

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **22477**
Docket Number CL-22231

Rolf **Valtin**, Referee

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

PARTIES TO DISPUTE: (

(The Western Pacific Railroad **Company**

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood
(**GL-8426**) that:

"1. The Western Pacific Railroad Company violated the Agreement when it relieved Ms. G. **Guadamuz** from her **Rule 2** Position of Secretary to Chief Mechanical Officer without just and proper cause.

2. The Western Pacific Railroad **Company** shall now **be** required to reinstate **Ms G. Guadamuz** to her **former position**, or comparable position with like salary, plus the difference in **the** rate of pay, including all wage increases between her **former** position of Secretary to the Chief Mechanical Officer and her present position, including any other **assignments** she may hold before **settlement** of this claim."

OPINION OF BOARD: The claimant was hired by the Carrier in March, 1974. She began as a Steno-Clerk **in** the Accounting Department. **Having demonstrated** above-average **typing** and shorthand competence, she was considered, along **with** others, **as** a candidate for filling a vacancy in the position of Secretary to the Chief Mechanical Officer. This is a so-called excepted position **under** Rule 2. The **claimant** became the successful candidate **and** entered the position **in** mid September, 1974.

According to the Carrier (**and** the record is not without documentation on this score), the quality of the claimant's work, as well as her attitude, turned out to be below expectations and below acceptable levels. She was removed from the position **in** late July, 1976 (thereupon exercising her seniority and **landing in a Demurrage Clerk job**).

It is clear beyond question that **we cannot** grant either of the demands which the Organization makes in the Statement of Claim. As to the demand that the **claimant** be returned to **the**

position from which she was removed, the fact, as already given, is that this is an excepted, Rule 2 position. It **is** firmly established; by a **long** line of Adjustment Board Decisions, that both the selection of **employees** for and their removal from such positions are reserved as exclusive Carrier rights. And as to the **demand** that **the claimant** be placed in a position of equal pay, the **answer must** be that the claimant's seniority -- not the asserted right to suffer no pay reduction -- governed her placement upon removal **from** the excepted position.

The real question in the case (not reflected in the Statement of Claim but fully raised on the property as part of the dispute) is whether the Carrier validly resisted the claimant's request for an "unjustly treated" **hearing** pursuant to Rule 46. The **Rule** reads as follows:

"An **employee** who considers himself unjustly treated, otherwise than covered by these rules, shall have the same right of hearing, appeal, and **representation** as provided in **Rule** 45, if written request which sets forth the **employee's** grievance is **made** to his **immediate** superior within 10 days of cause of complaint."

Essentially raised **is** an interpretative question going to the proper application of the phrase "otherwise than **covered** by these rules". We are proceeding with awareness of all of the following: that the Rule was adopted in times when Carriers held **many** more **managerial** prerogatives than they do nowadays -- which is to say that it is to be granted that the presence of the Rule in a modern collective-bargaining Agreement represents something of an anachronism; that there is divergence among past Decisions which deal with the meaning of the phrase; and that it can plausibly be argued, just as the Carrier argues, that the **area** here in question is a Rule 2 area -- i.e., an area addressed by the Agreement -- and hence not an area "**otherwise** than covered by these rules. "

We have nevertheless concluded that the claimant was entitled to the "unjustly treated" hearing she sought. We think the key lies in the fact that her removal from the position **was** a matter of unilateral managerial authority and that she was therefore without redress under Agreement rules.

We are **mindful** of the fact that the Carrier has already submitted documents of various sorts in defense of its decision to remove the claimant from the position. But such documentation is not the equivalent of affording her the opportunity of a Rule 46 hearing. **We are** also **mindful** of the Carrier's belief that such a hearing is **bound** to produce renewed acrimony and **mud-slinging**. But neither the anticipated posture of **one** or the other or both of the parties nor the anticipated strength or lack of it of the **employee's** complaint can be accepted as justification for refusing to provide the hearing. For, if a hearing can be refused on the grounds that the result of the **hearing** is a foregone conclusion, the right to be heard is no right at all. We hold that the **claimant**, if she still requests it, is entitled to a Rule 46 hearing.

We should reiterate, however, that it is not for us to direct the claimant's reinstatement to the position or to direct that she be placed in a comparable job or to direct wage restitution. The **claimant's** persuasive powers are her sole Agreement recourse on these scores.

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 removal of the claimant from the position of Secretary to **the** Chief Mechanical Officer was not a violation of the **Agreement**, but that the Carrier erred in declining the claimant's request for a **Rule** 46 hearing.

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A W A R D

Claim denied in part and **granted** in part, as given in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at **Chicago**, Illinois, this **31st** day of **July 1979**.

