

BEFORE
PUBLIC LAW BOARD NO. 119

AWARD NO. 4
(Case No. 4)

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

and

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY

STATEMENT OF CLAIM:

(1) Carrier violated the provisions of the effective Clerks' Agreement when it failed and refused to assign Clerk Thomas Dunn, the senior applicant to the bulletined position of Key punch Operator and, instead, assigned a new employee.

(2) Carrier shall now be required to pay Clerk Thomas Dunn for eight (8) hours' pay at the pro rata rate of the position of Key punch Operator, which is in addition to what he has already received as Train Clerk A, commencing Monday, January 3, 1966 and for five (5) days per week, Monday through Friday, thereafter that he is denied the right to fill the position of Key punch Operator to which his seniority entitled him.

JURISDICTION:

The jurisdiction of this Board is set forth in its Award No. 1. The statement of jurisdiction therein is incorporated herein by reference thereto.

OPINION OF BOARD:

On June 28, 1965, Claimant was awarded the position of Train Clerk A. The bulletined duties of the position, inter alia, required operating a key punch machine at the rate of 50 words per minute (wpm). It is not questioned that Claimant satisfactorily performed the duties of the position.

On December 24, 1965, Carrier bulletined a new position of Key punch Operator in its Data Processing Center. On the form of bulletin, prescribed by agreement of the parties, Carrier after "Brief Description of Duties" inserted:

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"Keypunch - Verify - Interpret tape for origin card flow. Applicant must be qualified and capable of typing at 60 wpm, and successfully pass typing test respectively before being assigned to the position. / Emphasis supplied. /

Two employees, Claimant being senior, bid for the position. Carrier gave Claimant a keypunch typing test which it says, without contradiction, indicated Claimant had a proficiency of 30 wpm. On July 7, 1966, Carrier awarded the position to a new employee. The record contains no evidence as to how Carrier assessed the keypunch typing proficiency of the new employee.

Carrier's sole given reason for not awarding the Keypunch Operator position to Claimant was that the test showed that he was not qualified to type at 60 wpm.

I. THE ISSUES

1. Does the record show that because Claimant had satisfactorily performed the duties of the position Train Clerk A, for about 7 months, with bulletined requirement of keypunch typing at 50 wpm, that he had reasonable fitness and ability to learn and perform keypunch typing at the rate of 60 wpm prescribed in the bulletined duties of the Keypunch Operator position; and,

2. Did Carrier, under the circumstances prevailing, have the right to subject Claimant to a test with the expressed objective of determining whether his immediate keypunch typing proficiency was at least 60 wpm?

II. CONTENTIONS OF THE PARTIES

1. Clerks'

Clerks contend that since Claimant had satisfactorily performed the duties of the Train Clerk A position, with a keypunch typing requirement of 50 wpm, this constituted a prima facie reasonable ability to learn and perform at the rate of 60 wpm;

Rule 9 of the Agreement contractually obligated Carrier to award the Keypunch Operator position to the senior employee bidder having reasonable fitness and ability as defined in the Rule;

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Under Rule 9 of the Agreement Carrier could not require, as a condition precedent to award of the position, that the senior employee bidder having reasonable fitness and ability have an immediate proficiency of keypunch typing at the rate of 60 wpm;

The only test as to qualifications to which the senior bidder having reasonable fitness and ability may be contractually subjected is that prescribed in Rule 17 of the Agreement.

2. Carrier's

It is the prerogative of management, in the absence of a contractual bar to: (a) define the duties of a position; (b) determine the qualifications of a bidder to perform the duties; and (c) subject bidders to test of qualifications of such design as it may unilaterally choose: provided, this is not accomplished in an arbitrary or capricious manner and absent intent to avoid or evade the compulsions of the Agreement.

III. RESOLUTION

In our Award No. 2 (Case No. 2) we interpreted Rules 9 and 17 of the Agreement. That Award is incorporated herein by reference thereto. In that Award we held that when there is a showing that the senior bidder has reasonable fitness and ability to learn and perform the duties of the position involved Carrier is contractually obligated to award the position to the senior bidder. Note, the words "to learn and perform" can only mean in futuro. This destroys Carrier's contention that the senior bidder must be fully qualified to perform the duties of the position as of the time award of the position is made. The "in futuro" is a limited period prescribed in the Agreement as follows:

"RULE 17"

"Qualifying Time"

"(a) An employee entitled to a bulletined position will be allowed thirty working days in which to qualify. Should he fail to qualify, he shall retain all of his seniority rights and may bid on any position subsequently bulletined, but may not displace any regularly assigned employee."

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We find that the Agreement binds Carrier, unequivocally, to award a bulletined position to the senior bidder having reasonable fitness and ability to learn and perform the duties of the position. When there is a showing that the senior bidder has reasonable fitness and ability, as defined in Rule 9, Carrier is contractually barred from prescribing the passing of any other test relative to qualifications. This contractual test for qualification is the ex post facto one, following assignment to the position, agreed to by the parties in Rule 17.

In the absence of any bidder for a position having reasonable fitness and ability, as prescribed in Rule 9, Carrier is free to subject employe applicants to test for aptitude or seek a new employe in the manpower market.

The issue in this case narrows as to whether Claimant had reasonable fitness and ability to learn and perform the duties of the Keypunch Operator position under proper supervision and direction.

In its Submission in Case No. 3, in which we issued our Award No. 3, Carrier admitted the "duties" of the Keypunch Operator and Train Clerk positions "are similar." The Carrier failed to award the Keypunch Operator position here involved to Claimant for the reason he failed to demonstrate, in a test to which it subjected him, an immediate proficiency in keypunch typing of 60 wpm. Yet, by silence, if not by expressed admission, it concedes that he satisfactorily filled the position of Train Clerk A which required a keypunch typing proficiency of 50 wpm. ✓ We find it to be a reasonable presumption that an employe who has demonstrated fitness and ability to type keypunch at the rate of 50 wpm. has the potential to learn to do such typing at the rate of 60 wpm. ✓ The presumption may be rebutted only in compliance with Rule 17. We, therefore, will sustain paragraph 1 of the Claim.

As to the compensation prayed for in paragraph 2 of the Claim, ✓ we shall sustain it only to the extent of the make whole principle established in labor law. That is to say, we will award that Carrier pay Claimant that amount which he would have earned absent Carrier's violation of the Agreement less what he actually earned during the period set forth in said paragraph. ✓

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FINDINGS:

Public Law Board No. 119, upon the whole record and all the evidence, finds and holds:

1. That Carrier and Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;
2. That this Board has jurisdiction over the dispute involved herein; and,
3. That Carrier violated the Agreement.

AWARD

Paragraph 1 of Claim sustained.

Paragraph 2 of Claim sustained to extent setforth in Opinion.

ORDER

Carrier is hereby ordered to make effective Award No. 4, supra, made by Public Law Board No. 119, on or before March 28, 1968

John H. Dorsey
John H. Dorsey, Chairman
Neutral Member

D. G. Vane
D. G. Vane, Carrier Member

C. E. Kief
C. E. Kief, Employee Member

Dated at Chicago, Illinois, this 27th day of February 1968.

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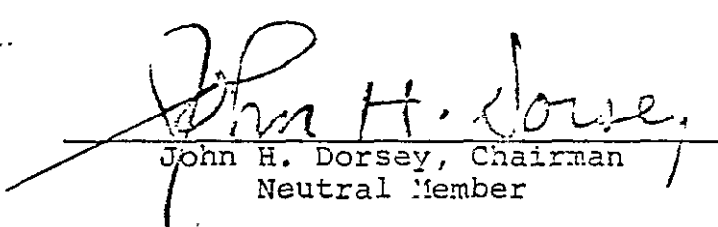
THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY

MOTION TO WITHDRAW
PETITION FOR INTERPRETATION

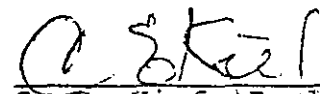
Under date of April 19, 1968, Carrier filed petition for interpretation of this Award. Copy of the petition is attached hereto and made part hereof.

During hearing, by agreement of the parties, Carrier moved to withdraw its petition for interpretation of this Award.

Motion GRANTED.


John H. Dorsey, Chairman
Neutral Member


D. G. Vane, Carrier Member


C. E. Kief, Employee Member

Dated at Chicago, Illinois, this 27th day of May, 1968.