

NATIONAL RAILROAD ~~ADJUSTMENT~~ BOARD

THIRD DIVISION

Award Number 20995
Docket Number CL-20919

Irwin M. **Lieberman**, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employees**
PARTIES TO DISPUTE: (
(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (GL-7681)
that:

(1) Carrier violated the *Agreement* between the parties when on May 14, 1973, *it* denied senior **employee** Mr. J. G. Baird the right to displace junior **employee** Mr. W. S. Young from position titled Assistant Chief Clerk, Superintendent's Office, Portland, Oregon.

(2) The Carrier violated the Agreement between the parties when it failed to timely render a decision in connection with a hearing that was held on May 23, 1973. Agreement was further violated when the Carrier failed to timely decline a claim that was filed under date of May 18, 1973.

(3) The Carrier shall be required to compensate Mr. J. G. Baird for a day's pay at ~~the~~ rate of \$43.45 per day for May 15, 16, and 17, 1973, and for each and every day thereafter until the violation is corrected.

OPINION OF BOARD: On May 14, 1973, Claimant, having been displaced from the position of **Rate** and Transit Clerk No. 8, filed his intent to displace the incumbent in the position of Assistant Chief Clerk, Superintendent's Office, Portland, Oregon. On the **same** date Claimant was notified by the Superintendent that his displacement was disallowed since his record **indicated** he had neither the background- qualifications required for the position. On May 16, 1973 Claimant advised the Superintendent that he was placing **himself** on the Extra List under protest. On May 18, 1973 the *Organization*, through the Local Chairmen, wrote to the Superintendent advising him that his decision to deny the position to Claimant was unreasonable, arbitrary and an abuse of discretion; that a hearing was requested in accordance with Rule 58; and that an interim Claim was being filed in behalf of Claimant. The hearing was scheduled and held on May 23, 1973. On August 5, 1973 Petitioner wrote to the Superintendent requesting that the Claim be allowed as presented on the grounds that the hearing had demonstrated that Claimant had the fitness and ability which **would** qualify him for the position in question and further that the *Organization* had received no information as to the outcome of the hearing or denial of the Claim. On August 22, 1973 the Superintendent responded as follows:

"This **will** acknowledge receipt of your letter dated August 5, 1973, relative to claim on behalf of Mr. **J. G. Baird**.

In your letter of May 18, 1973, File G-25-43, you requested a hearing under the provisions of Rule 58 of the Clerks Schedule.

This hearing was granted on Wednesday, May 23, 1973. It will be noted that your letter of May 18, 1973 included a request for a hearing and also **claims** on behalf of Mr. J. G. Baird. Any basis for a claim would have to be determined after the hearing. In my letter of May **21st**, 1973, you were advised that your request for a hearing was being granted, however my reply did not make specific reference to **time claims**, as Mr. Baird had already been advised that **his** bid was **not** being accepted. Any valid right that Mr. Baird might have to the position of Assistant Chief Clerk, which would include **time claims**, would have **to** follow the hearing. For sake of clarification, I should have made specific reference in my letter to you dated May 21, 1973 to include the declination of the time claims, which I inadvertently did not include, assuming that this matter would be based on the **outcome** of the hearing. It will be noted that you have taken no further action on the hearing.

This is to advise that your request that Mr. Baird be placed on the position of Assistant Chief Clerk for which he is not qualified, and pay **therefor** is being hereby declined account not sustained by schedule rules."

Rule 58 provides that an **employee** who considers himself unjustly treated shall have the same right of hearing and appeal as provided for in Rule 56. Rule 56, dealing with Investigations and Appeals, provides *inter alia* in Paragraph A:

"A decision will be rendered within twenty **(20)** calendar days after the completion of investigation."

Appendix C of the Agreement dealing with Time Limits on Claims and Appendix D concerning Local Handling of **Claims** both provide that the Carrier must disallow a claim within sixty days from the date of filing and if not so notified ". ..the claim or grievance shall be allowed as presented...."

Both parties hereto have presented certain information **and/or** arguments with their submissions to this Board which were not handled on the **property**; cross objections to this material are noted. Both parties are well aware that new evidence and **argument not** raised during the handling on the property is improperly presented to this Board; such material will not be considered in the resolution of this dispute.

With respect to the matter of whether Claimant should have been awarded the position, the Carrier had specified in the bulletin for the position that one of the elements of the position required: "Applicants must have a comprehensive knowledge of operating and non-operating labor agreements". Claimant admitted both during and prior to the hearing that he had no knowledge of **the duties** involved in the position and wished to Learn. **His** prior background with Carrier had been exclusively in the Accounting and Freight activities of Carrier and did not involve any exposure to the operating rules of the various

crafts, such as crew calling might have afforded. The Agreement provides (in Rule 7, which is applicable) that seniority shall prevail only when fitness and ability are sufficient. In a host of awards this Board has stated that whether an **employee** has the requisite fitness and ability for a position is a matter for the Carrier to determine exclusively; such determination will be overturned by this Board only when the evidence indicates that the action of Carrier was arbitrary or **capricious**. We also note that certain awards have held that it is not necessary for an applicant to be **immediately** qualified to assume all the duties of a position without some assistance and training (Award 5348 for example); however there must be a reasonable probability that the **employee** would be able to **perform** all the duties of the position within a reasonable period of time. There is nothing in the record of the hearing or the other handling on the property which indicates unjust treatment or an arbitrary or capricious judgment on the part of Carrier. We are not permitted to substitute our judgment for that of Carrier in disputes of this type (Award 20878 **among** others) under our Limited **review** authority.

The record is clear that Carrier did not either respond to the original Claim or report to the Claimant on the **outcome** of the hearing in **conformity** with the rules on time limits. Carrier argues that in the absence of any notification after the hearing and any change in his status, it **must** have been obvious to Claimant that he had failed to meet his burden of proving that Carrier's decision in rejecting his displacement was in error; ergo, no formal notification was required. At the same time Carrier argues further that the original claim was premature and should only have followed the hearing; it too did not warrant response. We do not agree with Carrier's position or logic since it is quite clear that Carrier's reasoning would foreclose the filing of any claim or appeal by inaction on its part. We find that Claimant was damaged by Carrier's failure to either respond to the original Claim within sixty days or render a decision within twenty days after the completion of the hearing. However, Carrier's letter of August **22nd**, supra, served both as a late denial of the Claim and as a decision with respect to the hearing. Carrier's liability under the Time Limits provisions under these circumstances has been **limited** by the National **Disputes Committee** decision No. **16** and a series of awards following it. For this reason, Claimant should be compensated for the period from May 14, 1973 through August 22, 1973 at the rate of \$43.45 per day.

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;

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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 violated.

A W A R D

Part L denied;

Part 2 sustained;

Part 3 sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

G.W. Paulsen
Executive Secretary

Dated at Chicago, Illinois, this 12th day of March 1976.