

The Third Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10224) that:

1. Carrier violated the Clerks' Rules Agreement when it denied the application of Mr. R. J. Brusca, St. Louis, Missouri, for the position of Assistant Supervisor Job No. 532, Interline Accounting Department on October 7, 1986 and instead, assigned junior employee, F. E. Randle to the position.

2. Carrier's action is in violation of Rules 3, 4, 6, 7, 8 of the Clerks' Schedule Agreement and Testing Agreement, effective September 1, 1982.

3. Carrier shall now be required to assign claimant (Mr. Brusca) to the position of No. 532 Assistant Supervisor with compensation for any wage or benefit differential between Job No. 532 and that retained by claimant."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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 waived right of appearance at hearing thereon.

On September 29, 1986, Claimant bid on a vacant position of Assistant Supervisor in the Transit Area of Carrier's Accounting Department. The Bulletin for that position contained the following qualifications for the position:

"Applicant must have ability in supervision work and be able to direct the activities of employees. Applicant must have sufficient experience and knowledge of all phases of transit accounting necessary to advise others, handle correspondence, make end of month work reports."

On October 6, 1986, Carrier found that Claimant did not possess sufficient fitness and ability for the position and awarded the job to a less senior clerk. In the course of the determination, Carrier offered Claimant the opportunity to take a test to indicate his capacity to handle the work of the position, but Claimant refused to take the test. Subsequently, Claimant requested an Unjust Treatment Hearing which was granted. Following the Hearing Carrier reaffirmed its decision in awarding the position.

Claimant had worked in the Transit Accounting Department for some seven years, ending fifteen years prior to the bid. The employee selected for the job had worked in the department for fifteen years, ending two years prior to the bid. Carrier did not test the employee who was awarded the position. Rule 4 of the Agreement deals with promotions:

"Rule 4
PROMOTION BASIS

(a) Employees covered by these rules shall be in line for promotion. Promotion, assignments and displacements under these rules shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.

NOTE 1: The word 'sufficient' is intended to more clearly establish the prior rights of the senior of two or more employees of the same seniority district having adequate fitness and ability for the position or vacancy sought in the exercise of seniority."

According to the Organization, Carrier failed to abide by the Rule cited, since Claimant was indeed qualified - had a superior record - and his seniority was ignored. Carrier, on the other hand, had serious reservations concerning Claimant's ability and desired to test him to be sure that he had sufficient ability to do the work. Carrier relied on the Letter of Agreement dated November 7, 1978, which provides as follows:

"Dear Sir:

In recognition of the principle that tests may serve as a guide in determining the qualification and ability of an employee to occupy a particular position, it is understood that Carrier does have the right to formulate and administer tests, the subject matter of which will be pertinent to the duties and responsibilities required of the position involved. Such tests will be formulated, administered and graded by supervisory personnel.

It is also understood that where skills and/or dexterity are involved, such as in taking shorthand, dictation, typing, keypunching, and/or the operation of other office machines and equipment, standard and generally accepted tests and methods will be used.

In other situations where there is some question as to the fitness and ability of an employee to occupy a position, and a test is given, it is understood:

1. The test will cover all of the general duties and responsibilities of the position involved.
2. There will be a standard passing grade established and published which shall be uniformly applied.
3. Should the senior applicant for a position be required to take a test and not pass same, other applicants will be afforded an opportunity to take a test, in seniority order, if there is a question as to their fitness and ability.
4. It is understood that upon request the involved employee's representative (the District or Division Chairman where possible) will be accorded opportunity to be present during the time test is being administered, and will be accorded opportunity thereafter to review the test and the involved employee's responses thereto.

Carrier supervisors and officers will cooperate with employees in furthering their genuine desire and efforts to become qualified for promotion and/or advancement to more desirable positions."

It is well established that this Board has no right to make any determination with respect to an employee's fitness and ability. That role may only be fulfilled by Carrier. Our sole function is to determine whether or not Carrier's actions in its decision making were arbitrary, capricious or discriminatory. This dispute differs from most other fitness and ability disputes in the existence of the Testing Agreement, supra. Therefore, the only real issue in this matter is whether Carrier acted arbitrarily or capriciously in insisting that Claimant take the test in order to be awarded the position.

A careful examination of the record of this matter indicates that Carrier may have been predisposed to select the ultimately successful bidder for the position. Nevertheless, the record reveals a legitimate question by the Carrier as to whether or not Claimant, based on experience which ended fifteen years earlier, had sufficient ability to perform in the position in question. Thus, the decision to ask Claimant to take the test cannot be characterized as capricious, arbitrary or discriminatory. His refusal to take the test, therefore, was the proximate cause of his not being awarded the position. The Claim must be denied.

Form 1
Page 4

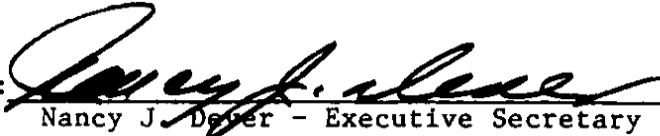
Award No. 28188
Docket No. CL-28316
89-3-87-3-871

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 20th day of November 1989.