

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 33458  
Docket No. CL-33942  
99-3-97-3-467

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

**PARTIES TO DISPUTE:** (Transportation Communications International Union  
(CSX Transportation, Inc. (former Seaboard  
( Coast Line Railroad Company)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of TCU (GL-11792) that:

(1) Carrier violated the Agreement on December 4, 1995, when it failed to honor bid submitted by Clerk J.E. Berry for Position No. 153, Operating Support Clerk, advertised by bulletin on November 10, 1995. Instead, the position was awarded to a junior employee.

(2) As a result of the violation, Carrier shall be required to assign Claimant Berry to Position No. 153, compensate him the difference in pay of this position and the position to which assigned, commencing December 4, 1995, and continuing until the violation is corrected.”

**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 employee 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.

On November 10, 1995 the Carrier advertised an Operating Support Clerk position, noting in the bulletin advertising the position that the required level of typing skills was 50 words per minute. At the time Claimant was working in a janitorial position, a position which did not require typing skills, and he expressed an interest in the position. However, when asked to submit to a typing test he declined to do so citing the fact that he had once worked as a Steno Clerk in the Carrier's Division Sales office in July 1978. Subsequently the position in question was awarded to a junior employee who had demonstrated the requisite typing proficiency noted in the original bulletin.

The Organization contends that the Carrier violated the Claimant's seniority rights when it awarded the position in question to a junior employee rather than the Claimant. In reply the Carrier contends that it awarded the position to the most qualified senior employee because the Claimant failed to demonstrate his typing proficiency required by the position in question. The Organization contends that the Carrier could not require that the Claimant demonstrate his proficiency by virtue of a Letter of Understanding between the parties that reads, in relevant part, as follows:

" . . . clerical employees who formerly worked in the Division Manager's Offices who have an exercise of seniority and wish to exercise seniority to a position in the Division Manager's office will not be required to take the typing test as a prerequisite for securing a position . . . ."

It is well-settled that the Carrier has the prerogative to determine the fitness and ability of employees to fill its positions and that the exercise of that prerogative is not to be disturbed unless the Carrier has acted arbitrarily or capriciously. Thus, the issue in this matter is whether the Letter of Understanding cited above constitutes some sort of waiver of this right.

Of course in determining whether there was such a waiver the Board must determine the parties' mutual intent when they agreed to the language in question. The first step in doing so is to look to the literal language chosen, for if it is clear and unambiguous, it is deemed to be an adequate expression of their intent. At first blush, the literal language appears to meet that test, for it speaks to clerical employees who formerly worked in the Division Manager's Offices, adding that those employees need not submit to a typing examination. However, seemingly clear and unambiguous language can be rendered unclear and ambiguous by operation of a latent ambiguity;

in other words, by the circumstances surrounding the parties' choice of the language in question.

Thus, we are asked by the Organization to conclude that the parties clearly and unmistakably intended to permit any employee in the office in question to obtain any position in the Division Manager's Office without demonstrating his or her ability to meet the standards legitimately imposed by the Carrier. We do not find the parties so intended, absent a clearer expression than that used by the parties. This conclusion is buttressed by the long-standing precedent establishing the prerogative of the Carrier to set those standards in the first instance. Simply put, because the Carrier possesses that prerogative, a clear and unmistakable waiver was necessary and we do not believe that the language of the Letter of Understanding rises to that level.

**AWARD**

**Claim denied.**

**ORDER**

**This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division**

**Dated at Chicago, Illinois, this 23rd day of August 1999.**