

**Award No. 11966
Docket No. CL-11893**

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

William N. Christian, Referee

PARTIES TO DISPUTE:

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

MINNEAPOLIS NORTHFIELD AND SOUTHERN

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

(1) When it removed Mrs. Alice Hicks from the position of Machine Operator in the Office of Auditor of Disbursements as a result of the hearing held on June 3, 1959 to determine her qualifications, and

(2) That the Carrier now restore Mrs. Alice Hicks to the position of Machine Operator in the Office of Auditor of Disbursements and pay her for all time lost from May 15, 1959.

EMPLOYES' STATEMENT OF FACTS: Under date of March 6, 1959, a position described as a new position of Machine Operator in the Office of Auditor of Disbursements was bulletined under BRC Notice No. 249, the duties of which were to operate National Cash Register Machine, Class 31, and perform related functions in connection therewith and such other general clerical duties as assigned.

Mrs. Hicks was the only applicant for the position and she was assigned thereto on March 23, 1959.

On May 13, 1959, Mr. Carlson, claimant's immediate supervisor, disqualified her, effective May 15, 1959. On May 20, 1959 Mrs. Hicks requested a hearing as to why she had been disqualified, as Mr. Carlson had failed to advise her definitely as to the reason for her disqualification.

Mrs. Hicks' request for a hearing was granted by Mr. McPherson, Vice President-Operations of the Minneapolis, Northfield and Southern Railway. Mr. McPherson acted as chairman of the hearing and made the first decision based on the evidence produced at the hearing, thereby eliminating any proper

OPINION OF BOARD: Employees object to an exhibit attached to Carrier's Rebuttal Submission. The exhibit is dated after Employees' notice of intent to file submission to this Board. The exhibit could not have been exhibited to Employees during handling of the claim on the property. The exhibit is excluded from our consideration. See Circular No. 1 of this Board.

Employees claim wrongful removal of Claimant from the position of Machine Operator in the office of the Auditor of Disbursements.

Rule 27 of the effective Agreement provides in part:

" . . . Disputes growing out of personal grievances and/or out of the interpretation or application of agreements or practices concerning wages, rules or working conditions between the parties hereto may be handled by one (1) or more duly accredited representatives, first with the immediate supervisory officer and, if not satisfactorily settled, may be appealed by the representative in the order of succession up to and including the highest official designated by the management to whom appeals may be made."

This obviously contemplates that such dispute as here first be "handled" with the immediate supervisor, with right of appeal thereafter up to and including the highest official designated by management to whom appeals may be made. Employees assert fatal defect in that the only formal hearing in this case was before the highest official designated by management to whom appeals might be made. However, Claimant and Employees clearly acquiesced and participated in such procedure, and must be deemed to have waived the right to any further or additional handling before the immediate supervisor, as prerequisite to hearing by Carrier's highest officer. See Award 9393 (Hornbeck). Also, it appears from the record that this procedural issue was raised for the first time on appeal to this Board; Employees thereby waived their right to raise the issue. See Award 11735 (Stark). (Had the issue been raised on the property, Carrier would have been afforded an opportunity to rebut with evidence such as the exhibit hereinabove excluded.)

Employees urge violation of that part of Rule 13 of the effective Agreement which provides:

" . . . Employees will be given full cooperation of department heads and others in their efforts to qualify."

We are not persuaded by the record that Claimant's disqualification was caused by any violation of this rule.

Employees urge fatal error because the hearing officer determined and announced a decision (after the hearing) before the reporter's transcript of testimony at the hearing was completed. Many judges and many juries decide cases without a transcript of testimony. Nothing in this Agreement requires a transcript of testimony prior to decision by the hearing officer.

The only remaining issue is whether Carrier was arbitrary or capricious in removing Claimant from the position of Machine Operator. We have reviewed the record carefully. Employees have failed to sustain the burden of proof. The controlling rule is well stated in Award 11572 (Hall):

"In a fitness and ability case, as we have here, this Board recognizes as a basic principle the prerogative of management to determine the fitness and ability of its employes and, further, we will not set aside the Carrier's decision unless it can be shown that it was arbitrary and capricious. . . ."

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 13th day of December 1963.