NATIONAL MEDIATION BOARD
WASHINGTON, DC

SPECIAL BOARD OF ADJUSTMENT 986

NATIONAL RAILROAD PASSENGER CORPORATION
(AMTRAK) – NORTHEAST CONFERENCE ("CARRIER")

AND

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
DIVISION – IBT RAIL CONFERENCE

NMB Case No. 299
Employee: Rashon Walker

Neutral Member: Barbara Zausner
Carrier Member: Mark L. Johnson
Organization Member: Jed Dodd

STATEMENT OF CLAIM

1- The Carrier's failure to disapprove Claimant R. Walker's application for employment in writing, as required by Rule 19 on September 21, 2012 constituted a violation of the Agreement (System File NEC-BMWE-SD-5093).

2- As a consequence of the violation referred to in Part 1 above, Claimant's application for employment shall now be considered as having been approved, he shall be reinstated to service immediately with all rights and benefits unimpaired and compensated for all financial loss suffered.

FINDINGS

Upon the whole record and on the evidence, the Board finds that the parties herein are Carrier and Employer within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant Walker was hired by the Carrier on July 2, 2012 and began work as a Third Rail Helper on that date. By the end of the calendar day on September 30, 2012, the Carrier had not informed Claimant, *in writing*, that his application for employment had been disapproved. Claimant was dismissed, the Carrier citing Rule 19, probationary period.

Rule 19 provides, Probationary Period:

> Applications for newly-hired employees shall be approved or disapproved within 90 calendar days after applicants begin work. If applications are not disapproved within the 90 calendar day period, the applications will be considered as having been approved. Applicants shall within 90 days from date of employment, if requested, have returned to them all documents which have been furnished to the Company. In the event an employee's application for employment is disapproved in accordance with the provisions of this rule, he shall be notified, in writing, by the Company of such disapproval.

The Organization appealed the disapproval of the employee's application under Rule 74 (b) alleging that as the disapproval was not

done consistent with Rule 19, it is deemed approved and "the Carrier's subsequent decision to remove him from service constituted inappropriate discipline." (Organization's submission, p. 3).

The Carrier contends the oral (not written) notice served on the Claimant at approximately 11:30 PM on September 21, 2012 satisfies the requirements of Rule 19. The disapproval was confirmed by letter dated October 8, 2012. The Carrier further asserts that the fact that written notice was not given until October 8 "does not nullify the application of Rule 19...." Moreover, "there is no avenue ... [of] appeal [for] newly-hired employees" whose applications have been disapproved under Rule 19. (Carrier's Mini Brief, p. 2).

A majority of this Board does not read the rule to require that written notice of the disapproval of one's application to the probationary employee by the end of the 90th day of employment or forfeit the right to disapprove the application. In our view, the reference to writing, coming as it does in the last sentence of the paragraph, is not a necessary procedural condition to disapproving an application. Therefore, we conclude that the oral notice was adequate and timely notification and the Carrier's action does not constitute improper discipline or discharge.

The cases submitted by the Organization are distinguishable. NRAB award 24822 deals with the date on which seniority was

established and refers to a 60 day limit found in an October 30, 1978 Fraternal Mediation Agreement. It is not clear how that document differs from Rule 19, if at all. However, the terms of Rule 19, which apply to this claim, differ from the 1978 document in specifically providing, "applications rejected by the Carrier must be declined in writing to the applicant" and limiting the period to 60 days.

The claim in NRAB award No. 39380 was also decided under different provision from Rule 19. The claim is "based on the erroneous premise that the Carrier failed to reject the Claimant's application ... within 60 calendars...." (Opinion, p. 3). The Board concluded that action taken on the 60th day falls "within" the 60 day requirement but the parties miscalculated the days in this case; notice was actually given on the 59th day after that claimant's seniority date was established.

PLB No. 6394, Award No. 52 was decided under Article XI, Section 1 of the October 30, 1978 National Agreement and Rule 3. It deals with how the 60 day probationary period is calculated. The Board agreed with the Carrier's position, "the 60 day probationary period begins the day **after** first service is performed." It also held, "the language of Rule 3 does not require that the Carrier deliver written notice to reject an application for employment." Oral notice was sufficient. NRAB award number 23265

deals with the appropriate day of notice for assigning work to outside forces.

AWARD

The Claim is denied.

Barbara Zausner

Barbara Zausner, Neutral Board Member
August 2, 2013

For the Carrier
Mark Johnson,
Director – Labor Relations

Jed Dodd

For the Organization
Jed Dodd,
General Chairman

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