

The Third Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(Central Vermont Railway, Inc.

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10337) that:

1. Carrier violated the Agreement between the parties when it removed Ms. A. G. Carpenter from the Swing Steno Clerk-Telegrapher Clerk position at Palmer, Massachusetts on October 9, 1987, without just and sufficient cause and failed to provide her a fair and impartial unjust treatment hearing.

2. Ms. A. G. Carpenter should now be reinstated to the position, the disqualification removed from her record and be compensated eight (8) hours pay at the rate of the Swing Steno Clerk-Telegrapher Clerk position commencing Monday, October 12, 1987, and each subsequent date thereafter until this matter has been resolved."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant herein had been disqualified from the position of Swing Steno Clerk-Telegrapher on October 9, 1987. She requested an Unjust Treatment Hearing by letter dated October 12, 1987, which was held on October 22, 1987. On December 8, 1987, the Hearing Officer issued a decision upholding the disqualification. Article 31 and Article 25 relate to the Unjust Treatment Hearing; they provide as follows:

"ARTICLE 25

Investigations and Hearings

25.1 An employee who has been in service for more than sixty (60) days or whose application has been formally approved shall not be disciplined of dismissed without investigation and hearing. He may, however, be held out of service pending such investigation and hearing. The investigation shall be held within ten (10) days of the date when charged with the offense or held from service. A decision will be rendered within seven (7) days after completion of investigation and hearing.

25.2 Investigations and hearings shall be held whenever possible at home terminal of employees involved. The carrier will, insofar as is practicable, conduct investigations and/or hearings at such place and at such time as not to cause employees to lose rest or time. Employees shall have reasonable opportunity to secure the presence of representatives and/or witnesses."

"ARTICLE 31

Unjust Treatment

33.1 An employee who considers himself unjustly treated shall have the same right of investigations, hearing, appeal and representation as provided in these articles if written request which sets forth the employee's grievance is made to his immediate superior within seven (7) days of complaint."

The Organization argues that the Claim should be granted on procedural grounds, in addition to the meritorious position. Specifically, the Organization contends the Claimant was deprived of due process by the conduct of the Hearing Officer and further, the decision was rendered six weeks following the close of the Hearing, rather than in the seven days specified in Rule 25.1.

Carrier maintains that Article 31 is not intended to conform to the provisions of Article 25 and furthermore the decision was rendered upon completion of the transcript of the Hearing and was timely. In addition, the Carrier argues that the Hearing Officer's roles were appropriate since the provisions of Rule 31 state that an employee must ask her immediate Supervisor for a Hearing.

Initially, it must be noted that Article 31 by its terms provides that an employee requesting an Unjust Treatment Hearing is accorded the same rights as any employee called for an Investigation or Hearing under the Agreement. Thus, the terms of Article 25 are indeed applicable, contrary to Carrier's contentions. From this it follows that the decision in this matter

should have been rendered within seven days of the completion of the Hearing, or on or before October 29, 1987. It was obviously tardy since the decision was dated December 8, 1987. It should be noted that the applicability of the general rules dealing with Investigations to be used in regard to Unjust Treatment Hearings has been settled over the years (see for example Third Division Award 25361).

The most significant procedural issue raised deals with the question of due process. It is the Board's conclusion that the multiple roles filled by the Hearing Officer did indeed deprive the Claimant of due process. First it must be noted that the Hearing Officer was the Supervisor of Claimant during her short stint on the job from which she was disqualified. He was the Officer who requested that she be tested and subsequently disqualified her. He then acted as Hearing Officer. In that role he repeatedly offered testimony while sitting in the chair. In addition, he rendered the decision following the Hearing. Finally, the Hearing Officer was the Carrier Officer who heard the first level of appeal and responded in behalf of the Carrier. These multiple roles played by him are wholly inconsistent with the principles of fair play and due process which are implicit in the entire Hearing and investigative process. While certain multiple roles have been accepted with respect to investigative Hearings, in this instance the Hearing Officer was in effect Judge, Jury, Prosecutor and Witness as well as the Appellate Judge. Based on these two fundamental procedural flaws, the merits cannot be considered. The Claim must be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of August 1990.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 28527

DOCKET NO. CL-28705

NAME OF ORGANIZATION: Transportation Communications International Union

NAME OF CARRIER: Central Vermont Railway, Inc.


The Organization has requested an Interpretation with respect to the Award in this matter. The issues raised deal with the questions of reinstatement and backpay. In essence the Organization insists that the position was not abolished until January 2, 1990, and thus Claimant is entitled to pay until that date. Carrier, on the other hand, states that the position in question was abolished on November 7, 1987, and furthermore Claimant earned more on another position during the three week period and thus is not due any additional compensation.

The Board has examined the facts presented in this matter and notes that the original dispute was resolved solely on a procedural determination. The record indicates, without equivocation, that the position in dispute was abolished on November 7, 1987. For that reason, full compensation, as specified in the Claim, is due Claimant for the period from October 12, 1987, through November 7, 1987, and the Board so finds.

Referee Irwin M. Lieberman who sat with the Division as a neutral member when Award 28527 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 28th day of October 1991.