

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21329  
Docket Number CL-21203

James C. **McBrearty**, 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-7817**, that:

1. The Carrier violated, and continues to violate, the **rules** of the Clerks' Agreement, when it denied Bernard H. Bmnotte positions identified as JO23 and JO99 in **the Joint** Facilities and **Contracts** Department, **General Office, St. Paul, Minnesota.**

2. The Carrier shall now be required to place Mr. Bmnotte on positions for which application was denied and reimburse **him** for any loss of wages resulting from his being denied these positions.

**OPINION OF BOARD:** Claimant **commenced** employment with the Northern Pacific Railway Company in General Office Building, Freight Accounting Department, St. Paul, Minnesota, on June 16, 1959.

Claimant established **a seniority** date of June 16, 1959, in the Freight Accounting Department in accordance with the Working Rules Agreement between the Northern **Pacific Railway** Company and the Brotherhood of Railway Clerks.

The Freight Accounting Department was one of the sixteen or so classified departments in the Northern Pacific General Office Building. Each of these classified departments maintained a separate seniority list in each of these respective departments.

Claimant continued on this separate seniority roster covering the classified department in which he was employed until March 3, 1970. On that date the merger of the component lines comprising the Burlington Northern occurred. The former Northern Pacific was one of the component lines which make up the Burlington Northern.

On **March** 3, 1970, Claimant, along with all **employees** in the various classified departments of the Northern Pacific Railway and the Great Northern Railway had their names dovetailed in seniority order on a consolidated roster in accordance with the provisions of the Burlington Northern Clerks' Merger Agreement, with an effective date of March 3, 1970. This consolidated roster is identified as St. Paul General Office District Roster No. 4, as shown in Article II, Section 1(1) (iv) of the above referred to Merger Agreement and Rule 4 of the Clerks' Working Rules Agreement with an effective date of March 3, 1970.

During the period 1959-1970, **Claimant** was the incumbent of various clerical positions. During the last two years in the Freight Accounting **Department**, Claimant occupied the position of Department Head of the Interline Forwarding Department. Subsequently Claimant went to the Passenger Accounting Department as Assistant Bureau Chief where he remained in that capacity until the merger of **the** component lines **com-**prising the Burlington Northern in March, **1970**.

Following the **consummation** of the merger, Claimant continued in Passenger Accounting, but not **in the** capacity of Assistant Bureau Chief. **In** February, 1972, **Claimant** became the incumbent of a Bill Clerk position in the Disbursement Accounting Office, where he continued to work until March, 1974, when he was displaced **from** this position by a senior **employee**.

**When** Claimant became aware of the fact that he was being displaced from the Bill Clerk position in Disbursement Accounting Department, he attempted to exercise seniority rights by displacing a junior employe on Bill Clerk Position **J** 023, Joint Facilities and Contracts Department.

Claimant's written request **for Bill** Clerk Position J 023 was rejected by Carrier because Claimant failed to pass a written **examination**, achieving a score of only 50 out of 100 points.

Claimant then sought to exercise seniority rights on Bill Clerk Position **J** 009, Joint **Facilities and** Contracts Department. However, this displacement also was not honored by Carrier, since Carrier believed it would not be proper procedure to allow Claimant to retake the test **imme-**diately, in light of the fact that one-half of the test was identical to the other test Claimant already had taken, but failed. (The other **one-**half of the questions were also the same as before, but required somewhat different answers, based on the different duties involved in Position **J** 009).

On March 6, 1974, Claimant wrote to Carrier requesting a hearing, under the provisions of the Clerks' Agreement, Rule 58, entitled, "**Griev-**ances." A hearing was held on March 14, 1974. As a result of this hearing Carrier issued a decision on March 22, 1974, sustaining the original decision to reject Claimant's request for Bill Clerk Positions **J** 023 and J 009.

In urging that the claim be sustained, Claimant has cited the following **rules** in the Agreement:

"Rule 56. INVESTIGATIONS AND **APPEALS**

A. An employe 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, the employe if he desires to be represented by other than himself, **may** be accompanied and represented only by the duly accredited representative, as that

"term is defined in this agreement. **He** may, however, be held out of service pending such investigation. The investigation shall be held within seven (7) calendar days of **the** date when charged with the offense or held **from** service. Notice of the investigation shall be in writing with a copy to the **Local Chairman**. The investigation shall be held in a fair and impartial manner. A decision **will** be rendered within twenty (20) calendar days after the completion of investigation.

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

**C.** When necessary to secure presence of witnesses or representatives not **immediately** available, reasonable postponement at the request of either the **Company** or **Employee** may be had.

**D.** If decision results in discipline to be administered, it shall become effective as promptly as necessary relief **can** be furnished, but in no case more than five (5) calendar days after notice of such decision to the employee. If not effected within five (5) calendar days, **or** if employe is called back to service prior to completion of suspension, any unserved portion of the suspension period shall be cancelled.

**E.** An employe dissatisfied with decision shall have the right to appeal to the next higher proper office, provided written request is made **to such** officer and a copy furnished to the agent or officer whose decision is appealed, within twenty (20) calendar days of the date of advice of the decision. The right of further appeal in the regular order of succession, up to and inclusive of the highest official designated by the company to whom appeals may be made, is hereby established.

**F.** A transcript will be made of all statements, reports, and information made a matter of record at the investigation, and a copy of such transcript will be furnished on request to the employe or his representative.

**G.** At the investigation or appeal, the employe may be assisted only by the duly accredited representative, as that term is defined in this agreement.\*\*

"**RULE 58.** GRIEVANCES

An **employee** who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided for by Rule 56, **provided written** request is made to his **immediate** superior within seven (7) calendar days of knowledge by the **employee** of the cause of the complaint."

"**RULE 7.** PROMOTION

**Employees** covered by these **rules** shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall **prevail**, except, however, that this provision shall not apply to excepted positions.

**NOTE:** The word 'sufficient' is intended to more clearly establish the right of the senior clerk or **employee** to bid in a new position or vacancy where two or more **employees** have adequate fitness and ability."

**The** primary issue in this dispute is the question of whether the Carrier violated the Clerks' Agreement, Rule 7, by the use of a test as the sole tool for determining fitness and ability under the provisions of Rule 7, and in **so** doing, acted in an unreasonable, arbitrary and capricious manner.

Prerequisite to any examination of the primary issue of the case at bar is a **disposition** as to whether the claim must be sustained for failure of the Carrier to follow the provisions of Rules 58 and 56, in that the Claimant was not afforded a timely hearing as requested under these **rules**.

In addition, a determination must be made as to whether or not the **Employees** failed to properly follow **the line** of appeal procedures in the progression of this claim on appeal.

Concerning Carrier's alleged violation of Rules 56 and 58, the Board finds that, although there was a technical violation in that the investigation was held eight (**8**) days after Claimant charged Carrier with unjust treatment, instead of seven (**7**) days as prescribed by Rule 56, we fail to see **how** the Claimant was in any manner prejudiced by the delay of one (1) day in the date of the hearing. What this Board looks for is prejudicial error adversely affecting a Claimant's procedural and substantive rights under the controlling Agreement. Since no **prejudice to** Claimant has been **shown** by the one (1) - day delay in the hearing, this matter may be dismissed as a non-prejudicial error.

Next, a determination must be made **as to** whether or not Claimant failed to properly follow the line of appeal **procedures** in the progression of this claim on appeal. Carrier asserts that the **claim is** barred from Board consideration because **Claimant** failed to follow the established appeals procedure. The appeals procedure asserted by the Carrier to be applicable to this case is **treated** in Carrier letters to the Union dated February 3, 1969; February 9, 1970; **May** 5, 1970; November 24, 1970; and January 2, 1974. All of the 1970 letters make reference to "Claims resulting from disciplinary actions." The, January 2, 1974 letter refers to the appeals **procedure** as follows:

**"APPEAL IN DISCIPLINE CASES**

With respect to discipline cases the initial appeal from decision will be **to the** employing officer designated above. The intermediate appeal will be to the Regional Assistant Vice President of Operations except as otherwise stated below:"

The above quoted procedure was not exclusively followed in this case, so the question is whether such procedure is applicable to a disqualification case. The Carrier's contention is that, **since** the hearing in this case was obtained under Rule 58 (unjust treatment), and since Rule 58 affords the same right of investigation and appeal as for discipline cases under Rule 56, it follows that the appeal of a decision resulting from a Rule 58 hearing is governed by the appeal procedures established for discipline cases under Rule 56. **Examina-**tion of this contention reveals that, although Rule 58 provides for an appeal after initial decision to the next higher officer and thereafter "in the regular order of succession" to the highest official, the Rule does not provide, and, therefore, omits the specific steps of the "regular order of succession." The omitted part of the **procedure, which is** the part in dispute here, is established by conference and correspondence of the parties and thus the Carrier's correspondence on the disputed procedure is pertinent.

Such correspondence, in speaking solely of discipline cases and in making no reference at all to unjust treatment cases, fails to reflect any intent whatever that unjust treatment cases were intended to be covered by the subject procedures. Indeed the correspondence reflects that discipline cases were **the only** cases contemplated by the subject procedures. Moreover, absent a clear contra statement of intent in the Carrier's correspondence, the cross-reference from Rule 58 to Rule 56 does not **automatically** place an unjust treatment case under appeals procedures which refer only to discipline cases. Such a result is strongly negated by the fact that the substantive differences between the two kinds of cases are significant and self-evident, and as well, by the fact that the usual meaning of the term "discipline" does not render it synonymous with the term "unjust treatment." In these circumstances the Carrier's contentions about the consequences of the **cross-**reference from Rule 58 to Rule 56 **cannot be** accepted, particularly since, as previously noted, the disputed procedures have been established by conference and correspondence between the parties and not by the Rules themselves.

Turning now to the **primary** issue in this case, Claimant did not successfully pass a written test, and this was made the determining factor by Carrier that he did not have sufficient fitness and ability.

A **determination** of how much weight should be given test results, along with other relevant factors, is a matter of judgment, When such judgment is exercised honestly and upon due consideration, it is not arbitrary action even though there may **be room** for two opinions.

**There is** nothing in the record which indicates unjust treatment or **an** arbitrary or capricious **judgment** on the part of Carrier. This Board will not set aside Carrier's **judgment** of fitness and ability unless it is arbitrary or capricious or has been exercised in such a wanner as to **circumvent** the Agreement. We are not permitted to blithely substitute our judgment for that of Carrier in **disputes of** this type under our limited review authority. (See Awards 21108, 21115, 20995, 20916, 20881, 20880, 20879, and 20878).

Accordingly, on the basis of the record considered as a whole, established precedent, and the foregoing analysis, the Board is compelled to deny the claim.

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;

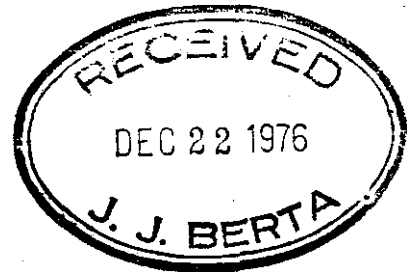
That the Carrier and the **Employees** involved in this dispute are respectively Carrier and **Employees** within the meaning of the Railway Labor Act, as approved June 21, 1934;

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. Paulke  
Executive Secretary

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