

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

George E. Bushnell, Referee

PARTIES TO DISPUTE:

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

MIDLAND VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: "(1) Carrier violated and continues to violate Clerks' Agreement when on January 4, 1940 it assigned H. C. Douglass, a non-employee to vacancy covered by Position Bulletin No. 2 and declined and refuses to consider application made by Clerk C. A. Kennedy for said position, and,

(2) Clerk Kennedy shall now be assigned to the position covered by Bulletin No. 2, for which proper application was made and be compensated for wage loss suffered retroactive to January 4, 1940."

EMPLOYES' STATEMENT OF FACTS: "Mr. J. G. Hannah, Clerk, rate \$4.47 per day, employed at Local Freight Office, Muskogee, Okla., retired from service as of January 1, 1940, and the vacancy thus created was bulletin December 26, 1939 in accordance with the provisions of Clerks' Agreement and under date of January 4, 1940, the position was awarded by bulletin to Mr. H. C. Douglass, a non-employee.

"Mr. C. A. Kennedy, Clerk, employed in the Accounting Department at Muskogee, with seniority in that Department and seniority district as of June 20, 1938 made proper application for the vacancy covered by position bulletin No. 2, and his right to said position has been and is being denied by the Carrier.

"Mr. Douglass prior to his assignment January 4, 1940 had no seniority rights as clerk, had not been in the employ of the Carrier for many years and his last employment being terminated 10 or more years ago."

POSITION OF EMPLOYES: "Following rules of agreement bearing effective date of June 14, 1921 are quoted:

'ARTICLE—1—SCOPE

'RULE—1—Employees Affected.— These rules shall govern the hours of service and working conditions of the following employees, subject to the exceptions noted below:

'(1) Clerks, checkers, foremen, sub or assistant foremen, and ticket sellers.

'(2) Other office employees, such as office boys, messengers, depot masters, baggage room employees, train and engine crew callers, telephone switchboard operators, office, Station and warehouse watchmen.

'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.'

'In Award 592, Docket CL-592 of the Third Division of the National Railroad Adjustment Board, B. of Ry. & S. C. versus Northern Pacific Railway Company, the Board denied the claim of the employee for assignment to position as crane operator, and said in the 'Opinion of Board':

'This case involves wholly a question of fitness and ability. 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.'

'Award 1009, Docket CL-949 of the Third Division of the National Railroad Adjustment Board, B. of Ry. & S. C. versus Peoria and Pekin Union Railway Company, denied the claim that the carrier violated the agreement when it refused to assign senior employees to positions as ticket agents when they had had no experience in that work.

'Award 1147, Docket CL-1053 of the Third Division of the National Railroad Adjustment Board, B. of Ry. & S. C. versus Florida East Coast Railway, denied the claim that the carrier violated the provisions of the agreement when it refused to make certain assignments because of its conviction that the applicant lacked the necessary fitness and ability, and the 'Opinion of Board' contains the following statement by the Third Division:

'The applicable rules of the Agreement governing the exercise of seniority embrace fitness and ability, as well as seniority, as a relevant consideration. Only when there is sufficient fitness and ability is it provided that seniority shall prevail.'

'There is no merit in the claim and it should be denied.

'Since this is an ex parte case, this submission has been prepared without seeing the employees' statement of facts or their contention as filed with the Board, and the carrier reserves the right to make a further statement when it is informed of the contention of the petitioner, and requests an opportunity to answer in writing any allegation not answered by this submission.'

OPINION OF BOARD: Based upon all the facts and circumstances of this particular case, especially as was developed in the supplemental submissions of the parties, the action of the carrier will not be disturbed.

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 employee involved in this dispute are respectively carrier and employee 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 action of the carrier will not be disturbed.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of March, 1941.