Award No. 10297

Docket No. CL-10324

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

George D. Bonebrake, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

1. Carrier violated the provisions and intent of the Clerks' Rules Agreement at Chicago, Illinois when it disqualified Employe Julia Lucas and removed her from Bookkeeper Position A-11.

2. Carrier shall reinstate Employe Lucas to Position A-11, and compensate her for the difference between the rate of that position and Comptometer Position A-20, or $4.08 per day, retroactive to the date of her removal from Position A-11.

EMPLOYE'S STATEMENT OF FACTS: On August 28, 1956 the Carrier posted Bulletin No. 7 in Seniority District No. 72 covering the Office of Auditor of Capital Expenditure, advertising for bid the following position:

"Bureau	Pos. No.	Title of Position	Daily Rate	Principal Duties
Investment	A-11	Bookkeeper	$19.77	Keep books for our Ledger Control Account, prepare journal entries & monthly balance sheets. Maintain depreciation and amortization accrual records. Prepare monthly statements of Operating expenses for Auditor of Expenditures. Require knowledge of bookkeeping and the ICC Accounting Classifications."

Employe Julia Lucas, with 33 years of seniority in District No. 72 and formerly the occupant of such positions as comptometer operator, equipment

> tion which had to be otherwise taken care of, although the duties of the position which Claimant Lucas was expected to perform were no greater than those which had been performed by previous occupants of the position.

While the employes have attempted to make contentions with regard to the extensions of the qualifying periods, nevertheless, the extensions were by agreement and the 90 day qualifying period which she was accorded must be considered in the same light as the 30 day qualifying period as referred to in Rule 8 (a). The Carrier maintains that the extensions were for the benefit of the claimant because at no time prior to either of the extensions had she demonstrated she had sufficient fitness and ability for the position.

The Carrier cannot be expected to retain on the position an employe who has so clearly demonstrated lack of fitness and ability. The Carrier officers and others in the department afforded the claimant full cooperation and consideration. She was given almost constant assistance and instructions during the first 30 day period and thereafter all necessary assistance required or requested was furnished and she was not, at any time, denied any help or instruction.

Board Awards have repeatedly held that the Carrier's decision as to the qualifications of an applicant must govern and that the Carrier's judgment cannot be set aside unless there is a definite showing that the Carrier acted arbitrarily, capriciously or in a discriminatory manner. Please see Award 11 of Special Board of Adjustment No. 171. None of the actions of the Carrier in this case were arbitrary, capricious or discriminatory.

The Carrier should like to direct attention to Third Division Award 6829, the Opinion of which contains:

> "We cannot substitute our judgment for that of the Carrier in matters of this kind. Our function is limited to a review of the Carrier's decision to ascertain whether it was made in good faith upon sufficient supporting evidence, or whether it was the result of capricious or arbitrary action without reasonable support in the record before us."

and to Third Division Award 7037, the Opinion of which contains:

> "Whether an employe has sufficient fitness and ability to fill a position is usually a matter of judgment and the exercise of such judgment is a prerogative of the management. We have regularly held that unless it has exercised that judgment in an arbitrary, capricious or discriminatory manner, we will not substitute our judgment for that of the management."

There are many other Third Division Awards which, applied to the circumstances in the instant case, clearly support the Carrier's actions which have been entirely fair and strictly in accordance with the provisions of the schedule rules.

The Carrier respectfully requests a denial award.

(Exhibits not reproduced).

OPINION OF THE BOARD: The case involves the removal of Claimant by Carrier at the expiration of the trial period—extended twice for 30 days each, making a total qualifying period of ninety (90) days in her case—from

the position of Bookkeeper, A-11 for which she had bid. The job was awarded to her as the senior bidder. She had formerly held other jobs, and at the time of the bid in question she was "Engineer Accountant—Position A-5..", which position she had held for approximately 1½ years. Her seniority date was July 20, 1923. After her removal from the job of bookkeeper she bid for and was awarded the position of "Comptometer Operator—Position A-20", which position was at a lower rate of pay. She requests reinstatement to the higher rated job and reimbursement for the difference in rates of pay.

Rule 8(a) of the appropriate Agreement is the provision involved. It provides as follows:

"TIME IN WHICH TO QUALIFY

"(a) When an employe bids for and is assigned to a permanent vacancy or new position he will be allowed thirty (30) days in which to qualify and will be given full cooperation of department heads and others in his efforts to do so. However, this will not prohibit an employe being removed prior to thirty (30) days when manifestly incompetent. If an employe fails to qualify he shall retain all seniority rights but cannot displace a regularly assigned employe. He will be considered furloughed as of date of disqualification and if he desires to protect his seniority rights he must comply with the provisions of Rule 12(b).

The 30 day qualifying period as provided in the Rule, as stated above, was extended twice for 30 days each, by mutual agreement of the parties. Some question is raised over the fact that she was notified 5 days prior to the expiration of the last extension of her disqualification for the job, but was permitted to remain on the job for the full period. In our view, this is not determinative of the issue, and at most is only an argumentative matter. Some question is also raised as to the reason for, or "bona fides" of the Carrier in its requests for the extensions. A sufficient answer is that bad faith was not shown—nor is it so found—and furthermore the extensions were by agreement. The Organization must have felt that additional time in her case was desirable, too. In our view the situation is the same as if Rule 8(a) read 90 days instead of 30 days.

Objection is also urged by Petitioner that Carrier's Exhibits "H" to "O", inclusive, are improper because not timely submitted, and they should not be considered. Carrier contends that those Exhibits are proper and should be considered, along with the others submitted. Without passing on the validity, or invalidity, of the Exhibits, we are of the opinion that the unquestioned proof is sufficient upon which to base our decision. We have, however, examined the ones objected to ,and our decision would be the same even in their absence.

The ultimate issue is whether Carrier violated the Agreement in disqualifying Claimant. Petitioner says that it did by acting arbitrarily, capriciously, and with bias and prejudice. If Carrier were shown to have done so, we would hesitate to say that it had violated the Agreement. We have searched the record, however, for proof of these charges and do not find them to have been established. Mere suspicion is not enough. The burden of establishing violation, of course, is upon Petitioner.

In this case and the circumstances thereof, we feel that Carrier acted fairly, and within its permissible managerial discretion in determining the qualification—or rather the lack thereof—of Claimant for the job. Without reflecting upon her abilities on other jobs, or her ambitions for the one in

question, she was found after a trial period three times longer than usual, that her services in such job were not satisfactory. Carrier is not shown to have abused its discretion in making such determination.

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

That the parties waived oral hearing;

That the Carrier and the Employe involved in this dispute are respectively Carrier and Employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of January, 1962.