

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Frank M. Swacker, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP
CLERKS, FREIGHT HANDLERS, EXPRESS
AND STATION EMPLOYES**

**FORT WORTH AND DENVER CITY RAILWAY
COMPANY**

STATEMENT OF CLAIM: "Claim of E. J. Fifer, et al, that his displacement from position of Invoice Clerk by W. B. Kellett, Freight Claim Agent, in Accounting Department at Fort Worth, Texas, with consequent displacement of other employes in turn, effective February 1, 1936, was violative of Rules 4, 5, 16 and 22 of current wage schedule agreement; claim of such employes for restoration and adjustment in compensation retroactive to that date."

STATEMENT OF FACTS: The following statement of facts was jointly certified by the parties:

"Effective February 1, 1936 Carrier permitted W. B. Kellett, who previous thereto occupied the official position of Freight Claim Agent, to displace E. J. Fifer from position of Invoice Clerk in Accounting Department at Fort Worth, Texas. E. J. Fifer has been in the employ of this Carrier in various clerk positions since October 11, 1920 and his name appears on the seniority roster with that date. His occupancy of the Invoice Clerk position hereinabove referred to was by regular assignment. Record of employment of W. B. Kellett is: May 1909 to September 1913 as Chief Claim Clerk; September 1913 to November 1913 as Freight Claim Agent; November 1913 to March 1919 as Chief Claim Clerk; and March 1919 to February 1936 as Freight Claim Agent. Effective February 1st, 1936 he was transferred to position of Invoice Clerk as hereinabove stated. His name was not carried on seniority roster. This change necessitated a total of twelve shifts or changes in employes and their positions. Accounting Department seniority district is composed of offices of Treasurer, General Auditor, Auditor of Expenditures, Auditor of Revenues, Car Accountant and Freight Claim Agent. Of the twelve employes affected, one (Fifer) was transferred to another position carrying the same rate; another employe was transferred to another position carrying a higher rate; nine were changed to positions, paying lower rates than the ones from which displaced; and the twelfth claimant, who was at the foot of the working list, was relieved in reduction of force.

"Following quotes certain rules of current wage schedule agreement:

'Rule 4.—Promotion Basis. Employes covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail, the Management to be the judge, subject to appeal by employe; except, however, that this provision shall not apply to excepted positions.

have their names published on seniority rosters. That is not to say that they are thereby barred from grading back into the ranks of clerks, if, as and when, occasion requires. In Decision No. 3797 of United States Railroad Labor Board, dated July 1, 1925, in dispute of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees versus Fort Worth and Denver City Railway Company and involving this very rule, now No. 22, the Employees sought to discredit the position of the Carrier by pointing to the fact that the name of a promoted clerk did not appear on the clerks' seniority roster during the period of several years that he served as Assistant Yardmaster, but by the decision of the Board the employee's seniority date was preserved for him, position of the Carrier was sustained and by that decision it was proven that the presence of an official's name on seniority roster is not vital to preservation of the valuable right of seniority.

"Award No. 250, hereinabove referred to, does not, in the opinion of the Carrier, support the contentions of the Employees. It covers a situation wherein the creation of an excepted position rule and the exception of a certain position occurred simultaneously. In any event, the Award does not permit such rule to deprive the employee of his seniority and therefore it does not discredit the arguments of the FW&DC in the instant case. Our understanding of the situation on the railway involved in Award No. 250 is that there was a recorded understanding that the rosters would be considered as correct as of a certain date and negotiated thereafter as to additions or holdouts. This was a special situation wherein the names of employees long in the service were added as fresh items on seniority roster and this was done by correspondence and negotiation. But in the case that created the dispute there was a departure from or disregard of the usual course; the name of the employee was added to the roster by the Carrier without agreement and understanding and not in conformity with the plan theretofore followed. Summarized, we understand Award No. 250, which, of course, is peculiar to and applicable only to the Carrier which it concerns, concluded that there was no question about the right of the employee to displace, but the question was as to when he had that right. Carrier holds that the dispute in Award No. 250 (Docket CL-222) is not comparable and that the contentions therein with respect to posting names on seniority rosters are not controlling in the instant case.

"In conclusion Carrier makes the statement that to allow this claim and to remove Mr. Kellett from the position of Invoice Clerk is to do an injustice to an aging employee who has been in the service of this Carrier in the aggregate thirty-three years and for a continuous period of twenty-eight years,—and this at a time in his life when he, unprepared and without other qualifications, will be unable to obtain remunerative employment in another line of endeavor. Carrier requests that the claim be denied."

OPINION OF BOARD: It is shown in the Joint Statement of Facts that W. B. Kellett, who displaced E. J. Fifer, effective February 1, 1936, entered the service of the carrier in May, 1909, as Chief Claim Clerk; that he occupied position of Freight Claim Agent from September 1913 to November 1913; position of Chief Claim Clerk, November 1913 to March 1919; and from March 1919 to February 1936, position of Freight Claim Agent. His name was not carried on the seniority roster, and effective February 1, 1936, he was transferred to position of Invoice Clerk, displacing E. J. Fifer, whose name appears on the seniority roster as of October 11th, 1920. This caused changes in assignments of other employees covered by the agreement, and whose names appeared on the seniority rosters, resulting in one being relieved of employment entirely in the reduction of force.

It is agreed by both parties to this dispute that Mr. Kellett, at no time prior to February 1, 1936, occupied a position covered by the National Agreement or succeeding agreements between them. Between May 1909 and February 1, 1936, Mr. Kellett occupied a position classified as excepted from the current agreement and those preceding it. He therefore acquired no seniority rights under the agreement.

It should be remembered that this is a controversy between the Carrier on the one hand and the Organization on the other, growing out of an agreement between the former and that class of employees represented by the latter, which class is quite definitely enumerated, both by inclusion and exclusion; that Mr. Kellett never at any time occupied a position falling within the included class, but at all times, until the occasion of the complaint, occupied positions in the excluded class. He therefore got nothing from the agreement or under it, has no claim under it and could not ever legitimately assert a right to be placed on the roster contemplated by the agreement. To repeat—he has no rights whatever under the agreement and upon the agreed stated facts none could be asserted for him. It is suggested by the Carrier that there is a sort of moral obligation on its part to permit him to grade back into the classified ranks; but this is in no sense a right, merely an indulgence on the part of the Carrier, suggested to be a prerogative of it with respect to any and all officers, although clearly excluded from the agreement. The difficulty with this attempt at largess is that it is sought to be indulged at the expense of other parties to an express contract. The carrier is, of course, free to perform its moral obligation by retaining Mr. Kellett upon some excepted position, but it has no prerogative to trench on the agreed upon work covered by the contract.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employees involved in this dispute are respectively carrier and employees 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 Mr. W. B. Kellett did not hold seniority rights under the agreement on February 1, 1936, and the agreement was violated when the carrier permitted him to displace an employee covered thereby; that Mr. Fifer was displaced contrary to the provisions of the agreement as were the other employees involved, and each is entitled to be restored to his previous position and accorded reparation for wage loss sustained; and further, Mr. Kellett acquired no seniority rights under the agreement subsequent to February 1, 1936, as a result of this violation.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Ill., this 24th day of March, 1938.