

Award Number 5550

Docket Number DC-5389

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employees, Local 582, on the property of the Southern Pacific Railroad Company, for and in behalf of Mr. Theopolis Toler, waiter, that he be paid the difference between the amount he received from unemployment insurance benefits and extra work as a waiter, and the amount he should have received as a regular assigned employee, beginning October 2, 1949, and continuous thereafter until the claim is adjusted.

EMPLOYEES' STATEMENT OF FACTS: Mr. Theopolis Toler entered service of the Dining Car Department, Los Angeles District, Southern Pacific Railroad Company on July 18, 1944. He was in continuous employment until about May or June 1949. Between June 1949 and October 1, 1949 Mr. Toler worked on extra trips at the call of the Carrier.

During September 1949 the Carrier advertised certain new positions on the "Starlight" and Mr. Toler placed his bid with proper officers of the Carrier in accordance with the existing rules of the Agreement. Mr. Toler was not awarded a position but Mr. Horace Combs, a junior waiter who entered service of the Carrier on June 10, 1945 was awarded a position. The position involved was advertised as "Waiter-In-Charge". Neither Mr. Toler or Mr. Combs, at the time of the bidding had established seniority as Waiter-in-Charge.

POSITION OF EMPLOYEES: There is in evidence an agreement between this organization and the Carrier governing the Craft or Class of employees of which Mr. Toler and Mr. Combs are members. Said Agreement was amended by Mediation Agreement dated July 25, 1949. Copies of the Agreement and the Amendments thereto are on file with your Board.

Rule 14(b) of the Agreement provides in part:

"(b) All positions and vacancies, covered by this agreement shall be filled by the appointment of the best qualified individual based on ability, fitness and seniority - - -."

Rule 15(a) and (b) provides in part:

"(a) A new position or vacancy, known to be of a duration of more than thirty (30) days, shall be advertised, in the seniority district where such position or vacancy occurs, for a period of fifteen (15) consecutive days - - -."

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 employees who have rendered service in a lower classification covered by an Agreement should have preference over new people or employees 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 A. This agreement modified the current agreement in one respect only, namely: it provided that consideration would be given to application of an employee 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 employee is available, the position could be filled by an employee not covered by the agreement. In other words, that agreement contemplates that preference will be given to qualified employees under the agreement over employees not covered by the agreement, but the agreement 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 employee 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.

CONCLUSION

The carrier has demonstrated that the instant claim is not properly before this Board and should be dismissed because the procedure covering appeals as set forth in the agreement has not been followed; that no proper claim exists in favor of the claimant because the positions involved were properly assigned to employees other than the claimant; and that an award sustaining the claim would be equivalent to writing new rules, and nullifying certain sections of existing rules, which have been specifically agreed to by the parties to the agreement.

(Exhibits not reproduced.)

OPINION OF BOARD: Under date of September 30, 1949, the Carrier posted a bulletin to employees, Southern District, advertising for bids three new positions of waiter-in-charge. No applications for these three positions were received from employees holding seniority as waiter-in-charge. Applications were received from a number of waiters, among which was one from Waiter Toler (claimant), but none of the applicants had any experience as waiter-in-charge or had acquired any seniority as such. Waiters-in-charge are in a separate seniority class.

The Superintendent of Commissary, after giving consideration to the applications received, filled the three positions by the appointment of the best qualified individuals, based on ability, fitness, and seniority, in accordance with Rule 14 of the Agreement.

There was no violation of the Agreement, and claim should be denied.

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 claim will be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois this 8th day of November, 1951.