

BEFORE
PUBLIC LAW BOARD NO. 119

AWARD NO. 2
(CASE NO. 2)

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 Miss Kathleen Judy, the senior applicant to the bulletined position of Personnel Assistant and, instead, assigned a junior employee.

(2) Carrier shall now be required to pay Miss Kathleen Judy for the difference in what she earned as M.C.B. Accountant and what she would have earned as Personnel Assistant, commencing with December 1, 1965 and continuing each and every day thereafter that she is denied the right to fill the position of Personnel Assistant to which her seniority entitled her.

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:

Claimant's seniority dates from June 16, 1964. Starting July 8, 1964, she was assigned to a position bulletined:

"M.C.B. Accountant assignment will be open effective July 6, 1964. Bids account this assignment will be accepted up to 10:00 A.M., July 7, 1964. Applicant must be able to take dictation in shorthand, translate and type same."

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It is undisputed that the duties of this position included the reporting of investigations in the department to which she was assigned; and, that Claimant performed this work satisfactorily. It is to be noted that the bulletined duties of the position contained no specified capability in shorthand or typing words per minute.

On November 22, 1965, Carrier bulletined a position of Personnel Assistant in which the duties were briefly described:

"Knowledge of wage schedules required; also applicant must be qualified and capable of taking shorthand at rate of 120 wpm and typing at 60 wpm, and successfully pass shorthand and typing tests respectively before being assigned to the position. Take investigations in shorthand and transcribe on typewriter. Other incidental duties in connection with this position."

Bids for the position were made by Claimant and an employee junior to her in seniority, Sue Jennings, having a seniority date June 10, 1965. Carrier gave Claimant a shorthand and typing test from which it concluded that she did not have the "skill" to take shorthand and do typing at the rate of 120 and 60 words per minute respectively. It did not subject Jennings to a test as prescribed in the bulletin. It relied, in lieu thereof, on a certificate of a high school, dated May, 1965, that one Susan Bomia successfully wrote Gregg Shorthand at 130 words per minute for five minutes. (NOTE: We assume that Susan Bomia and Sue Jennings are one and the same person.) Carrier introduced no evidence that Jennings had proven herself capable, by test, of typing 60 words per minute. On November 30, 1965, Carrier awarded the Personnel Assistant Position to Jennings. It defends its passing over of Claimant by asserting that she did not possess the necessary "skills." Clerks contend that the passing over of Claimant violated the Agreement, particularly Rule 9 which reads:

"Promotion, assignments and displacements under this agreement shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail."

NOTE: The word "sufficient" is intended to more clearly establish the right of a senior employee to bid in a new position or vacancy where two or more employees have adequate fitness and ability. An employee shall be considered as having adequate fitness and ability when he has reasonable fitness and ability to learn and perform the duties of a position under proper supervision and direction, and need not have immediate fitness and ability resulting from actual past experience in performing the work incident to a particular position."

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As an aid to our interpretation and application of Rule 9 we take judicial notice of Rule 17 of the Agreement which reads:

"(a) An employe 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 employe.

(b) When it is definitely determined, through hearing if desired, that an employe cannot qualify, he may be removed from such position before the expiration of thirty working days. An employe who fails to qualify on a temporary vacancy may immediately return to his regular position."

I. THE ISSUE

Whether Claimant had reasonable fitness and ability to learn and perform the duties of the Personnel Assistant Position under proper supervision and direction as contemplated by Rule 9 and should have been given the opportunity to qualify as provided for in Rule 17.

II. RESOLUTION

It is established by Awards of the Third Division, National Railroad Adjustment Board, that in the first instance the employer must be the judge of the fitness and ability of an employe, absent any agreement provision to the contrary. Further, the employers' judgment as to fitness and ability of an employe will not be set aside unless it is shown that the employer acted in an arbitrary, capricious or discriminatory manner. Premised on those principles we will adjudicate the Claim before us.

1. Interpretation of Rule 9

The "NOTE" incorporated in Rule 9 makes certain the meaning of the parties and dissolves what otherwise might be an ambiguous phrase in the Rule: "fitness and ability being sufficient, seniority shall prevail." /Emphasis supplied./

The Rule provides that where two or more employes bid for a position Carrier is contractually bound to award the position to the senior employe having "adequate fitness and ability" which is defined as:

"An employe shall be considered as having adequate fitness and ability to learn and perform the duties of a position under proper supervision and direction, and need not have immediate fitness and ability resulting from actual past experience in performing the work incident to a particular position." /Emphasis supplied./

This Rule imposes on Carrier a limitation in exercise of its judgment relative to fitness and ability. Otherwise stated, Carrier does not have an absolute right to judge fitness and ability in the first instance subject only to being set aside upon a finding that Carrier acted in an arbitrary, capricious, or discriminatory manner.

As we interpret the Rule Carrier is contractually obligated to award the position to the senior employe having "reasonable fitness and ability" as defined in the NOTE in Rule 9. The senior employe, to merit award to the position, need not be the best qualified of all the bidders. He need only have "reasonable fitness and ability to learn and perform the duties of the position under proper supervision and direction" /Emphasis supplied./ Consequently, since it is undisputed that Claimant was the senior bidder, the pivotal issues becomes: Whether Clerks have made a showing in the record that Claimant had "reasonable fitness and ability."

2. Claimant's Fitness and Ability

✓Carrier admits that Claimant from July 8, 1964, up to the time she bid on the position here involved -- which was bulletined November 22, 1965 -- satisfactorily reported investigations in the department to which she was assigned. ✓But, it says, without adducing proof, that the investigations which the employe assigned to the position here involved would be required to report demanded greater "skill" in shorthand and typing. This is a conclusionary statement, unsupported by proof, which has no evidentiary value. Among those who have participated in trials or investigations it is a matter of common knowledge that the speed at which shorthand reporting is required derives from the oral delivery of interrogators, witnesses and others participating in the proceedings; not from a department under whose aegis the proceeding is conducted.

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✓ Having demonstrated, satisfactorily, her ability to report investigations we find that Claimant had "reasonable fitness and ability to learn and perform the duties of the position" here involved. The Agreement, Rule 17, vested Claimant with the right to demonstrate her qualifications to learn and perform the duties of the position within 30 days; and, anytime within those 30 days if it was definitely determined that she could not qualify Rule 17 (b) vested Carrier with the right to remove her from the position. We find that Rule 17 fully protects Carrier's right to have a position filled by an employee qualified to perform its functions.

3. Discrimination

The bulletin for the job here involved states that "applicant must be qualified and capable of taking shorthand at rate of 120 wpm and typing at 60 wpm, and successfully pass shorthand and typing tests respectively before being assigned to the position." /Emphasis supplied./ Jennings, who was assigned to the position, was not subjected to such test as a condition precedent to her being awarded the position. Claimant was subjected to a shorthand test. Where, as here, the bulletin, unilaterally drafted by Carrier, required demonstration of qualification by tests, Carrier, to avoid discrimination, had the obligation to conduct the test under like conditions for all applicants. That Carrier, in this case, did not do so, it admits. It arbitrarily overlooked the conditions which it unilaterally prescribed. It, again, unilaterally, chose, instead, to premise its valuation of fitness and ability on a high school evaluation of Jennings' shorthand capabilities, dated May, 1965. We find the high school certificate not to be evidence of Jennings' shorthand proficiency as of the time the position here involved was bulletined. Even disregarding the specifics of Rule 9 we find the basis on which Carrier evaluated the relative shorthand capabilities of Claimant and Jennings was discriminatory and its award of the position involved to Jennings was arbitrary.

C O N C L U S I O N S

Upon the basis of the foregoing and the record as a whole we find that: (1) Claimant, by evidence of record, had the fitness and ability entitling her to be awarded the position involved subject to Rule 17; and, (2) Carrier's awarding of the position to Jennings was discriminatory and arbitrary and in violation of Rule 9. We, therefore, will sustain the Claim.

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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.

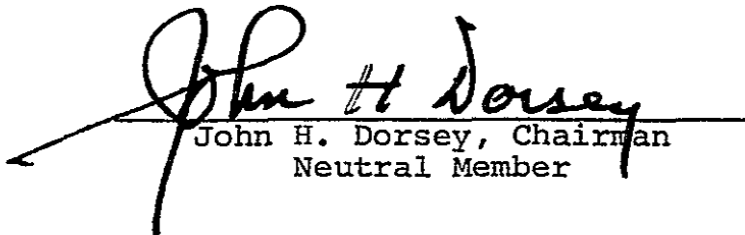
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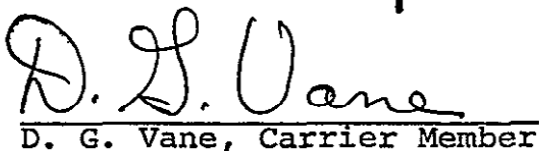
Claim sustained.

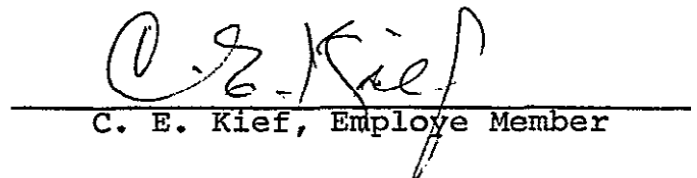
ORDER

Carrier is hereby ordered to make effective Award No. 2, supra, made by Public Law Board No. 119, on or before

March 28, 1968


John H. Dorsey, Chairman
Neutral Member


D. G. Vane, Carrier Member


C. E. Kief, Employee Member

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

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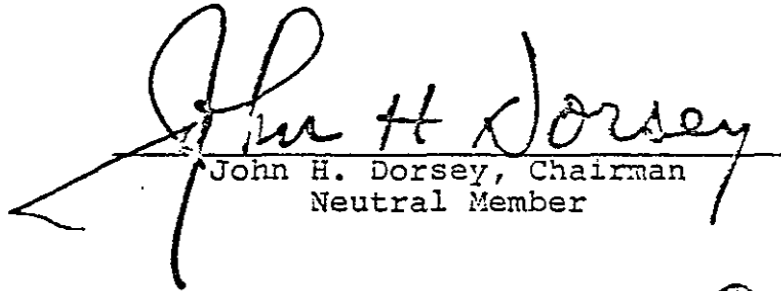
THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY

MOTION TO WITHDRAW
PETITION FOR INTERPRETATION

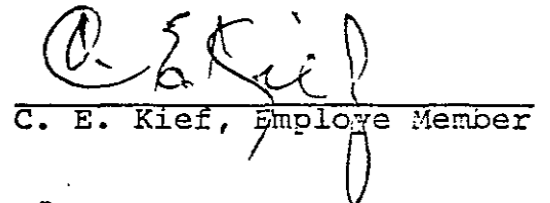
Under date of April 19, 1968, Carrier filed petition for interpretation of this Award. Copy of the petition is attached hereto and made part hereof.

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.