

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21328
Docket Number CL-21113

James C. McBrearty, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employees**

PARTIES TO DISPUTE:

(Southern Pacific **Transportation** Company (Pacific Lines)

STATEMENT OF CLAIM: Claim of the **System Committee** of the Brotherhood, GL-7770, that:

(a) The Southern Pacific Transportation Company violated the **Clerks' Agreement** when it unjustly disqualified Mrs. **E. E.** Whetstine (E.E. Yost) from Traffic Service Clerk Position No. 540; and,

(b) The Southern Pacific Transportation Company violated **Rule** 46 of the Agreement when it **failed** to give the Division Chairman a copy of decision following investigation; and,

(c) The Southern Pacific Transportation Company violated **Rule** 48 of the Agreement when it failed and refused to give Mrs. Whetstine a copy of the transcript of investigation; and,

(d) The Southern Pacific Transportation Company shall now be required to allow Mrs. Whetstine the difference in compensation on Positions 539 **or** 540 whenever she **was available** to perform service thereon September 29, 1972 and each work day thereafter until disqualification is lifted.

OPINION OF BOARD: Claimant entered Carrier's service as a clerk on **February** 1, 1966, in the General Office Building, San Francisco, and transferred **to the Oregon** Division as a clerk on **June** 16, 1970.

Claimant occupied a position on the Eugene, Oregon, Clerical Extra Board, and on occasions filled vacancies on Position No. 539, Division Clerk and Position No. 540, Service Clerk, in the District Freight Traffic Office at Eugene. During her **occupancy** of these two positions, Carrier alleges that Claimant on four separate occasions was **discourteous** and argumentative with Carrier's customers. Moreover, Carrier argues that while these **shortcomings** were discussed with Claimant as they occurred, it was to no apparent avail. Consequently, after Claimant's last alleged outburst to a **customer** (who was anxious about getting a box car full of furniture up from **Roseville**, California to Eugene, Oregon, for a special **ware-**house sale), the District Traffic Representative filed a personal record memorandum on September 29, 1972, **that** Claimant was disqualified from further service on Positions Nos. 539 and 540.

On October 4, 1972, the Agent at Eugene conferred with Claimant on the contents of the personal record memorandum of September 29, 1972, outlining the **reasons** for her disqualification from further service on Positions Nos. 539 **and** 540. On November 5, 1972, Claimant filed a displacement on Position No. **540, but** was not awarded said position because of her previous disqualification.

Subsequently, on **November 17, 1972**, Claimant requested an investigation under the provisions of **Rule 50** of the current agreement. As a **result** of the evidence adduced at the **formal** investigation held on November 24 and 28, 1972, the disqualification of Claimant for service on Position No. 540 was affirmed by Carrier in letter dated December 7, 1972.

Claimant thereafter exhausted the appeal procedures up to and including the highest officer designated by Carrier to receive such claims, the latter declining the claim, and affirming the disqualification of Claimant. The matter is now properly before the Board.

The rules cited by the parties as being applicable to the instant case are as follows:

"RULE 26
SENIORITY DATDM

(a) Seniority begins at-the time **employee's** pay starts on the seniority district and on the roster where service is first **performed**. Where two **or** more **employees** enter upon their duties'at the same hour on the same day, seniority rank of such **employees** shall be determined by agreement between the employing officer and the Division Chairman or **Chairmen**.

(b) An employe voluntarily leaving the service or **who** has absented himself, except in case of illness or other physical disability, without proper leave of absence, which **must** be in writing if in excess of sixty (60) days, shall forfeit his accumulated seniority; if he re-enters the **service** he shall be considered a **new** employe. **An** employe **who** has been dismissed and request for reinstatement is not made within sixty (60) days from date of notice of dismissal, **will**, if reinstated, be considered a new employe unless restoration of seniority previously held is agreed to between the carrier and the organization."

"RULE 27

PROMOTIONS, ASSIGNMENTS, **DISPLACEMENTS**

Employees covered by these **rules** shall be in line for promotion. Promotions, assignments and displacements 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 the senior employee to bid in a new position **or** vacancy, or **to displace** a junior employee, where two or more **employees** have adequate fitness and ability. In such cases the senior employee will be awarded the position unless **it** is obvious he **cannot** qualify. **Employees** shall be given cooperation in their efforts to qualify."

"RULE 34

SHORT VACANCIES

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(b) New positions or vacancies of thirty (30) calendar days or less duration, shall be filled, whenever possible, by the senior qualified Guaranteed Extra Board employee who is available and who has not **performed** eight (8) hours' work on a calendar day; a **Guaranteed** Extra Board employee will not be considered as being available to perform further work on vacancies after having performed five (5) days or forty (40) hours of work at the straight time rate in a work week beginning with Monday, except when such Guaranteed Extra Board **employee** secures an assigned position under the provisions of Rule 33 or **returns** to the Guaranteed **Extra** Board **from** a position to which he was assigned, in which event he shall be compensated as provided for in Rule 20, Sections **(b)** and **(c)**.

NOTE: 6. Guaranteed Extra Board **employees** will be advised of the various known vacancies available to them at the **time** called and be allowed in seniority **turn to** respond to the one of their choice provided the starting time thereof is within the eight-hour period **commencing** with the start of such calling period established pursuant to Article VII, Section I(d) of the Agreement of September 16, 1971. To the extent practicable, employees will also be notified of vacancies which arise after the time initially called and **permitted** to change choice to one of the latter vacancies or **to a** vacancy choice relinquished by a senior employee in application of **this agreement**.

If a Guaranteed Extra Board **employee** misses a call during calling period established pursuant to **Article** VII, Section I(d) of the Agreement of September 16, 1971, on a day on which he has not **performed** service, he will not be considered available for service on that calendar day. If the Guaranteed **Extra** Board employee has performed service on the date of call and the call missed during calling period referred to herein is for service on the following calendar day, he will not be considered available for service on such following calendar day.

Calendar days on which Guaranteed Extra Board employees are not available by reason of missing **call**, as provided herein, or laying off, as provided in **Rule** 34(d), will be counted in computation **of five days** and 40 hours as referred to in **Rules** 20 and 34 and such time will be deducted from the 40 hours per week guarantee provided for **under Article** VII of the Agreement of September 16, 1971.

"RULE 4 6 **DISCIPLINE AND INVESTIGATION**

An employee who has been in service more than sixty (60) days or whose application has been formally approved shall not be disciplined or dismissed without investigation, at which investigation he may be represented by the regularly constituted committee or an employee of his choice coming within the scope of this Agreement. He may, however, be held out of service pending such investigation. The investigation shall **be held** within fifteen (15) days of the date when charged with the offense or held from service. A decision will be rendered to the employee within fifteen (15) days after the completion of investigation, copy of which decision will be furnished to the Division Chairman.

Investigations and hearings **shall be** held whenever possible at home point of **employees** involved. They will also be held at such time as not to cause **employees** to lose rest or time, whenever possible to do so.

**"RULE 48
TRANSCRIPT**

A transcript of the evidence taken at the investigation or on the appeal shall **be furnished to** the employe and his representative, who shall have fifteen (15) days in which to offer evidence in rebuttal."

**"RULE 50
GRIEVANCES**

An employe who considers himself unjustly treated, shall have the same right of investigation and appeal as provided in Rules 46, 48 and 49 if written request is made to his superior within fifteen (15) days of the cause of complaint."

Claimant alleges that Carrier is guilty of procedural violations of Rules 46 **and** 48, while Carrier argues that Claimant is guilty of a procedural violation of Rule 50.

After a thorough review of the record, the Board **finds** that the alleged procedural violations **committed by both**, Carrier and Claimant either were **not** properly raised on the property **and/or** were **non** prejudicial **and** would not have supported the claim in **any** event.

Therefore, the Board must turn to the merits to dispose of this case.

Claimant argues that she was unjustly disqualified by Carrier from Traffic Service Clerk Position No. 540. Carrier states that under Rule 27, it must judge the "fitness and ability" of employes, and that Carrier's judgment **on** that matter cannot be upset by this Board unless Claimant can prove that **in** making said judgment, Carrier was arbitrary or capricious.

In construing rules such as Rule 27 herein involved, this Board has consistently adhered to the principle that whether an employe possesses sufficient fitness **and** ability for a position is a matter exclusively for the Carrier to **determine**, and such a determination once made will be sustained **unless** it appears that the action was biased, arbitrary, or capricious. (See Awards 21243, 20787, 20361, 19144, 19129, 18943, 18025, 17264, 16871, 16841, 15494, 14813, 13759, 12669, 11572, 5966, 4687, **and** 2692).

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Once Carrier has determined that Claimant lacks sufficient fitness and ability, Claimant has the burden of coming forward with evidence of substantial probative value to support her contention as to fitness and ability,' and to the arbitrariness of Carrier's action. (See Awards 21243, 20361, 19129, 16871, **15494**, 6143, and 4687).

Claimant has failed to sustain this burden. We believe that Carrier's decision was made in **good faith** upon sufficient supporting evidence, and its decision as to fitness and ability was not biased, arbitrary, nor capricious. Thus, Carrier's determination will stand, and the claim will be denied.

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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 30th day of **November** 1976.

