

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

THE TEXAS AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of Dining Car Steward W. E. Parker for assignment in regular dining car service with pay for time lost by reason of not being assigned to a regular position in accordance with his seniority and/or rights to service as such.

JOINT STATEMENT OF FACTS: On January 1, 1945, the claimant, W. E. Parker, was employed as a dining car steward and has been an extra steward since that date performing service on troop train dining cars. On August 26, 1946, he requested permission to exercise his seniority on a regular main line passenger train diner. On August 31, 1946, the Superintendent of Dining Car Service instructed the claimant to make some trips with regular passenger train diner stewards to familiarize himself with the duties of a regular main line dining car steward.

After making several trips with regular passenger train diner stewards Welborne and Crow, he made a trip on Trains 11, 8, 7 and 2, Fort Worth to El Paso, El Paso to Big Spring, Big Spring to El Paso and El Paso to Fort Worth with regular steward Creel so that he, the claimant, might have an opportunity to perform the duties of steward under the observation of the Superintendent of Dining Car Service. The Superintendent of Dining Car Service accompanied claimant on this entire trip to observe claimant's work on the diner. After the completion of this trip, the Superintendent of Dining Car Service, on September 26, 1946, disqualified the claimant from regular passenger train diner service.

POSITION OF EMPLOYES: Paragraphs (a), (b), (c), (d) and (e), Rule 7 of the agreement governing dining car stewards read:

"(a) Rights to preferred runs shall be based on seniority, ability and merit; ability and merit being sufficient, seniority shall govern; the Superintendent of Dining Cars to be the judge as to ability and merit. Employees accepting a position in the exercise of their seniority right will do so without causing extra expense to the railway company.

(b) Employees accepting or now holding official or excepted positions with the carrier or organization shall retain and continue to accumulate seniority.

(c) All permanent vacancies, new positions or temporary vacancies known to be for more than thirty (30) days' duration will be promptly bulletined for a period of six (6) days (bulletin to expire at noon the sixth day) and the senior applicant making application will be assigned, subject to the provisions of paragraph (a) of this article.

plicant if his fitness and ability are sufficient and it may not properly insist upon the right to make the assignment to the applicant which it deems best qualified. Award 2534. After the Carrier has determined that a senior applicant lacks sufficient fitness and ability, the burden is upon such applicant to establish that he possessed reasonably sufficient fitness and ability to occupy the position. Award 1147. Where there is evidence, which if believed, is sufficient to sustain the Carrier's judgment that a senior employe lacks sufficient fitness and ability for the position sought, the judgment of the Carrier will not be disturbed. Award 3057. Otherwise stated, whether an employe possesses sufficient fitness and ability for a position within the meaning of the rule is a matter exclusively for the Carrier to determine and such a determination once made will be sustained unless it appears that the action of the Carrier was capricious or arbitrary. Award 2692."

It will be noted that the rule involved did not specifically provide that the carrier or its officer should be the sole judge as to fitness and ability. The claim was denied.

It is the carrier's sincere belief that the Claimant had been given every reasonable opportunity to qualify for the position of regular main line steward which he desired and that the disqualification of Claimant by the Superintendent of Dining Cars was fair and impartial and in accordance with the sound judgment of the Superintendent of Dining Cars. However, it must be pointed out that the claim herein is for pay for time lost, and shortly after claimant was disqualified for regular dining car service, he was furloughed in a reduction of forces. During his furlough he has been working elsewhere—at least a part of the time as a policeman for the City of Fort Worth—and has received compensation in such outside service, although the carrier is not informed as to the amount of such compensation. The compensation he has received in outside employment would off-set entirely or at least to a large extent, the claim for pay for time lost. See Third Division Awards 326, 624, 693, 1499 and others. This matter is not mentioned here with any thought that the claim will be sustained; on the contrary, we feel confident that it will be denied. It is mentioned merely because the Board has ruled in several cases that unless the issue of off-setting the compensation received in outside service from the pay for time lost is raised by the carrier in its submission, same will not be considered by the Board.

OPINION OF BOARD: The statements of the parties are so conflicting that the Board finds it impossible to render a decision. Therefore, the case should be remanded for further handling on the property.

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 parties waived oral hearing thereon;

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 case will be remanded in accordance with the Opinion.

AWARD

Case remanded in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 18th day of September, 1947.