

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20537

Docket Number CL-20464

Frederick R. Blackwell, Referee

(Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and
(Station Employees
PARTIES TO DISPUTE: (
(Norfolk and Western Railway Company
((Involving employees on lines formerly operated
(by the Wabash Railroad Company)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7444) that:

(1) Carrier violated the provisions of Rules 15 (a), 17 (f) and 31 (d) of the Clerks Agreement, when it arbitrarily and capriciously disqualified Clerk Thomas Byle from the position of TOFC Clerk #96-A, Detroit Terminal, Detroit, Michigan, effective January 9, 1973.

(2) Carrier shall now return Claimant to Position #96-A, TOFC Clerk, with all rights and privileges unimpaired.

(3) Carrier shall pay Claimant eight (8) hours pay at the pro rata rate of Position #96-A for Tuesday, January 9, 1973 and for each subsequent work day thereafter.

(4) In addition to the money amounts claimed herein, the Carrier shall pay an additional amount at 8% per annum compounded annually on the anniversary date of claim.

OPINION OF BOARD: The Claimant went on a leave of absence, due to an injury, in July of 1972. Upon returning from leave on December 21, 1972, he exercised seniority to acquire a position (TOFC Clerk #96-A) occupied by a junior employee. He was disqualified from position #96-A on January 9, 1973. The claim asks that he be returned to the position and compensated for eight (8) hours at the pro rata rate for each work day from the date of disqualification. The Employees allege violation of several rules including Rule 17 (f) which provides that "Employees awarded bulletined positions will be allowed thirty (30) days in which to qualify ..." Although the Claimant bumped to the position, rather than bidding it in pursuant to bulletin, the Employees contend that the Claimant was entitled to the thirty (30) day qualifying period provided by Rule 17 (f). The Carrier raises two procedural matters, one concerning time limits and the other concerning the failure of the Employees to cite or discuss the rules relied upon during handling on the property. As regards the merits, the Carrier asserts that Rule 17(f) is not applicable, and that the Claimant's disqualification was proper in that he was afforded a reasonable time to qualify on the position.

With regard to the Carrier's first procedural defense, time limits, the chronology begins with a letter dated January 9, 1973, and signed by Superintendent R. C. Churchill. This letter notified the Claimant that he was disqualified from working the position of TOFC Clerk #96-A. On the same date the Claimant wrote to Superintendent Churchill stating that "...I request a hearing to determine the exact cause for my disqualification..." After hearing on January 16, Superintendent Churchill wrote to Claimant under date of January 18, 1973 stating that, based on the hearing record, the decision to disqualify "is affirmed." By letter dated January 31, 1973, the Regional General Chairman wrote to Mr. F. A. Johnson, Director of Labor Relations, appealing the decision of Superintendent Churchill and asserting, inter alia, that the Claimant was entitled to be returned to, and paid for all time held off of, such position. The Regional General Chairman's letter was acknowledged by Mr. Johnson's February 21, 1973 letter which also set February 26 to hear the appeal on the case. The appeal was discussed in Mr. Johnson's office on February 26 and then declined in his letter dated March 28, 1973; inter alia, this letter states:

"No claim has been presented by or on behalf of Clerk Byle '*** for all time held off of position***' to the officer of the Carrier designated to receive claims and grievances within the time limit provided in Article V of the August 21, 1954 National Agreement, and the claim you have presented in his behalf is therefore, barred from further handling."

The Carrier's Submission restates the above quoted procedural objection and also identifies Superintendent Churchill as the officer of the Carrier designated to receive claims and grievances within the time limit provided in Article V of the National Agreement of 1954. However, the Carrier's Submission leaves doubt as to whether the objection is made to the entire claim or just to the monetary portion of the claim in parts 3 and 4 of the claim. The former is suggested by some passages of the Submission, while the latter is suggested by other passages. The latter is also suggested by the prayer of the Carrier's Submission wherein parts 1 and 2 of the claim (merits) are the subject of a request for denial, while parts 3 and 4 (monetary) are the subject of a request for dismissal. With these considerations in view, we note that, without contradiction, the Carrier has identified Superintendent Churchill as the official to whom a claim should have been presented in the first instance. Also without contradiction, the Carrier states that "the first claim for compensation appears in Regional General Chairman P. W. Jurgens' letter of January 31, 1973, directed to Director Labor Relations F. A. Johnson...." We therefore conclude that no claim for compensation was presented to Superintendent Churchill within the time limit provided by Article V of the 1954 National Agreement; accordingly

the Carrier's objection to the monetary portion of the claim in parts 3 and 4 of the claim is sustained. Award Nos. 17738 and 20063. However, the other parts of the claim stand on a different footing. The Claimant's January 9 letter to Superintendent Churchill requested "a hearing to determine the exact cause for my disqualification..." This language, in the surrounding circumstances, can fairly be read as an objection to the disqualification. That the Carrier viewed the letter as having made such an objection is clearly indicated by the Carrier's case at the hearing, as well as by Superintendent Churchill's post-hearing letter of January 18 which "affirmed" the disqualification. This last letter, Superintendent Churchill's letter of January 18, was timely appealed by the January 31, 1973 letter of the Regional General Chairman to Mr. Johnson. Accordingly, there is no time limit bar to consideration of the merits of disqualification.

On the Carrier's second procedural issue, omission of rule citation on the property, we believe the record supports the Employees' assertion that the violation of the rules was discussed in the February 26 conference on the property. In this regard we note that, following the parties' conference on February 26, 1973, Mr. Johnson denied the appeal in a March 28, 1973 letter to the Regional General Chairman. This letter presents a counter argument in that it states the Carrier's argument that the Claimant was not covered by Rule 17 (f) and, in the course thereof, the rule is cited and set out in full. The letter thus strongly indicates that the Employees' position on Rule 17 (f) was discussed in the conference on February 26. We are therefore satisfied that the basis of the claim was clearly understood by the Carrier and that it has not been surprised or prejudiced by lack of knowledge of the rules relied upon by the Employees.

We come now to the merits. The Claimant had been assigned to the position for twenty days and had actually worked it for six days when the disqualification occurred. Superintendent Churchill's pre-hearing letter of January 9, 1973 took the position that the Claimant was required to be qualified for the position before he assumed it. When confronted with the Superintendent's position in the hearing the Claimant asserted that he had thirty days to learn the job. But Superintendent Churchill's position was adhered to by the Interrogating Officer who said its basis was that the Claimant had bumped to the position rather than bidding it in. However, the TOFC Terminal Supervisor, Mr. Harness, failed to support the Superintendent's position when asked by the Interrogating Officer whether it was the Claimant's "obligation to understand the duties of this position before he bumped?" In fact, the Supervisor testified that, prior to the bump, the Claimant had told him he did not know anything about the job. The Supervisor said that he and others assisted the Claimant for five or six of the six days on which the Claimant worked the job. The testimony also showed that the Claimant's physical condition prevented him from climbing up on cars and trailers to perform important data-gathering duties and that this problem led to the unsatisfactory performance of other duties such as the preparation of reports. The Claimant's typing proficiency was also indicated as

being poor which slowed the performance of billing and report work. On the other side of the ledger, Supervisor Harness said that the job was "pretty rough" and not easy to learn; and that he asked the Claimant "...on more than one occasion to bid on a job or to go on the extra board..." Following the hearing, the Regional General Chairman's appeal letter of January 31, 1973 challenged the position initially taken by Superintendent Churchill and the Interrogating Officer that the Claimant's status required him to be qualified before assuming the position. However, at this juncture, the Carrier abandoned its initial position. Instead, in Mr. Johnson's letter of March 28, 1973, it was asserted that Claimant was afforded an opportunity to qualify on the position, that he was assisted by the Supervisor and others toward that end, but that, nonetheless, he failed to perform satisfactorily. This last position is continued in the Carrier's Submission to this Board, while the Employees' Submission continues to attack the Carrier's initial position as erroneous. Both Submissions further argue the status question and whether Rule 17 (f) is applicable. In the Carrier's discussion of the inapplicability of Rule 17 (f), the Submission goes on to say that its practice has been "...to afford employees displacing on positions a reasonable length of time in which to qualify...." Further elaboration on its practice is found in the Carrier's Reply Brief.

"As explained in the Carrier's ex parte submission, Rule 17 (f), concerning the period during which employees awarded bulletined positions may qualify, deals with the rights of individuals who submitted application and were awarded positions pursuant to Rule 17, paragraph (a). It has been the practice, although the rules do not so provide, to afford clerical employees displacing on positions, a similar period of time in which to qualify."

In reviewing the foregoing, and the whole record, we note that the Carrier's initial position was that the Claimant was required to be qualified before he bumped to the job. This position was also taken by the Carrier in the hearing and, thus it is clear that such position was the basis of the Carrier's disqualification decision in the first instance. We further note that the Supervisor's knowledge that the Claimant did not know anything about the job raises a serious doubt that, even if otherwise valid, the Carrier's initial position could be applied to the Claimant in this case. However, as previously noted, the Carrier has abandoned its initial position and now argues that the Claimant was afforded a reasonable period of time to qualify on the position. In view of this shift in position by the Carrier, we think the status question is rendered academic and that it is appropriate to resolve this dispute on the basis of whether the Carrier's

disqualification of the Claimant was in accordance with its own stated practice of allowing an employee who displaces to a position a reasonable period of time to qualify. The hearing record shows that the Claimant had not achieved a satisfactory level of performance after working the job for six days. However, during the time the Claimant was on the job, the Supervisor, as stated in his own words, had asked the Claimant "...on more than one occasion to bid on a job or to go on the extra board..." The Supervisor, by asking the Claimant to leave the job in this manner, injected an undue degree of negativism into the learning process. But more important, the Supervisor himself said that the job was a rough one which was not easy to learn. In light of this characterization of the job by the Supervisor, and in light of the fact that the Claimant actually worked the job for only six days, we are convinced that six days was not a reasonable length of time to learn the job in the circumstances of this case. We conclude therefore that the Carrier did not allow the Claimant a reasonable length of time to qualify on the position in accordance with its own stated practice and that its disqualification action was so premature as to be arbitrary and capricious. Accordingly, we shall sustain parts 1 and 2 of the claim. Parts 3 and 4 of the claim, as previously indicated, shall be dismissed.

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 Employee involved in this dispute are respectively Carrier and Employee 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

Parts 1 and 2 of the claim are sustained. Parts 3 and 4 are dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December 1974.