PUBLIC LAW BOARD NO. 6394

AWARD NO. 52

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it improperly rejected Mr. D. Cumberledge's employment application and improperly terminated him from service by letter dated January 11, 2008 (Carrier's File MW-PITT-08-105-LM-264 NWR).

2. As a consequence of the violations referred to in Part (1) above, the Carrier shall now be directed to restore Claimant D. Cumberledge '...to service with all seniority rights unimpaired and to compensate claimant for all time lost since January 11, 2008 and to otherwise make him whole.'"

Upon the whole record and all the evidence, after hearing, the Board finds the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

AWARD

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The Claimant began working for the Carrier on or about November 12, 2007 in a probationary capacity as a trackman. The Claimant was informed via letter on January 11, 2008 that his application for employment had been rejected. The Carrier's letter cited Article XI, Section 1 of the October 30, 1978 National Agreement:

> Applications for employment will be rejected within sixty (60) calendar days after seniority date is established, or applicant shall be considered accepted. Applications rejected by the carrier must be declined in writing to the applicant.

At the third and final internal appeals level, the Carrier also cited Rule 3 from of the July 1, 1986 Agreement, which outlines in part:

> Persons entering service will not establish seniority until their applications have been approved...Rejection, if made will be within sixty calendar days after the person performs first service.

The issue in the current case is whether the Carrier dismissed the Claimant in the appropriate time table given the language in Article XI, Section 1 and Rule 3.

The Carrier argues that it fully complied with the 60 day requirement mentioned in Rule 3 because the language states that rejection must occur within sixty days **after** the applicant first performs service. The Carrier holds that the Claimant's seniority date was established on November 12, so the 60 day time period to reject started the next day - on November 13, 2007. Accordingly, the Claimant's application was rejected on the 60th day in writing on January 11, 2008. The Carrier also invokes Rule 3 of the 1986 agreement. Since Rule 3 does not require a written notification of rejection, the Carrier maintains that regardless of when it issued the Claimant written notification, its oral notification to the Claimant on January 10, 2008 was sufficient.

The Organization argues that there are 61 calendar days between when the Claimant began service (November 12, 2007) and receipt of the termination letter (January 11, 2008), which exceeds the 60 day time period under Article XI, Section 1. In addition, the Organization contends that Rule 3 under the July 1, 1986 Agreement does not apply in this case because it had not been retained as part of the agreement that governed the Claimant at the time of rejection. The Organization also disputes that the Claimant was notified orally of his application rejection on January 10, 2008.

In coming to a decision in this case the Board has closely relied on the cases cited by both the Carrier and Organization to determine what the customary practice is when counting days after service begins. Overall, we find the weight of the evidence supports the Carrier's position that the 60 day probationary period begins the day **after** first service is performed. As noted by 3 NRAB, Award 19177 this practice is also customary in wider law – Arbitrator Edgett found "...the time within which an act is to be done is to be computed by excluding the first day and including the last...." . In a similar case involving a question regarding the 60 day time table, Arbitrator Lieberman in PLB 2751, Award No. 4 found "...applications must be disapproved within sixty calendar days **after** the applicant begins work...the parties intended the period to exclude the first day of employment...." In contrast, the case cited by the Organization is substantively different in that it concerns an employee's procedural right to a fair and impartial trial before dismissal when working a 90 day probationary period.

The Board notes that the language of Rule 3 does not require that the Carrier deliver written notice to reject an application for employment. Concurrently, the Board finds that there is insufficient evidence in the record to support the Organization's contention that Rule 3 was not applicable to the current case. Although the Organization argues that there is no evidence that the verbal notice of rejection was given to the Claimant, we find again insufficient evidence in the record to support this argument. Due to these findings, regardless of whether the date of receipt of written notification was the

60th or 61st day following the Claimants first day of service, the Claimant did receive verbal notice on either the 59th (according to the Carrier) or 60th (according to the Union) day – both of which are within the time table required.

The claim is denied.

M.M. Hoyman
Chairperson and Neutral Member

J. Dodd
Employee Member

D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on January 31, 2012.