

Award No. 6712
Docket No. CL-6826

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Glenn Donaldson, Referee

PARTIES TO DISPUTE:

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

HOUSTON BELT & TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that—

(a) The Carrier violated the Clerks' Agreement when it failed and refused to permit Mr. E. J. Cox to exercise his seniority and displace a junior employe on position of Delivery Clerk No. 229 at Commerce Street Warehouse. Also

(b) Claim that Mr. Cox be paid the difference between the amount he earned and the amount the occupant of Delivery Clerk position No. 229, earned each day he was available, retroactive to and including October 24, 1952. Also

(c) Claim that all other employes who were displaced and suffered loss as a result of the violation outlined in (a) above be compensated for such losses. Also

(d) Request that a joint check of payrolls and other records be made to accurately determine the employes involved and losses sustained.

EMPLOYEES' STATEMENT OF FACTS: Mr. E. J. Cox, with seniority date of September 5, 1940, advised of his desire to exercise displacement rights on Delivery Clerk position No. 229 at Commerce Street Warehouse effective October 24, 1952, displacing J. H. Riley who has seniority date of December 23, 1941.

The checking and handling of freight for the Commerce Transfer and Warehouse Company is performed by this Carrier under the provisions of tariffs approved by the Interstate Commerce Commission.

The wage sheets furnished us by the Carrier show the following Houston Belt & Terminal positions at the Commerce Street Warehouse on December 1, 1952—

Delivery Clerk	No. 229
"	No. 230
Stevedore	No. 315
"	No. 320
"	No. 321

In numerous Awards the Board has held that an applicant for a position must show fitness and ability. See Awards 4040, 4485, 5147 and 5148.

In Award 5417 the Board stated that:

"Repeated decisions of this division of the Board have established the rule that once fitness and ability of an employe have been found by the carrier to be lacking, the burden rests upon the claimant to overcome that decision by substantial and competent proof. See E G Awards 1147, 2031, 2491, 3273, 3469, 4040 and 5147."

With respect to paragraph (a) and (b) of employees claim—It is the carriers position that Mr. Cox was not fit for position No. 229 at Commerce Warehouse for the reason he was objectionable to carriers patron, and claim should be denied.

With respect to paragraph (c) and (d) of the claim—this part of the claim is hypothetical in that no claim is made for specific individuals and accordingly is not properly before and should receive no consideration by the Board. Your Board has previously on more than one occasions denied similar claims, viz:

In Third Division Award 4305 which included in the statement of claim a claim for "other similarly affected employes" your Board stated: "The claims for 'other similarly affected employes' must be denied. The only claims properly before the board for its consideration are those of named parties for specified dates and locations."

And in Award 5375 in which paragraph (d) of the Statement of Claim included: "All other employees who may have been adversely affected xxx", your Board stated: "Paragraph (d) of the claim is denied for reason of indefiniteness."

In Award 6101 which in addition to naming certain individuals the Statement of Claim included: "Any other Clerks who may have filled these positions since November 12, 1948." Your Board stated: "This claim is inordinate, and the claim will be allowed for only the named claimants."

The matters contained herein have been the subject of correspondence and/or conference between the parties.

(Exhibits not reproduced.)

OPINION OF BOARD: This controversy involves the failure of the Carrier to place Claimant upon a position to which he would have assumed except for a third party complaint. The Carrier defends upon the ground that a patron, its warehouse lessee for whom it performed services, objected to Claimant working upon their premises for personal reasons. Accordingly, it contends, Claimant is unfit under the promotion, assignment and displacement rule, Rule 7 (a) of the Agreement.

Carrier was advised of its patron's objections on October 22, 1952, two days before Claimant was to displace a junior employe. If Carrier in such a case had reviewed its employe's record in light of the objection registered, and upon exercising its independent judgment, found good cause to deny the displacement and based its refusal upon grounds of unfitness, there is little likelihood that such a claim would come before us. We say this because under Rule 7 (a), fitness is one of the conditions for exercising displacement, and ability to daily meet and courteously deal with the public is recognized as one of the important prerequisites of a contact position such as that with which we are here involved. Further, it can be assumed that Carrier's denial, in such case, would be based upon a course of bad conduct, and not upon the somewhat trivial, single reason assigned here.

We have twice refused to permit third party objections, standing alone, to defeat the orderly advancement of railroad employes to positions to which they aspire. Awards 1233 and 6373. We believe that this is a sound, fair and proper course to follow although in specific instances, momentary embarrassment and pecuniary loss may result to the Carrier. Once the third party right to dictate Carrier's personnel practices be conceded, opportunity exists for interference upon more serious grounds.

The Carrier, having failed to demonstrate Claimant's unfitness for the position in question and having conceded his ability and seniority, erred in holding him off the assignment. We sustain Claims (a) and (b) and find that Claimant is entitled to be made whole financially for any loss of earnings suffered between October 24, 1952, and January 23, 1953, when he entered upon his proper assignment. We find nothing in the record in proof of Carrier's assertion that Claimant was instructed earlier to report for the assignment.

During the course of processing this claim on the property, the General Chairman advised the General Manager that H. W. Russ, P. A. Talbert, M. J. Eddings, B. C. Erwin, M. Benavides and Johnnye Highfield was affected through the displacements made or refused and requested a joint payroll check, which request, it appears, was denied by Carrier. Under the circumstances, we find that the denial of said request was improper. We shall sustain parts (c) and (d) of the claims, but only as to the six individual employes named in said request.

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 violated.

AWARD

Sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 9th day of July, 1954.