

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21675  
Docket Number CL-21143

Frederick R. Blackwell, Referee

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

PARTIES TO DISPUTE: (  
(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7767) that:

1. The Carrier violated, and continues to violate, the rules of the Clerks' Agreement when it denied Bennie Vazzano, Rate Clerk, Position T-1-099, Local Office, North Kansas City, Missouri.

2. The Carrier shall now be required to place Mr. Vazzano on Rate Clerk Position T-1-099, and his personal record cleared from any and all reference that he was not qualified for the position.

OPINION OF BOARD: The Claimant, with a seniority date of March 22, 1951, was the senior bidder on a December 7, 1973 advertisement of a permanent vacancy on the position of Chief Rate Clerk (Job T-1-099), Local Freight Office, North Kansas City, Missouri. However, the Carrier declined to place him in the position on the ground that he did not possess sufficient fitness and ability to qualify for the position, and on December 26, 1973, the Carrier awarded the position to a junior employee. On January 7, 1974, the Organization requested a hearing on the matter. The hearing was held on January 14, 1974, and resulted in February 6, 1974 Carrier letter indicating that its decision about the Claimant's qualifications remained unchanged. The matter is now before the Board on a voluminous record which raises several procedural issues along with the merit issue.

The procedural issues raised by the Carrier are: (1) that the Organization's request for a hearing was untimely under the Rule 58 provision which requires a hearing request to be made within seven (7) calendar days of the cause of the complaint; and (2) that the claim is barred from consideration by the Board in that the Organization did not adhere to the appeal procedures which are applicable on this property. The procedural issue raised by the Organization is that, since the Carrier's post-hearing decision letter of February 6, 1974 was twenty-three (23) days after the conclusion of the hearing on January 14, 1974, the Carrier violated the Rule 56 A time limits under which the Carrier must render a decision in a matter under investigation "within twenty (20) calendar days after the completion of the investigation" and that, because of the Carrier's violation of such time limits, this case must be disposed of under Rule 56 A at the stage in handling at which the violation of such rule became evident.

The Carrier's first procedural point is that the Organization's request in the Claimant's behalf for a hearing was untimely under Rule 58, which provides that such a request must be made within seven (7) calendar days from the date of the cause of the complaint. Here, the cause of the complaint occurred on December 26, 1973, the date on which the position of Chief Rate Clerk was awarded to a junior employee, and the request for a hearing was made on January 7, 1974. These facts reflect that the hearing request was made twelve (12) days after the cause of the complaint occurred and thus, at the time the request was made, the request was not within the time limits provided by Rule 58. The untimeliness of the request was mentioned on the property in a Carrier letter of April 15, 1974, which, in pertinent part, states as follows:

"On January 7, 1974 the local chairman requested a hearing. This was 12 days after the assignment notice awarding position T-1099 had been posted which was five days beyond the time limits requiring the Carrier to give the claimant a hearing. But the Carrier did hold a hearing to resolve the issues of the Claimant's fitness and ability to hold the Rate Clerk position."

The Organization's response to the foregoing is found in a May 15, 1974 letter which, in pertinent part, states as follows:

"If there was any cause for the Carrier to consider that the provisions of Rule 58 had not been complied with, the time for citing their cause of complaint would have been when the request for investigation was made and not months later when the matter is on appeal to your office."

The position reflected in the Organization's letter of May 15, 1974 is well taken. The Carrier had opportunity to object to the hearing request as not meeting the Rule 58 time limit provisions at the time the hearing request was made. The Carrier failed to lodge such objection, however, and the hearing was in fact held on January 14, 1974. In these facts, the conclusion is inescapable that the Carrier waived its right to object to the untimeliness of the hearing request and the instant record affords no basis for finding that such right has been revived. Accordingly, the instant record does not support the Carrier's first procedural objection.

The Carrier's second procedural point arises from the fact that following the declination of the initial appeal by the employing officer (W.J. Condotta, Terminal Superintendent), the Organization filed under date of March 13, 1974 identical appeal letters with the intermediate appeal officer (J.E. Hamer, Assistant Vice President-Operations) and the final appeal officer (T.C. DeButts, Vice President-Labor Relations). The Organization's method of appeal was construed by the Carrier as bypassing the intermediate appeal officer, which, according to the Carrier's viewpoint, rendered the claim fatally defective (April 15, 1974 letter of Vice President-Labor Relations).

The Carrier's basis for this position is that since the hearing in this case was held pursuant to Rule 58 (unjust treatment), which provides the "same right of hearing and appeal as provided by Rule 56," the Organization was required to follow the appeal procedures established for discipline cases under Rule 56 (Investigation and Appeals). The Carrier's Submission reflects that such procedures were established by Carrier letters dated February 3, 1969, February 9, 1970, May 5, 1970, and January 2, 1974, and the Submission describes the procedures as follows:

"The record is clear that in discipline cases, the initial step in the appeals procedure is to the employing officer, then to the intermediate officer (Assistant Vice President-Operations) and then to the final appeal officer (Vice President-Labor Relations)."

The Carrier's Submission asserts that the required progression in the above described procedures was not followed by the appeal steps taken by the Organization in the instant case and, further, that the Organization's filing of simultaneous appeals with the intermediate appeal officer and the final appeal officer was in violation of the provisions of Rule 56 E and Appendix C, which require appeals to be taken in the "regular order of succession." Such violation, the Carrier submits, is a bar to consideration of the claim.

The Organization's response to the Carrier's position on the appeal procedures is that the intermediate appeal step referred to by the Carrier was applicable to disciplinary cases, but not to nondisciplinary cases such as the one involved here, and that in any event, the simultaneous filing of appeals complied with the Carrier's construction of the appeal procedures. In support of this position the Organization calls attention to Award No. 20916 which involved these same parties and the same procedural argument by the Carrier, and which expressly ruled that the bypassing of the intermediate appeal did not result in a jurisdictional defect in a claim concerning the qualifications of an employe for a particular position. The following extract from that Award is pertinent:

"We note, however, as asserted by Petitioner, that Rule 58 which applies to 'GRIEVANCES' provides that 'An employe who considers himself otherwise unjustly treated' must make 'written request . . . to his immediate superior . . . ' (Emphasis supplied). Additionally, Carrier's letters of February 3, 1969, and February 9, 1970, specifically state that:

'In other than discipline cases there will be only two steps for the handling of claims and grievances. They should

be initially filed with the employing officer of the individually named Claimant. If not settled at that level such claims and grievances may be appealed to Vice President-Labor Relations at St. Paul, Minnesota.'

The conflicting aspects of this issue are argued vigorously by both principals and many prior Awards are cited as precedent. We are persuaded, however, that this is not a discipline case and that in view of the express language of Rule 58 and the above quoted letters of Carrier, the procedures applicable to 'Grievances' were complied with by Petitioner."

The Carrier letters referred to in Award No. 20916 are the same letters on which the Carrier relies in the instant case, and thus the analysis in that Award applies with equal force to the procedural argument presented by the Carrier in this case. Accordingly, although the Carrier might well have promulgated appeal procedures which would have required a nondisciplinary case to be subject to the intermediate appeal step, the Carrier did not in fact do so and as a result the Carrier's argument in this regard is not supported by the record and prior Award No. 20916.

The remaining procedural issue is the Organization's argument that the claim must be sustained because the Carrier did not render its posthearing decision "within twenty (20) calendar days after the completion of the investigation" as required by Rule 56 A of the Agreement. The hearing was held on January 14 and the Carrier's posthearing decision letter was dated February 6, 1974, so there is no question that the posthearing decision was rendered after the expiration of the twenty (20) day time limit provided by Rule 56 A. However, the Carrier submits that the Rule 56 A time limits do not apply to the confronting case because the instant hearing was initiated by an employee rather than by the Carrier. In support of this position, Carrier contends that there are substantial differences between disciplinary proceedings and proceedings held, as here, at the request of an employee. A disciplinary proceeding, the argument goes, is initiated in the first instance by the Carrier lodging charges against an employee, which charges the Carrier has the burden of proving in a formal hearing. If the charges are proved in the hearing, notice of assessment of discipline is issued; but, if the charges are not proved, no notice is issued and the record is closed. With respect to the Claimant's nondisciplinary hearing, the Carrier's Submission states the following:

"... the hearing results from a request by the employee, who obviously is seeking to develop facts to prove he was unjustly deprived of the requested position. Following that hearing, if such facts are clearly proven, the

application of Rule 57 would call for the Carrier to place the employee on the position. If the facts support the Carrier, the initial determination stands and no further action is required.

But here the employees contend that because the Carrier did not formally notify the employee that he had not proven his case and that there would be no change in the Carrier's initial determination until 23 days after the hearing, the employee must now be assigned to a position he cannot handle.

There is no showing as to how the employee was prejudiced by not being formally notified on the 20th day rather than the 23rd day that the record did not support his bid for position T-1-099. Had he proven at the hearing that he possessed the necessary fitness and ability, and that rejection of his bid did in fact constitute unjust treatment, he would then have been notified of reversal of the Carrier's previous decision and assigned to the position sought. Absent any such notification, and absent any change in his status, it must certainly have been obvious to him that he had failed to meet his burden of proving that the Carrier's decision in rejecting his bid was in error."

The Carrier also cites Third Division Award No. 13331, First Division Award No. 15579, and a court decision referred to as Atlantic Coast Line R. Co. v. BRAC, 210 F. 2d 812. While it is not necessary to analyze each of these authorities, it is noted that the authority which affords the most support for the Carrier position, Award No. 13331, rejected the claim of an employee who had been denied a position on the ground that he did not possess the requisite qualifications. The employee was also denied his request for a hearing under the unjust treatment rule. Although the Board held that the denial of a hearing was a violation of the unjust treatment rule, the Board went on to state that such denial did not prejudice the employee's seniority rights inasmuch as he did not possess the necessary qualifications in the first instance. As applied to this case, the Carrier urges that, if the denial of a hearing was not prejudicial to the employee in Award No. 13331, the delay of three days in issuing the posthearing decision in this case does not constitute such prejudice.

In support of its position that the time limit provisions of Rule 58 must be applied as written, the Organization cites Third Division Awards Nos. 16030 and 19796. In Award No. 16030 the Board considered a time limit rule substantively identical to the herein rule, except that fifteen (15) days - instead of twenty (20) days - was allowed for the Carrier to render a decision following a hearing. Following the hearing in Award No. 16030, the Carrier issued a thirty (30) day suspension to the involved employee; however, because the Carrier failed to comply with the fifteen (15) day rule in giving notice of the suspension, the Board set aside the suspension with the following comment:

"Where either party has failed to comply with the requirement of Article 6 of the Dining Car Stewards' Agreement, the claim must be disposed of under this Article at the stage of handling in which such failure becomes evident."

In Award No. 19796 the Board considered a time limits problem which is identical to the issue presented by the parties' positions in this dispute. There, an employee had been given a hearing under Rule 26 of the therein applicable Agreement (unjust treatment) and the Carrier had failed to render a decision within the time allowed under Rule 23 (Investigations) for rendering a decision after completion of the investigation. In addition, as here, the Carrier argued that the time limit provisions of the investigation rule did not apply to a hearing not initiated by the Carrier; however, the Board rejected the Carrier's argument and sustained the claim on the basis of the following analysis:

"We will next consider the contention advanced by Petitioner that Carrier violated the time limits by failing to render a decision within ten (10) days after completion of the investigation, citing the provisions of Rule 26:

'An employee who considers himself unjustly treated, otherwise than covered by these rules, shall have the same right of hearing, representation and appeal as is provided in Rules 23 and 24 \*\*\*'

The pertinent provision of Rule 23 reads:

'\*\*\* A decision will be rendered within ten (10) days after completion of investigation\*\*\*.'

\* \* \* \* Carrier argues: \* \* \* (2) Rule 23 is not applicable to the situation here involved as the hearing which was held was held under the provisions of Rule 26 and was not an 'investigation' under Rule 23 and therefore the time limits of that rule are not applicable.

\* \* \* \*

The language of Rule 26 dispels Carrier's second argument. There are no time limits specifically stated in Rule 26, just as there are no time limits mentioned in the provisions of Rule 24 to which Rule 26 refers. However, Rule 26 also makes reference to Rule 23 which does set forth time limits which must, of necessity, be applicable to all three rules

(23, 24 and 26). Carrier suggests that we decide that there are no time limits in either Rule 24 or Rule 26 to govern the handling of investigations, hearings and appeals if they are not initiated by the Carrier; but are commenced at the request of the employee. Such a construction and application would be obviously destructive and certainly not convey the intent of the parties to the Agreement. Awards 17081 (Meyers), 17145 (Devine), 18335 (Dugan), 18352 (Dorsey), 18354 (Dorsey), 18620 (Franden) and 19275 (Edgett) are cited with approval."

In assessing the foregoing pro and con of the Organization's position that the claim must be sustained on the basis of the Carrier's violation of Rule 56 A, it is noted that, although the facts in the authorities cited by the Carrier are not parallel to the instant case, the reasoning in the authorities reflect an approach which would have to be considered as supportive of the Carrier position. It is also noted that one of the Organization's cited authorities, Award No. 16030, is consistent with the Carrier's argument in that this Award involved a disciplinary matter which the Carrier concedes is subject to the time limit provisions of Rule 56 A. In the final analysis, however, Award No. 19796 is the Award which must be given precedential effect, because this Award is not only squarely in point with the facts of the instant dispute, but it also reflects the traditional view that time limit provisions are to be applied as written by the parties and that any deviation from this principle would amount to rewriting the parties' Agreement, which no third party is empowered to do. Two time limit rules are involved in this case, the seven (7) day limit on requesting a hearing under Rule 58 and the twenty (20) day limit on the Carrier's rendering a posthearing decision under Rule 56 A. Had the Carrier asserted the time limit provisions of Rule 58, instead of waiving such provisions as previously indicated, there can be no question that the Carrier would have been entitled to have the claim disposed of under that Rule. By the same token, there can now be no question that, in view of the Carrier's failure to comply with the time limit provisions of Rule 56A, the Organization is entitled to have the claim disposed of under that Rule. Finally, it is additionally noted that if the Carrier's argument were accepted as correct, and it were held to be exempt from the Rule 56 A time limits in an unjust treatment case, the Carrier would have an indefinite period of time within which to render a decision after hearing in such a case. Such a result cannot be the parties' intention regarding the rule, because it would frustrate an employee's right effectively to protest an adverse decision through the grievance procedure. Accordingly, it is concluded that the Carrier violated the time limits in Rule 56 A.

In view of the foregoing, the claim will be sustained on the basis of the Carrier's violation of Rule 56 A and the merits will not be reached.

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

The Carrier violated the time limit provisions as per Opinion.

A W A R D

Claim sustained on time limits as per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A. W. Paulsen  
Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1977.