

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25644
Docket Number CL-25713

James R. Cox, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees

PARTIES TO DISPUTE:

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(Bessemer and Lake Erie Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9858)
that:

1. Carrier violated the effective Clerks' Agreement when, on or about March 1, 1983, it failed and refused to accept the application of Ms. A. E. Lekon for the position of Secretary, Public Affairs, but rather assigned it to an employe not covered by the provisions of such agreement.

2. Carrier shall now place Ms. Lekon on the position of Secretary, Public Relations, and shall compensate her at the salary of that position, in addition to her other earnings, commencing March 1, 1983, and continuing for so long as she is denied the position sought.

OPINION OF BOARD: A vacancy arose in the excepted position of Secretary of Public Affairs at the Carrier's General Offices in Monroeville, Pennsylvania in March 1983. Although Claimant Lekon carried a June 23, 1975, seniority date on the General Office Roster, the opening was filled with Ms. Klatt, an Employe without seniority under the Agreement who had been put back from a Management position in Fall, 1982. Claimant requests assignment to this excepted classification and to be compensated for any salary lost as a result of the failure to be awarded the job.

Secretary of Public Affairs was an excepted non-management position and the Organization argues that under Rule 2(g), "In filling excepted positions that Company shall give preference to qualified employees coming under the provisions of this agreement." They also rely on Rule 28 which mandates that Employes covered by the Agreement shall be in line for promotion "...based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail."

The Carrier contends that Rule 2 requires it only to give preference to Employes when vacancies develop in excepted positions and that they retain the right to hire from the outside. They further argue that, even based on relative qualifications, Klatt was properly given the job.

Rule 2(b) of Attachment 2 does exclude excepted positions from the operation of the Agreement including Rule 28 (except for Rules 41 and 42). Rule 2(g) of that same attachment specifically addresses itself to "filling excepted positions" and must be given effect without regard to Rule 28's reference to seniority. As the Special Board of Adjustment 252 stated in Award 25:

"The employees under the Agreement who aspire for appointment to a Rule 2 position are entitled to a personal preference as distinguished from some vested right which all employees, as a class, have in the sanctity and integrity of the Agreement.

"Thus the distinction here is not one without a difference, since the preference depends in some measure upon a qualified employee under the Agreement standing for appointment and a new employee having been preferred."

The Claimant in that case had previously been denied an excepted position he had sought because of lack of qualifications, but SBA 252 upheld his later claim for the same job since:

"...another, who was not under the Agreement was given a preference for qualifying on a position under the Agreement. As between two aspirants for advancement to and qualifying on a classified position under the Agreement, claimant was entitled to a preference that was not shown him."

While having a "preference" is not to possess a "priority", it does require, at the very least, that there be consideration and assessment of qualifications. While "certain rights of selection" are recognized by the Organization, they stress that in this case, Claimant was a qualified person.

The evidence does show that Claimant, along with several other unit Employees, did have her qualifications reviewed for the securing of the Public Affairs position.

The evidence does not show that Carrier acted arbitrarily or disregarded Claimant's qualifications or that she, on the basis of her relative ability, should have been granted an interview as were other unit Employees.

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:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1985.

LABOR MEMBER'S DISSENT TO
AWARD NO. 25644, DOCKET NO. CL-25713
(REFEREE JAMES R. COX)

The Majority has erred in this instance and the Award is contrary to the established facts. They state:

"The evidence does show that Claimant, along with several other unit Employees, did have her qualifications reviewed for the securing of the Public Affairs position.

The evidence does not show that Carrier acted arbitrarily or disregarded Claimant's qualifications or that she, on the basis of her relative ability, should have been granted an interview as were other unit employees."

Stating the aforementioned does not make it a fact. The evidence on the property does not support such a conclusion, it was not until page 10 and 11 of the Carrier's Submission that they even indicated that the Claimant may have been considered for the position of Secretary, Public Affairs. That argument should not have been considered by the Majority as it was a de novo argument. On the property the Carrier stated in Employees Exhibit "B" page 2 that four (4) clerks were given interviews and others were considered for the vacancy. In that same Exhibit "B" the Employee's position was set forth as follows:

"It is the Organization's position that Rule 2 of the Agreement gives preference to BRAC represented employees. Ms. Klatt was an "outsider" not covered by the BRAC agreement and should not have been given preference to the position. Ms. Lekon is qualified and would have accepted the position. Committeeman W. Beatty also stated that Ms. Lekon should have been appointed to the position, based on her qualifications; however, he felt that Ms. Lekon was not even considered."
(underlining our emphasis)

It is important to remember that the Carrier never stated that the Claimant was considered for the position and that the Employees stated she was not. The Employees position was not refuted by the Carrier on the property nor did they take exception to it until they wrote their Submission.

The Majority opinion is based entirely upon an inadmissible and unsupported allegations. There is absolutely no evidence offered on the property which indicates that the Claimant was considered for the position nor is there any evidence offered that she was not qualified for the position over a non-employee.

The case law authority on this issue required a sustaining award. The Majority erred in not so finding. We must, therefore, strenuously Dissent to Award No. 25644, and emphasize that Awards out of the norm have no precedential value.


William R. Miller, Labor Member

Date October 2, 1985