NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21697

THIRD DIVISION Docket Number CL-21215

Walter C. Wallace, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, GL-7830, that:

1. Carrier violated, and continues to violate, the rules of the Clerks' Agreement when it denied Gladys F. Schmidt the position of Assistant Supervisor, Data Control Department, General Office, St. Paul, Minnesota.

2. Carrier shall now be required to place Gladys F. Schmidt on position of Assistant Supervisor and reimburse her for any loss of wages as a result of being denied the Assistant Supervisor position.

OPINION OF BOARD: Since 1952, the Claimant had been employed in data processing. Sometime prior to March 15, 1974 she learned that her job was to be abolished. She then attempted to exercise her rights and displace a junior employe in the position Assistant Supervisor, Data Control. Her request was rejected on the basis she was "not qualified to fill the position of Assistant Supervisor". Thereafter, on March 15, 1974, Claimant requested a hearing under Rule 58.

In a letter dated April 2, 1974, Carrier replied and the requested hearing was set for April 5, 1974. At the hearing, the Claimant's representative took exception to the hearing on the ground the time limit rule had been violated in that the hearing had not been held within seven days of the request of March 15, 1974. Carrier's position was that the time limit rule had been met insofar as the hearing had been set within seven days of April 2, 1974. The claim raises a series of questions related to procedural aspects that must be considered before we reach the substantive issue involving qualifications.

First, the time limit question involves Rules 58 and 56A which provide:

Rule 58:

"An employe 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 employe of the cause of the complaint."

Rule 56A:

"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." (emphasis added)

Clearly, Rule 56A deals with discipline while Rule 58 deals with other matters. In order to conclude that the Carrier was required to schedule a hearing within seven days of the date that she had knowledge of the cause of the complaint, as Claimant urges, we would have to read Rule 56 differently. It now includes a time limit provision requiring the hearing to be held within seven days of the date when she was charged with the offense or held from service (the underscored sentence above). Neither occurred here and we cannot add words to the agreement to achieve this result.

This Board is not empowered to do more than interpret the agreements reached by the parties. If we were to go further and add provisions, we would usurp the authority reserved to the parties that is exercised through free collective bargaining. We have carefully reviewed the awards cited to this Board on the subject of time limits. A number involved interpretations but we are not persuaded any of them go as far as would be necessary here to sustain the award. See Award

16262 (Dugan); Award 11757 (Dorsey); Award 8160 (Bailor); Award 18352 (Dorsey); and Award 19796 (Sickles). In the latter case, this Board was called upon to interpret a time limit rule where none existed previously. Admittedly, this case comes closer to the matter we have before us than any other case cited. Nevertheless, we believe there are significant differences that are controlling. In that case this Board was called upon to determine whether a time limit rule was violated in that a decision was not rendered within ten (10) days of the investigation. An "unjust treatment" hearing was available under Rule 26 of that agreement which provided:

> "An employe 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 part of Rule 23 provides:

> "...A decision will be rendered within ten (10) days after completion of investigation."

In Award 19796 it seems clear the time limit rule regarding the decision could only make reference to the investigation, i.e., ten days after. Here we are required to go beyond that. Even if we assume, en arguendo, that a time limit rule was to be applied regarding the holding of an investigation, we are faced with the difficulty that there is no reference point that would permit us to apply the rule. In a nondiscipline case such as this, a time limit rule that relates to a "date when charged with the offense or held from service" could have no meaning. Neither an offense nor a withholding from service occurred here. The only way this difficulty could be overcome would be to change the plain meaning of this phrase to apply to a nondiscipline case and, as we stated previously, we are not authorized to do this.

In Award 20351 (Twomey) these same parties dealt with the same rules. The issues raised there are distinguishable from the instant case; however, this Board significantly stated:

> "Rule 56 contains no limitation on the Carrier concerning a time restriction under which carrier must call for an investigation after receiving knowledge of an alleged violation of rules."

Accordingly, we conclude the Carrier is not in violation of any time limit rule in conducting the investigation as it did here.

The next question relates to Claimant's charge that she was not accorded a fair and impartial hearing in accordance with Rule 56. We have made a careful review of the record and we do not agree. We do not believe the Carrier officials acted in an unreasonable, arbitrary and capricious manner. The charges made to this Board on this issue include allegations that "due process" was denied, that Claimant was denied an opportunity for in-depth examination as to reasons why she possessed fitness and ability for the job, and the hearing officer was domineering, dictatorial, unreasonable and uncooperative. The specifics of these charges do not measure up to the allegations. For instance, it is claimed the hearing officer refused to answer questions directed to him by Claimant's representative. We do not find this to be a fatal flaw, particularly when the answer was better directed and obtained from a witness. The hearing officer is charged with the conduct of the hearing. Whether or not he will serve as a witness in the same hearing, is a matter generally left to his discretion. Absent prejudice to the Claimant, which was not shown here, we cannot hold that his exercise of discretion here was an abuse.

We have carefully reviewed the transcript and it is clear there were sharp exchanges, but the Claimant's representative was afforded full opportunity to voice his objections, present his case and cross-examine the Carrier's witnesses. We do not believe the Claimant was denied the essentials of a fair hearing and we cannot find rule support for the allegations relating to a lack of "due process."

Next, it is claimed on behalf of the Carrier that the employe failed to follow the proper line of appeal in the progression of this claim. We are persuaded the Employes' have the better argument here. Once again, the interplay between Rule 56 and 58 is to be considered with the added fact that the appeal procedures of this Carrier differ as to discipline cases and nondiscipline cases. The former involve an intermediate step: the initial appeal will be to the employing officer; then to the Regional Assistant Vice President of Operations; and then to the Chief Operating Officer of the Carrier designated to handle such disputes. The nondiscipline appeals do not include the intermediate step. In this case, the employe's appeal proceeded without the intermediate step and it is Carrier's position that in fitness and ability cases the intermediate appeal should be followed. We believe

the Carrier's letter of January 2, 1974 which involved a reissue of instructions covering procedures for filing and appealing claims and grievances is decisive of this issue. If an intermediate step was required, it should have been spelled out in these instructions. It was not and we cannot require it now.

We come to the question of Claimant's fitness and ability. Clearly, she had many years of experience in data processing. In Award 3273 (Carter) this Board held that the Carrier has the right in the first instance to determine the fitness and ability of the applicants. Where a determination is made that a senior applicant lacks sufficient fitness and ability, then the burden of proof is on the employe to prove she has the required fitness and ability for the position; and, second, that the employe must demonstrate the Carrier acted in an arbitrary and capricious manner in denying that the employe had the required fitness and ability. When we review the proof here, we cannot say the burden has been met on the matter of fitness and ability. The only witness on behalf of the employe was the Claimant herself. She stressed her long service and provided no additional proof that could be considered substantial evidence in support of her contention. By way of contrast, the Carrier witness was persuasive to the effect she lacked the necessary qualifications. We cannot say, on this record, that Carrier was wrong.

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 Employes involved in this dispute are respectively Carrier and Employes 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 Agreement was not violated.

A W A R D

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulus
Executive Secretary

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