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NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 27989  
Docket No. MS-28026  
89-3-87-3-590

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (William J. O'Brien  
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"This is to serve notice, as required by the rules of the National Railroad Adjustment Board of my intention to file an ex parte submission September 8, 1987 covering an unadjusted dispute between me and Conrail involving the question of discrimination in covering the position of stevedore in Framingham, Massachusetts."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Considering the case at bar on merits, the on-property record indicates that Claimant requested to exercise his Agreement rights to displace onto a Stevedore position at the Auto Terminal in Framington, Massachusetts effective August 27, 1985. His request was denied by Carrier's Supervisor due to physical disability (absent a hand since birth).

During the progression of this Claim on property the Carrier provided Claimant a test to determine his physical qualifications for the Stevedore position. A committee of six (6) determined that in the Carrier's words the Claimant "could not safely perform the various duties of the Stevedore assignment and therefore could not be considered qualified." The record specifically notes that Claimant was unable to safely climb ladders in inclement weather and handle forty pound bridge plates.

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Claimant argued on property and before this Board that he had sufficient fitness and ability to perform the job. Further, with normal wrist action and a dedicated history of safely performing heavy and similar tasks, Claimant was qualified. If Carrier had such concerns, some minimal accommodation or more proper and complete test should have been given. The Claimant argues that Carrier's actions were arbitrary, capricious, biased and defective.

The Board is concerned with this instant case, but as an appellate forum and not a court of equity, we must rule precedentially and upon the probative evidence.

By long established precedent this Board has found that "fitness and ability" determinations are vested with the Carrier (First Division Awards 20384, 17523; Second Division Award 6233; Third Division Awards 15387, 9534; Fourth Division Awards 4093, 3960). In the instant case, the test committee consisted of the Regional Medical Director, Safety Supervisor, District Claim Agent, Personnel Specialist, Health Services Manager and Supervisor. On the record, there is nothing that this Board can find to support Claimant's alleged Agreement violations. Once the Carrier finds insufficient qualifications, the burden of proof shifts to the Claimant to overcome that decision with substantial probative evidence. Based upon the cold record, such evidence is absent. The Commission that evaluated the allegation on property found no Carrier defect. Absent proof of record to shoulder the burden of an unfair test or Carrier violation of Agreement provisions, we are constrained to deny the Claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Deyo - Executive Secretary

Dated at Chicago, Illinois, this 29th day of June 1989.