness and ability; fitness and ability of applicants being sufficient, seniority shall prevail.

The majority decision of this Award must be viewed as being contrary to the bulk of Awards before this Board which have enunciated the principle that "sufficient means" - "adequate" fitness and ability, Claimant being senior to the employe used for the work in question does not have to be as well qualified therefor as the junior employe. All that is necessary is that the senior employee have "adequate" fitness and ability.

The record before this Board reflects the fact that:

1. Claimant placed a proper application for Swing Job No.6 as advertised by Bulletin No.42, but Carrier disallowed his application.
2. Claimant had sufficient fitness and ability to learn to perform the duties of Swing Job No.7 within a reasonable time as prescribed within Rule 9.
3. Carrier's refusal to allow Claimant's bid was not based upon an honest and impartial evaluation of whether Claimant had fitness and ability to learn to perform the duties of the position within a reasonable

time, but instead was based on whether or not Claimant was immediately qualified to step in and assume the duties of the position without guidance or assistance and without expense to the Carrier under the provisions of Rule 9-C for time spent in familiarizing himself with the position.

On Page 2 of its decision, the majority opinion reflects the Carrier's attitude and incorrect reasoning when it states:

> "...Other things being equal, the employee who has had experience can become a competent employee in job vacancy faster than the employe who has had no such experience..." (Underscoring ours).

Clearly, this rule is not based upon the premise of who is best at the immediate moment or who may be the fastest but rather upon a contractual right which guarantees that seniority shall prevail when an employe has adequate or sufficient fitness and ability. In this instance, Claimant possessed the necessary fitness and ability coupled with superior seniority. Claimant's rights have been unquestionably,incorrectly,denied.

The majority opinion in this instance is palpably wrong and contrary to legions of better reasoned Awards.

William R. Miller - Labor Member

Date November 28, 1984