

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

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

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 Employes on the Western Pacific Railroad Company that T. E. Driscoll be paid for time lost at rate of \$5.90 per day, while held off position of Train Desk Clerk, Stockton, California, from November 11 to November 23, 1937, inclusive."

EMPLOYES' STATEMENT OF FACTS: "Position of Train Desk Clerk, Stockton, rate \$5.90 per day was advertised for bids through Clerks' Circular No. 100-37 of October 27, 1937. Through Clerks' Circular No. 102-37 of November 3, 1937, T. E. Driscoll was assigned to this position. Driscoll reported for work on November 5th, advising he would spend two or three shifts breaking in on his own time in order to get fully acquainted with the local conditions, terminal facilities, etc. On November 11th, Driscoll advised the local officials that he was ready to take the job over, but was not permitted to go to work until November 24th."

CARRIER'S STATEMENT OF FACTS: "November 3, 1937, in accordance with the provisions of Rule 31 of current agreement with clerks' organization, notice was posted that T. E. Driscoll was assigned to position of Train Desk Clerk, Stockton, California.

"November 5, 1937 Driscoll reported to Yardmaster, Stockton, and requested permission to break in on position, subsequently requesting that he be permitted to take over position under pay, effective November 11, and 13, and finally serving demand to be permitted to take over position effective November 16.

"Driscoll's requests to be permitted to take over position effective November 11 and again November 13 were declined, because, in opinion of Yardmaster, he had not demonstrated sufficient fitness and ability for position.

"November 16, 1937 Driscoll reported, in accordance with his demand to be permitted to take over the job effective that date, and was informed by Yardmaster that, in opinion of Management, he required more breaking in on the job, whereupon Driscoll authorized Yardmaster to call someone else, and disappeared.

"November 20, 1937 Driscoll presented claim for a day's pay for each day he was not permitted to work on Train Desk Clerk position, Stockton, California, commencing November 11, 1937. Claim was declined by Carrier.

' * * * * The position requires training, experience and judgment. The ordinary Yard Clerk could not under ordinary circumstances take up the work and carry on its multiplied responsible duties. The petitioner is without substantial experience in handling this particular line of work * * * * .'

"While the dispute in Docket CL-124, Award No. 96 involves the demand of a Yard Clerk for the position of Car Distributor, the principle in Award No. 96 is identical with that in the case herein before you.

"Award No. 98, Docket CL-125 reaffirms principles set forth in Award No. 96.

"The findings in your Award No. 324 contain the following:

'Manifestly it is within the province of the carrier in the first instance to determine whether the applicant possesses sufficient fitness to exercise the displacement. Awards of this and other divisions have held that its judgment must be free from arbitrary and partial motives. If its action is dictated by proper considerations, the individual ideas of the members of the Division cannot be substituted for the conclusions it has reached.

'Assuming as we must, that both the management and Mrs. Smith's representatives acted altogether in good faith, we can only reach the conclusion that the question of her fitness was one upon which reasonable minds might differ. And such being so, it must follow that the prerogative which the carrier has reserved has not been abused.'

"In Award No. 592 the Board stated:

'The junior man awarded the position of crane operator had some experience on the position while the petitioner, who is senior, merely thinks he could operate it if accorded some instructions and practice; quite possibly he could but the carrier is under no obligation to assume this hazard when it has available a known qualified man. It is not a question of relative qualifications; the man awarded shows actual qualifications; the petitioner mere potentiality.'

"Driscoll had never demonstrated fitness and ability for position of Train Desk Clerk, Stockton Yard. He was merely a potentiality.

"Stockton is Carrier's principal point of interchange and is an important industrial center. Position of Train Desk Clerk, Stockton Yard, is the heaviest of its kind on lines of this Carrier, and the errors in diversions and routing can be extremely costly not to mention the loss of business due to dissatisfied patrons. Driscoll was not qualified by previous experience for this heavy job, having worked only 88 days on lesser important yard clerical jobs, and although he was accorded more than reasonable opportunity to demonstrate fitness and ability he did not do so and there is no just foundation for the claim for pay November 11 to 23, 1937, inclusive. In fact, the granting of the employees' claim would be inconsistent with the Board's position in numerous awards conceding to the Carriers the right to demand fitness and ability for a position.

"Carrier respectfully requests that claim of employees be declined."

There is in evidence an agreement between the parties bearing effective date of October 1, 1930.

OPINION OF BOARD: Claimant Driscoll was assigned to the position of Train Desk Clerk at Stockton by bulletin dated November 3, 1937. He reported and requested permission to break in on his own time. This permission was granted. The rules contemplate that an employee should possess the necessary qualifications at the time he bids for a position and that he should take up the position upon his assignment thereto and have a reasonable time in which to qualify on the job. Sometimes, however, an employee

in order to minimize the risk of not being able to qualify after a position had been assigned to him would request the carrier for an opportunity to break in on the job at his own expense for a limited period. The practice of permitting this came to be recognized but it was also recognized that the breaking in period should not be protracted, and in August, 1931 the parties agreed that two days should be sufficient.

Driscoll obtained permission to break in on the new position at his own expense. After the expiration of two days he felt that he needed more time. Instead of directing him to assume the position and to take his chances on qualifying, the Carrier, desirous of assisting him and also believing that he was not yet sufficiently experienced, permitted him to continue breaking in at his own expense. On November 11, 1937 he asked to be put to work but the Carrier still felt that he was not ready; he demurred but continued to break in, serving notice that on November 16th he would definitely insist on taking up the position.

On November 16th, 1937 Driscoll reported for work. According to the Carrier's evidence the Yardmaster showed him a note from the Night Yard Master saying that he thought Driscoll should break in for a few more days, whereupon, although the Yardmaster told Driscoll that he would put him on the job if he wished, Driscoll said: "Call someone else," and thereupon departed. This evidence is contained in an affidavit by the Yardmaster executed more than a year after the event, and since only four days after the event Driscoll filed a claim with the Carrier based on the Carrier's refusal to put him to work, and since the Carrier took no steps to bulletin the position which Driscoll allegedly had abandoned we think the weight of the evidence negatives the assumption that Driscoll was invited to take up his duties on November 16th and deliberately turned down the very opportunity he had been seeking.

The Carrier finally started him in the new position on November 24, 1937.

What transpired subsequently is irrelevant. For, in the view we take of the rules and the understanding of August, 1931, the Carrier was obligated, once it had assigned Driscoll to the position, to put him on the payroll at his request, subject, of course, to Driscoll's qualifying within a reasonable time thereafter. The intent of the understanding of August, 1931 appears to have been, not that the Carrier should have the right to require an employee to break in on an assigned position at his own expense until the Carrier adjudged him ready to go on the payroll, but rather that the employee should have an opportunity to break in for limited period if he so desired. If he preferred to start at once and to take his chances on qualifying, the rules permitted him to do so.

Since, therefore, Driscoll had the right, if he had wished to exercise it, to take up his new position as soon as it was assigned to him, we think he did not lose his right to be put to work thereafter at his request.

Under all the circumstances the effective date of the claim should run from November 16th, 1937 rather than from November 11th. Driscoll at best seems not to have been sure of his own qualifications. At the time he asked to go on the payroll on November 11th, he appears to have acquiesced in the Carrier's view that he was not yet sufficiently experienced, and to have modified his request accordingly, stating that he would insist on being put to work on November 16th.

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 the provisions of Rules 30 and 31 were violated by the carrier.

AWARD

Claim sustained to the extent of payment for time lost from November 16 to November 23, 1937, inclusive.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 24th day of July, 1939.