

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37729
Docket No. CL-38179
06-3-04-3-107

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(CSX Transportation, Inc.)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood (GL-13031)
that:

- (a) The Carrier violated the TCU/CSX-North Clerical Rules Agreement effective June 1, 1999, as revised, particularly Rule 9, 18, 30 and other rules, when in letter dated February 21, 2003, Claimant Appelfeller was advised that she would not be allowed to exercise her seniority onto Messenger Position 4B02-300;
- (b) Claimant Appelfeller was qualified, available and willing to perform the duties of Messenger Position 4B02-300, had the Carrier not improperly denied her the aforementioned exercise of seniority;
- (c) Claimant Appelfeller should now be allowed eight (8) hours pay, based on the pro rata rate of her full protected rate, as well as any other benefits, including overtime earnings lost, commencing February 21, 2003 and continuing for each and everyday thereafter, on account of this violation;
- (d) That in order to terminate this claim, Claimant must be allowed to exercise her seniority and allowed to cover Messenger Position 4B02-300;

- (e) This claim has been presented in accordance with Rule 45 and should be allowed."

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.

The instant claim arose after the Carrier refused to allow the Claimant to displace onto Messenger Position No. 4B02-300 at Selkirk, New York, in September 2003 for reasons of physical fitness.

Certain key facts emerge from the on-property record. Although the precise time is not established by the evidence, the Claimant previously filled the position in question at some time prior to the claim dates. She apparently vacated the position to ensure that she met some unspecified protection obligation under the Agreement. Again, the record does not establish how long the Claimant had been off the position before the claim arose.

On or shortly before February 7, 2003, the Claimant gained the right to exercise her seniority and displace junior employees. She attempted to displace onto Shipper Receiver Position No. 0188-300 in the Purchasing and Materials Department. This Department requires prospective employees to undergo a physical examination to determine their fitness for the work for their own safety as well as the safety of others. The work requires heavy lifting, carrying heavy material and/or operating materials handling equipment.

By letter dated February 18, 2003, the Claimant was informed that she was disqualified from holding the Shipper Receiver position because of her limited weight lifting ability. Among other assertions, the letter stated:

"Per testing at your transfer Medical Examination you were unable to lift beyond twenty pounds safely."

According to the record, the Claimant did not challenge this disqualification or the accuracy of the 20 pound weight lifting limitation determined by the medical examination.

The Claimant next attempted to displace onto the Messenger position that she formerly held. The Carrier denied her attempt and the instant claim followed. According to the text of the claim, the Carrier informed the Claimant by letter dated February 21, 2003 that she would not be allowed to exercise her seniority onto the position. A copy of the letter does not appear in the on-property record so we do not know precisely what it said.

In its April 28, 2003 reply to the claim, the Carrier asserted that the Messenger position had a lifting requirement of 50 pounds. This was due to the need to lift paper, supplies, and water weighing that much. The Carrier also asserted its rights to determine physical fitness standards and the right to remove employees from active service in the presence of genuine concerns about a given employee's physical and medical fitness for duty. The Carrier cited several prior Third Division Awards in support of the existence of these rights. According to the reply, the Carrier also took the position that the Claimant's prior service in the same position had no bearing on the case because it was not previously aware that the Claimant lacked fitness for the position.

Thereafter, the Organization renewed its previous contentions. It also questioned the reasonableness of the weight lifting requirement on the Messenger position and alluded to it as being arbitrary. It also alleged that other employees worked in the Purchasing and Materials Department "... who might not be able to ..." satisfy the 50 lbs. lifting requirement, thereby not treating the Claimant in the same manner as others. The Carrier also disputed this contention.

In its final correspondence on the property, dated March 4, 2004, the Carrier described how the Selkirk Terminal Superintendent removed the 50 pound lifting requirement from several Clerk/Jitney Driver¹ positions as of September 9, 2003. The Claimant was able to displace onto one of the positions effective October 17, 2003, thus ending the continuing violation aspect of her claim.

In reviewing the parties' Submissions, we noted at the outset that they did not contain identical versions of the on-property record. Accordingly, we limited our consideration to only those documents that were clearly exchanged during the handling of the claim on the property. It is well settled that new evidence and argument may not be raised for the first time before the Board.

The claim, as filed, cited three Rules as having been violated by the Carrier's refusal to allow the Claimant to exercise her seniority as it did. Those were Rules 9, 18, and 30. Of the three, only Rules 9 and 30 were advanced in the Organization's Submission. Nonetheless, our review of the record does not reveal either of them to be applicable to the facts at hand. Rule 9 provides for a 30-day qualification period for an employee awarded a bulletined position. The instant dispute does not involve an award to a bulletined position. Moreover, as the Rule is written, it would appear to be directed to providing sufficient time in which to acquire knowledge and skills necessary for successful performance. The physical disability involved here, namely the inability to safely lift more than 20 pounds, is not related to knowledge or skills acquisition. Rule 30 provides a pay guarantee for regular assigned employees who are not used on their regular assignments. At the time the Claimant sought to exercise her seniority, the record does not demonstrate that the Claimant was a "...regular assigned employee..." within the meaning of the Rule. Finally, although the claim also referenced "...other rules..." no other Rules were specifically identified during the development of the on-property record.

The Carrier's right to determine reasonable physical fitness requirements as well as its right to remove a given employee for genuine concerns about the ability to safely satisfy the physical demands of a job have been recognized by prior arbitration authority. See, for examples, Third Division Awards 36117, 32778, 25013, as well as the Awards cited in them. Accordingly, it becomes the

¹ Clerk/Jitney Driver is apparently the official job title of the "Messenger" position in dispute.

Organization's burden of proof to challenge the reasonableness of any such physical standards. Mere assertions of arbitrariness are not sufficient to satisfy this burden; nor are vague references to other unnamed employees who "... might not ..." have the requisite physical capacity but were allowed to continue in positions. Finally, the mere fact that the Claimant once filled the same position in dispute does not undermine the reasonableness of the physical standard for two reasons. First, as the Carrier contended, there was no evidence that the Carrier was aware of any prior limitations in the Claimant's physical fitness. More importantly, however, the fact that the Claimant may have successfully performed on the position at some time in the past does not prove that she retained the requisite level of fitness in February 2003. This is especially so when one recalls that the Claimant did not challenge her disqualification from the Shipper Receiver position or the legitimacy of the 20 pound lifting limitation that caused it.

Finally, the removal of the 50 pound lifting requirement from the Messenger position in the Fall of 2003 does not prove that it should have existed before that time. The record fails to establish the reasons that resulted in the removal.

Given the foregoing discussion points, we must find that the Organization's burden of proof to properly establish a violation of the Agreement has not been satisfied. Accordingly, we must deny the claim.

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 February 2006.