

Award No. 11569

Docket No. CL-11325

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Arthur W. Sempliner, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Carrier violated the Clerks' Agreement:

(a) When it disqualified Mrs. Joan T. Lewis from position of Assistant Chief Clerk in the General Freight Agent's office, Detroit, Michigan, on March 28, 1958, without granting her full cooperation of supervision and employees in her efforts to qualify during the period beginning March 17, 1958 and ending on March 28, 1958, which she occupied such position, and

(b) When it failed to grant Mrs. Lewis a hearing as requested orally of the General Freight Agent on March 28, 1958, and in writing on May 19, 1958, and

(c) When the time claim submitted by Mrs. Lewis was not declined within the time limit prescribed, and

(d) That Carrier shall now be required to compensate Mrs. Joan T. Lewis for all wage loss sustained beginning with Monday, March 31, 1958, and continuing until such time as she is restored to position of Assistant Chief Clerk.

EMPLOYEES' STATEMENT OF FACTS: Mrs. Joan T. Lewis was first employed as a Clerk-Stenographer in the General Freight Agent's office, Detroit, Michigan, on April 10, 1951. Except for a short furlough in 1952 she continued to occupy this position to and including December 31, 1957, when it was abolished. At that time she indicated a desire to displace the Assistant Chief Clerk in the same office who was junior to her, but she was advised that she was not considered qualified to handle the position and that it would be necessary for her to post on it before displacement would be permitted. This she did and finally on January 27, 1958, she was permitted to make displacement. After working the position about three weeks, she was disqualified on February 14, at which time she requested a hearing under Rule 32. After some delay it was agreed that Mrs. Lewis would do some further posting and she

Carrier's special statement as to the claim as made:

Part (d) of the claim asks that the Carrier shall now be required to compensate the Petitioner

" * * * for all wage loss sustained beginning with Monday, March 31, 1958, and continuing until such time as she is restored to position of Assistant Chief Clerk."

Apparently the claim is for punitive, and not actual, damages. Yet the Carrier submits the Petitioner can request as damages an amount no greater than actual damages. That is to say, the Petitioner can only claim the monetary difference between what she assertedly would have earned on the position, less any compensation she earned on other positions on the Carrier, less any compensation earned in outside employment, less any compensation she might by reasonable diligence have earned. The Petitioner held rights on District 60 Seniority Roster for the Southwestern Region of the Freight Traffic Department. Following her disqualification, she could have asserted bid on any bulletined position in this entire region. This roster covers such points as Columbus, Cincinnati, Indianapolis, St. Louis, etc. The record indicates she did not desire or choose to do so. As of December 12, 1958 she resumed on the position of clerk-stenographer in the same office at Detroit.

She continues in that capacity. The Carrier submits the claim here can only be for actual, not punitive, damages.

CARRIER'S CONCLUSION

It is the position of the Carrier in this case the claim made here at all its parts is without merit. Carrier respectfully requests that the claim at all its parts be declined.

OPINION OF BOARD: The Claimant, a Clerk-Stenographer, whose position was abolished December 31st, sought to displace the Assistant Chief Clerk. The General Freight Agent informed the Claimant that in his opinion, she was not qualified to take the position of Assistant Chief Clerk, and therefore must post before displacement would be permitted. On January 27th, after posting from January 1st, she was allowed to take the position on a trial basis. During the period from January 1st to January 27th, the Claimant was given an oral examination on various aspects of the position of Assistant Chief Clerk. The oral examination consisted of some 80 questions, 35% of which the Claimant answered correctly. On February 14, after working the position from January 27th, a little over two weeks, the Claimant was disqualified for the position, at which time a hearing was requested under Rule 32. Rule 32 reads as follows:

"RULE 32.**"Failure to Qualify.**

"Employees after being awarded bulletined positions or permitted to exercise displacement rights, will be allowed thirty (30) working days in which to qualify, and, failing, shall retain all their seniority rights and may bid on any bulletined position but may not displace any regularly assigned employee. An employee who fails to qualify on a temporary vacancy may immediately return to his regular position.

"Employees will be given full cooperation of supervisors and employees in their efforts to qualify.

"When it is definitely determined, through hearing if requested, that the employee cannot qualify, he may be removed from the position before the expiration of thirty (30) working days. Removal after the expiration of thirty (30) working days is subject to handling in accordance with the procedure set forth in Rule 48 (b-1)."

A hearing was held on March 4th, conducted by the General Freight Agent — Smith. The Claimant was present, as was Mr. Bloom, of the Clerk's Organization. The record is lacking in detail of the hearing. The Organization describes the hearing as "turning into an informal discussion". On March 17th, the Claimant was again given an opportunity to handle the position, which continued until March 28th, at which time the Claimant was given the following written notice:

"This will confirm conversation today concerning the type of work you have been doing on the position of Assistant Chief Clerk in this office.

"By the end of today, you will have completed another two-week period of work. During this time all possible assistance has been given you in your attempt to perform in an acceptable manner the work assigned to the position.

"In my opinion you are not doing the work satisfactorily and I have no other recourse but to disqualify you for the position of Assistant Chief Clerk in this office, effective March 28, 5:00 P. M.

You have not handled correspondence properly, you have failed to observe instructions on car movements, and due to your apparent lack of knowledge of the railroad have used unnecessarily the telephone lines, thereby wasting your time and others."

Claimant alleges that after receiving the communication of March 28th, she requested a hearing orally, and under date of May 19th she wrote, requesting a hearing under Rule 32. It is the position of the Organization that no hearing was held subsequent to the oral request of March 28th or the written request of May 19th, and that under the Time Limit Rule, the claim must therefore be granted and compensation paid.

The Claimant makes very serious allegations, that she was not given the proper encouragement and cooperation, as is required pursuant to Rule 32, while exercising displacement rights. The docket does not support the allegations. In fact, quite to the contrary, the docket indicates that General Freight Agent Smith, while personally of the belief that the Claimant could not handle the position, leaned over backward to give the Claimant an opportunity to try out. During the time the Claimant was posting, she was given an oral examination, and subsequent to the oral examination, she was given an opportunity to try out. Claimant wrote two letters, one dated January 11 and one dated February 19th, alleging that she was dealt with unfairly, but her allegations are not supported, and the letters themselves cannot be taken as evidence. Having been given an opportunity to displace, which opportunity lasted from January 27 to February 14th, a hearing was demanded under Rule 32. This hearing was held March 4th. In the absence of any showing that the hearing of March 4th was to be set aside and not considered a hearing, this is the

only hearing required under Rule 32. Subsequent requests for a hearing and the invocation of the Time Limit Rule because such a hearing was not held, cannot be maintained. The Claimant had received the hearing provided for by the rules.

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 Employees involved in this dispute are respectively Carrier and Employees 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 claim must be denied, in accordance with the opinion above.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June 1963.