NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25008
Docket Number CL-25181

Thomas F. Carey, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(Chicago Union Station

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9740) that:

1. Carrier violated the effective Clerks' Agreement when it disqualified Mr. I. A. Gellhause from the position of Foreman before the expiration of the sixty (60) day qualification period without benefit of hearing;

2. Carrier further violated the effective Clerks' Agreement when it deprived Mr. I. A. Gellhause of due process following requested hearing;

3. Carrier shall now compensate Mr. Gellhause, in addition to any compensation already earned, eight (8) hours' pay at the pro rata rate of Foreman commencing on November 19, 1981, and for each and every Wednesday through Sunday thereafter, and shall further compensate him at the time and one-half rate, less other earnings, for all service performed outside the hours and work days of his former position of Foreman, commencing on November 19, 1981, and continuing for so long as a like violation exists. Compensation to be determined by a joint check of Carrier records.

OPINION OF BAORD: The Claimant is an employe who had approximately 23 1/3 years of service with the Carrier prior to the dispute. During his employment, the Claimant served as, among other things, Assistant Mail Foreman, Mail Handler, Tractor Operator, Caller and Redcap. During his employment with this Carrier, however, Claimant had never worked a full time job in the Baggage Department until August 4, 1981. Prior to August 4, 1981, Claimant had mainly worked in the Mail Department and as a Redcap for 6 years for Amtrak.

When Claimant returned from his 6-year leave of absence with Amtrak, he exercised seniority displacement rights over a junior employe to position of a Parcel Agent in the Baggage Department effective August 4, 1981. Claimant worked the position of Parcel Agent in the Baggage Department from August 4, 1981 until October 4, 1981, when he was displaced by a senior employe exercising displacement rights. Effective October 4, 1981, Claimant exercised seniority displacement rights to the position of Foreman in the Baggage Department. His work experience as a supervisor was as an Assistant Mail Foreman in the Mail Department for the 2-month period from August 6, 1963 to October 8, 1963.

On November 18, 1981, Claimant was verbally informed of his disqualification from the position of Baggage Foreman, by Mr. Peter Sontoyo, Supervisor, General Baggage & Mail Department. From November 19, 1981, to current date, Claimant has been working the position of Parcel Agent in the Baggage Department.

The Organization contends that the Carrier violated the Clerks' Agreement when it disqualified Claimant from the position of Foreman before the expiration of the sixty (60) day qualification period without benefit of hearing. Rule 16(a) Time in which to Qualify states:

> "(a) Employes entitled to bulletined positions or exercising displacement rights to positions held by junior employes will be allowed not less than sixty (60) days in which to qualify."

While paragraph (a) of Rule 61 allows an employe sixty (60) days in which to qualify for a position, paragraph (b) permits the removal of an employe before the expiration of the sixty (60) day period if it can definitely be determined that the employe cannot qualify before the expiration of the sixty (60) day period. Claimant worked the position of Baggage Foreman for a forty-six (46) day period, October 4, 1981 to November 18, 1981, so there was ample time to determine his qualifications for the position, and the sixty (60) day trial period is not guaranteed.

Claimant was disqualified on November 18, 1981, and the Union requested a hearing on November 30, 1981. A hearing to determine the propriety of Claimant's disqualification was set for December 9, 1981, and it convened on the appointed date.

At the time of the hearing, there was a malfunction of the tape recorder that was being used and hence there was no transcript of the proceedings. The Organization was notified of the malfunction, but they did not request that the hearing be repeated. In Third Division Award No. 23015, Rodney E. Dennis, Referee addressed the subject of transcripts when he stated:

> "... Since, in such case, Carrier bears the burden of proof, and since the facts needed to carry that burden are elicited at a hearing, it is important that this board have the transcript of the hearing before it in order to make a proper determination.
>
> Absent that information, this board has no recourse but to uphold the claim on the basis that carrier has not carried its burden of proof, based on the record it submitted for this board's consideration."

In "disciplinary" cases Carrier has the burden of proof and a record is essential. But there is some question in "qualifications" hearing as to who carries burden. The Claimant has an obligation to establish the basis for his "qualified" claim.

Given facts of the case, the absence of a transcript is unfortunate, but is not deemed sufficient grounds to set aside the decision.

The Claimant cannot claim that because he was a new and inexperienced supervisor he was not counseled and instructed as to the proper handling and execution of Baggage Foreman's duties and responsibilities. After working as a Baggage Foreman for six (6) weeks, Claimant was notified that he was not properly supervising employes and was not performing the duties of his position in a proper fashion. He was then disqualified from Baggage Foreman effective November 19, 1981.

The record supports the fact that the Supervisor found him inadequate and made such evaluation to the Claimant. The record also shows the Claimant's prior supervisory experience was, in fact, limited to a 2-month period in 1963.

It is universally accepted in this industry that the right to determine the fitness and ability of an employe is solely the right of management. This decision cannot be reached in an arbitrary or capricious manner, however. The issue before us that must be decided is whether the Carrier acted in an arbitrary or capricious manner when they disqualified the Claimant from the position of Baggage foreman. A careful examination of the facts before us compels this Board to conclude that the Carrier did not act arbitrarily, capriciously or unreasonably when it determined that the Claimant could not properly perform the duties of Baggage Foreman. The Claimant was given a trial and he was found unqualified, hence there is no support for the instant claim, and it must be denied as a result.

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

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of September 1984.