Award No. 5147
Docket No. DC-5053

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employes, Locals 41, 456 and 582, on the property of the Southern Pacific Railroad Company (Pacific System) that:

(1) The carrier has violated the provisions of the existing agreement, particularly Rules 14 and 15 thereof and continues to violate said rules by refusing to assign Jack Hernandez to position of Bartender on the "Starlight" (trains 94 and 95) operating between Los Angeles and San Francisco, and

(2) that Jack Hernandez be assigned to the disputed position and be allowed all seniority he would have accrued under Rule 15 (d) retroactive to the date wrongful assignment was made to Junior employe, and such junior employes name be stricken from the Bartenders' Seniority Roster; and

(3) that Jack Hernandez be compensated to the full extent—that is the difference between what he has been paid and the amounts he would have earned in the Bartender's position on the Starlight (trains 94 and 95) retroactive to the date junior employe was assigned.

EMPLOYES' STATEMENT OF FACTS: Jack Hernandez entered the service of the Carrier as a dining car waiter February 18, 1918 and was promoted to the position of Lounge Car Attendant June 18, 1940. During this period of 32 years of unbroken service he has maintained an excellent record.

On June 18, 1942, Mr. Hernandez was, as a result of a bid according to the then existing practices, given a position as "Bar Car Waiter." He held this position (on different trains) for a period of six (6) years, 1948 when he was awarded a bid to the position of Bartender on the San Joaquin Daylight (trains 51 and 52). He held this position for a period of approximately 2 months when the train was discontinued and therefore his position abolished.

Mr. Hernandez immediately filed bid, under Rule 14 of the existing agreement for position of Bartender on the Starlight, (trains 94 and 95) a new train with home terminal at Los Angles. The carrier awarded the positions to 3 junior employes—none of whom had prior seniority as Bartenders. Mr. Hernandez' bid was rejected.

There is in existence an agreement between the Carrier and this organization, governing Bartenders which became effective, and amended by Media-

(Rule 11 (a)). He did not have seniority as Train Bartender, which is a separate seniority class, in a separate seniority district (Rules 11 & 12), and has no basis, under the agreement, to assert a claim to the bartender position, predicated on his seniority in other classes and districts. There are ten separate and distinct seniority classes of employes covered by the agreement. If it had been the intent of the parties to permit seniority as dining car waiter to be exercised in the filling of positions of train bartender, or seniority as lounge car attendant or all-day-lunch car attendant, or any of the other classes to be exercised in filling positions of train bartender, such an important feature would obviously have been provided for in the agreement.

The Board's attention is respectfully directed to Award No. 4357 of this Board, Joint Council Dining Car Employes vs. Southern Pacific Company (Pacific Lines). This case involved claim that the senior available lounge car attendant, in the event no bartender was available, should have been assigned to perform duties of Train Bartender instead of the individual who was assigned. The individual who was assigned did not initially have seniority as a Train Bartender, nor did he have seniority in any of the other classes covered by the agreement. The Board, in its award, said in part:

> "While we feel that employes who have rendered service in a lower classification covered by an Agreement should have preference over new people or employes not covered by the same Agreement in filling vacancies in higher rated position, to sustain the claim herein would require us to write a new Rule into the Agreement by interpretation, something which this Board has no power to do. Accordingly, the claim must be denied."

Subsequent to that award, the parties entered into an agreement, effective July 25, 1949, copy of which is submitted as Carrier's Exhibit C. This agreement modified the current agreement in one respect only, namely: it provided that consideration would be given to application of an employe covered by the agreement, who desired to perform service in a position in a seniority class in which he had not acquired seniority, but that if, in the judgment of the Company no such qualified employe is available, the position could be filled by an employe not covered by the agreement. In other words, the effect of that agreement was merely to give preference to qualified employes under the agreement over employes not covered by the agreement. It did not in any way change the carrier's practice and right under the agreement to fill positions by the appointment of the best qualified individual, nor did it in any way modify Rule 10 (d) of the agreement, which restricts the seniority of an employe to the classes and districts in which he has acquired seniority and which thus prevents him from exercising such seniority in a class in which he has not acquired same.

Obviously an award by this Board, sustaining the claim, would be equivalent to a complete nullification of Rule 10 (d) and to the establishment of a system of promotion which is not provided for nor contemplated by the agreement.

CONCLUSION

The carrier has demonstrated that no proper claim is before this Board; that the assignment of an employe, other than claimant, to fill the position in question was proper and not in violation of the agreement, and that an award by this Board sustaining the alleged claim would, by interpretation, be equivalent to writing new rules into the agreement and to nullifying certain sections of existing rules thereof, and therefore the claim should be dismissed.

(Exhibits not reproduced.)

OPINION OF BOARD: At the outset the Carrier raises the objection that the Board does not have jurisdiction to consider this matter because it was not processed on the property in the manner provided in the Agreement.

Rule 14 (b) of the current Agreement provides, in part: "The Superintendent of Commissary * * * shall be the judge of an employe's qualifications to fill a position or vacancy, subject to appeal to Manager * * * and final decision shall rest with the Manager." The Carrier's position is that the matter was not handled by the Superintendent and an appeal taken to the Manager of the Department. The Superintendent declined to confer with Petitioner because of claimant's representation by a national officer of the Organization. After some discussion the Assistant Manager of Personnel handled the matter. In the Carrier's Answer to Petitioner's Ex Parte Submission, there appears the following: "* * * in view of the unusual circumstances he (Assistant Manager of Personnel) was willing to, and did, handle the matter to conclusion with the General Chairman." Thus it appears that the Carrier waived a procedural requirement of the Agreement, and the matter is now properly before the Board.

The essential facts upon which the claim is premised are not in dispute. Claimant entered the service of the Carrier on February 18, 1918, as a dining car waiter. He was promoted to lounge car attendant on June 18, 1940. On June 18, 1942, he was given a position as bar car waiter. In 1948, during a period of two months, he worked a position as bartender on trains 51 and 52. These trains were then discontinued. He applied for a position as bartender on trains 94 and 95 but the position was assigned to another employe.

The Agreement between the parties of December 1, 1947, amended July 25, 1949, established separate seniority classes for dining car waiters, lounge car attendants and train bartenders. The claimant had seniority on the dining car waiter roster and on the lounge car attendant roster. He had not worked the prescribed minimum time to acquire seniority on the bartender roster.

When the positions of bartender were established on trains 94 and 95 (Starlight) there was no available employe with seniority as train bartender. The Carrier considered applications from employes covered under the current Agreement, and assigned the positions to three employes whose seniority was junior to that of claimant.

The contention of the claimant is that under the terms of the Agreement, as amended July 25, 1949, the Carrier was obligated to assign the positions of bartender on the basis of seniority of the applicants on other rosters, qualifications and fitness being equal. The Carrier takes the position that as all applicants were without seniority on the bartenders' roster, that it was not required to consider the seniority standing of the applicants on other rosters.

The applicable provisions of the current Agreement, as amended, are set forth in the submission.

As he did not have seniority as a bartender, under Rule 15 (d) the claimant had a right to apply for a vacancy or new position in the train bartender class which had not been filled by an employe holding seniority in such class. His assignment to the position was subject to the provisions of Rule 14.

Rule 14 deals with qualifications for filling positions or vacancies. Paragraph (a) states that the principle of seniority shall be adhered to; but this principle is modified by the provision that seniority shall not be applied in a manner to impair efficiency of the service. Paragraph (b) provides that appointment shall be based on "ability, fitness and seniority." And it must be noted that in the selection of train bartenders the Carrier reserved the right to require employes to establish "to the satisfaction of the Management" possession of proper qualifications for the position. This rule differs materially from the rule which often appears, that "fitness and ability being sufficient, seniority shall prevail."

The very language of the rule places the responsibility upon the Carrier to determine fitness and ability; and when the Carrier has by its selection of an employe for appointment made its determination of fitness and ability, the burden is then on an unsuccessful applicant to establish that the action

of the Carrier was unreasonable or made with improper motives or in some manner unfair to such applicant. There is no showing of such deviation from the responsibility imposed on the Carrier by the rule. The Petitioner asserts, and we assume it to be true, that the claimant is an able and competent employe. The burden, however, imposed by the rule was to establish to the satisfaction of Management that he possessed the proper qualifications for position of train bartender. For a sound statement of circumstances under which this Board might substitute its judgment for that of Management on the question of ability and fitness, see Award 4040 where the Board had under consideration a rule more favorable to the employe than is here involved.

Even if we assume that the seniority the claimant had established as a waiter is available to him in connection with his application for a position under the terms of Rule 15 (d), nevertheless, such advantage is subordinate to the reserved right in Management to determine that an applicant has the proper qualifications for a position as a train bartender.

For these reasons we have concluded that the Carrier did not violate the current Agreement, as amended, when it failed to assign claimant to position of bartender on trains 94 and 95.

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 Employes involved in this dispute are respectively Carrier and Employes 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 Agreement was not violated.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 15th day of December, 1950.