

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Dozier A. DeVane, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees on The Western Pacific Railroad, that Carrier violated the Clerks' Agreement by not assigning A. J. Bertero to position of Train Desk Clerk at Sacramento on March 7, 1938 and subsequent dates, that A. J. Bertero be assigned to position of Train Desk Clerk at Sacramento and that he be paid the difference between what he earns as Warehouseman's Clerk, rate \$5.40 per day, and what he would have earned had he been used as Train Desk Clerk, rate \$5.90 per day, on March 7, 1938 and on subsequent dates on which the regularly assigned employee was absent."

EMPLOYEES' STATEMENT OF FACTS: "Due to illness, H. G. Bone, regularly assigned to position of Train Desk Clerk at Sacramento Freight Station, was unable to report for duty on March 7, 1938. No qualified extra man being available, it became necessary to assign a regularly assigned man to the work. Fred Peters, whose seniority date is September 11, 1925, was assigned to this position instead of A. J. Bertero, whose seniority date is March 12, 1920."

CARRIER'S STATEMENT OF FACTS: "Commencing March 7, 1938 regularly assigned employee to position of Train Desk Clerk, Sacramento, California, was temporarily absent from duty because of illness. Because no extra employee possessing necessary fitness and ability was available, Carrier used an employee regularly assigned to a lower rated position to perform the duties of Train Desk Clerk during the absence of assigned employee. An employee junior to Warehouse-Clerk A. J. Bertero was used for this relief work and request of Bertero was declined by Carrier on grounds that he did not possess necessary fitness and ability due to total absence of vision in one eye. Regularly assigned employee was absent from duty from March 7 to April 11, 1938."

POSITION OF EMPLOYEES: "The Agreement between the employees and the Carrier, effective October 1, 1930 contains the following:

Rule 29. Employees 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, except however, that this provision shall not apply to Rule 2 positions.

NOTE: The word 'sufficient' is intended to establish more clearly the right of the senior clerk or employees to bid in a new position or vacancy where two or more employees have adequate fitness and ability.

"Numerous awards of your honorable Board have conceded to Carriers the right to require fitness and ability for a position. Carrier does not dispute that Bertero possesses the ability to perform the duties of the position, but, because of the permanent loss of total vision in one eye, Carrier emphatically claims that he does not possess sufficient fitness to occupy a position whose duties require him to be around live tracks, moving trains or engines.

"Your attention is respectfully directed to Award No. 235 of your honorable Division, and, as in Docket TE-242, the question of personal safety is involved in this case and Carrier is entitled to be precautionous. Opinion of Carrier's Chief Surgeon is expressed in the following:

'Men who have vision in only one eye are necessarily subject to two defects which in my opinion must increase the hazard of their work in such places as railroad yards where trains and cars are being moved, and where they are required to cross tracks upon which such movements are conducted:

'(1) Their field of vision is restricted so that they do not see objects on the side of the bad eye at an angle of, roughly, more than 45° from line of vision. Therefore, unless looking more or less directly in the direction of approaching body, they are unaware of its approach except through hearing.

'(2) Their ability to judge distances, both absolute and relative, and so to judge speed of approaching body, is reduced. It is easy to understand this if one realizes that judgment of distance is largely dependent upon viewing the object from two points (two eyes) instead of one. This is what is known as stereoscopic vision. Anyone can demonstrate for himself the kind of deficiency involved by looking through an old fashioned stereoscope with one eye instead of two, in which case the picture viewed appears flat (2 dimensions) instead of with depth (3 dimensions).'

"Carrier asserts that it would be unfair not only to the Railroad, but to Bertero himself, for your honorable Board to authorize his use in any except an inside job. In addition, the granting of employes' request would be inconsistent with your Award No. 235."

OPINION OF BOARD: The employe regularly assigned to position of Train Desk Clerk, Sacramento, California, was absent from duty because of illness. Carrier used an employe junior to claimant to perform the duties during the absence of the regularly assigned employe. Claimant was denied his right to the position under the seniority rule on the ground of physical disability. The employe in question had suffered the loss of an eye and the work in question required employe to spend part of his time in the freight yard around moving trains and engines.

Petitioner contends that since the employe suffered the physical disability long before he entered carrier's employ and had theretofore been permitted to perform the duties of the position in question, carrier is now estopped to deny his right to the position on the ground of said physical disability.

The record shows that employe suffered the loss of an eye when a child and that for a number of years after he entered the service of carrier this physical disability had not prevented him from filling any position which his seniority entitled him to fill. About 1932 however his superintendent gave instructions that he should not thereafter be permitted to hold any position that required his presence in the freight yard around moving trains and he has not since said date held any such position.

The Board is of the opinion that where the question of personal safety is involved carrier is entitled to be abundantly precautionous and even though it may have acquiesced in the employe filling the position in the past, it

has the right, no discrimination being shown, to thereafter refuse to again assign the employe to a position that will require his presence around live tracks. See Awards 235, 489, 592 and 772.

Carrier contends that the employe was not entitled to the position in question upon other grounds but in view of what is said above it is unnecessary to consider the other reasons assigned.

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 employe involved in this dispute are respectively carrier and employe 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 evidence fails to sustain the claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of June, 1939.