NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21873

THIRD DIVISION

Docket Number CL-21291

Nicholas H. Zumas, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, GL-7929, that:

1. Carrier violated the Agreement between the parties when on April 16, 1974, it disqualified and removed Mr. Wesley M. Nelson, Jr., Clerk, Minneapolis, Minnesota, from Car Distributor Position No. 1.

2. Carrier violated the Agreement between the parties when it failed to timely render a decision in connection with a hearing that was held on May 28, 1974; also the belated decision was rendered by a Carrier witness.

3. The Carrier shall be required to place Mr. Wesley M. Nelson, Jr. on the Car Distributor position at Minneapolis, Minnesota, and reimburse him for any loss in compensation as a result of being disqualified effective April 16, 1974; also $3.00 per day for being held off the Car Distributor position.

OPINION OF BOARD: Claimant's position as Chief Clerk at 43rd Avenue was abolished and he exercised his seniority to the position of Car Distributor Assignment No. 1 effective April 8, 1974. He spent four days of his vacation during the week of April 1, breaking in on the assignwent, and began work on the assignment on April 8 and worked through April 16. On April 15, Claimant was informed by his supervisor that he was being disqualified because of unsatisfactory performance. Carrier asserts that such action may be taken under the provisions of Rule 12 "FAILURE TO QUALIFY" that states:

> "A. Employes awarded bulletined positions, or employes securing positions through exercise of seniority, will not be disqualified for lack of fitness and ability to do such work after a period of thirty (30) working days thereon. Such employes will be given reasonable opportunity to qualify during such period.

"B. An employe failing to qualify for a position secured by bulletin or in exercise of seniority, will thereupon revert to the extra list in the seniority district without loss of seniority rights, but may not displace any regularly assigned employe.

"C. An employe disqualified for a position to which his seniority entitles him will be notified in writing as to cause for such disqualification, and if he considers himself unfairly disqualified, he may request and shall thereupon be given an investigation as to such disqualification under the provisions of Rule 58.

* * * "

Claimant considered himself unfairly disqualified and asked for a hearing under Rule 58 that provides:

"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."

Hearing was held on May 2, 1974 and, as a result, Carrier officials affirmed the earlier determination that Claimant lacked the qualifications necessary for the Car Distributor's position. Carrier did not, however, notify the Organization or Claimant of its decision until May 30, 1974. The Organization contends that Carrier violated Rule 56 and that Claimant is entitled to be restored to the position for that reason. The pertinent portion of Rule 56 provides:

"/T/he 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." (Underscoring added).

The identical issue between the same parties Was recently decided in favor of the Organization by Third Division Award Ne. 21675. There the Board held:

"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's 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 be no question that, in view of the Carrier's failure to comply with the time limit provisions of Rule 56 A, 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 employe'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."

No authority need be cited for the time-honored rulings of this and other Divisions that we will not disturb an award involving the identical issue between the same parties unless it is palpably erroneous. The Board finds that Award No. 21675 is not palpably erroneous and we are bound by the result. It is unnecessary, therefore, to consider the merits of the dispute at this time.

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1978.