

Award No. 6907

Docket No. CL-6994

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement:

1. When on September 24, 1953, per Superintendent's Station Bulletin No. 103, the Carrier assigned R. L. Dever, seniority date, Clerks' roster, Station and Yards, November 5, 1951, to position of Relief Clerk No. 5, Osawatomie, Kansas, and failed and refused and continued to refuse to assign the senior qualified applicant, Clerk E. E. Kellogg, seniority date September 10, 1951, to the position as advertised;

2. Clerk Kellogg shall be compensated for a pro rata day's pay at the rate of the position that Relief Clerk No. 5 was scheduled to relieve upon each day as claimed; beginning September 26, 1953 and ending October 26, 1953, when Claimant Clerk Kellogg entered military service, as shown in Claim Statement attached hereto and made a part hereof, account Carrier having denied the senior qualified Clerk assignment to Relief Clerk position No. 5, to which he was justly entitled on the basis of seniority, fitness and ability under Agreement provisions in violation of Rules 5, 6 (a), 8 (b) and related rules of the Clerks' Agreement.

CLAIM STATEMENT

Clerk E. E. Kellogg, Central Kansas—Colorado Division.

Claim dates as shown below, September 26, 1953 to and including October 26, 1953.

Date	Classification	Rate
September 26, 1953	Yard Clerk	\$ 13.52
September 27, 1953	Yard Clerk	13.52
September 28, 1953	Yard Clerk	13.52
September 29, 1953	Yard Clerk	13.52
September 30, 1953	Yard Clerk	13.52
October 3, 1953	Yard Clerk	13.52
October 4, 1953	Yard Clerk	13.52
October 5, 1953	Yard Clerk	13.52
October 6, 1953	Yard Clerk	13.52
October 7, 1953	Yard Clerk	13.52
October 10, 1953	Yard Clerk	13.52
October 11, 1953	Yard Clerk	13.52
October 12, 1953	Yard Clerk	13.52
October 13, 1953	Yard Clerk	13.52
October 14, 1953	Messenger-Porter	11.70
October 17, 1953	Messenger-Porter	11.70
October 18, 1953	Messenger-Porter	11.70
October 19, 1953	Messenger-Porter	11.70
October 20, 1953	Messenger-Porter	11.70
October 21, 1953	Messenger-Porter	11.70
October 24, 1953	Messenger-Porter	11.70
October 25, 1953	Messenger-Porter	11.70
October 26, 1953	Messenger-Porter	11.70
23 days	Total	\$294.58

EMPLOYEES' STATEMENT OF FACTS: On September 14, 1953, the Division Superintendent at Osawatomie, Kansas, advertised to clerical employees in Station and Yard service, per Bulletin No. 103, copy submitted for the record, designated as Employees' Exhibit "1," a relief position in Osawatomie Yard, Relief Clerk No. 5, assigned Saturday through Wednesday, with rest days Thursday and Friday to work relief assignments of

Saturday	8 A.M. to 4 P.M.	Yard Clerk	\$13.52 per day
Sunday	8 A.M. to 4 P.M.	Yard Clerk	13.52 per day
Monday	7 A.M. to 4 P.M.	Yard Clerk	13.52 per day
Tuesday	7 A.M. to 4 P.M.	Messenger-Porter	11.70 per day
Wednesday	4 P.M. to 12 P.M.	Messenger-Porter	11.70 per day
Thursday and Friday	—rest days.		

Clerk E. E. Kellogg was the regularly assigned occupant of Yard Clerk position, Osawatomie Yard, 12 Midnight to 8 A. M., Wednesday through Sunday, rest days Monday and Tuesday and his work days were changed to Friday through Tuesday, with changed rest days of Wednesday and Thursday (see Superintendent's letter addressed to Clerks, dated September 11, 1953, quoted in the record beginning page 4, Employees' Exhibit "2") and it will be noted that in the same letter the Superintendent addressed to clerical employees, namely, J. L. Jackson, G. E. Mueller, E. E. Kellogg, R. L. Dever, E. L. Obermeier, E. E. Todd and J. E. Doman, several other changes in work assignments and rest days were made on clerical positions in Osawatomie Yard simultaneously with the changes made in the assigned work days and rest days of the position held by Clerk Kellogg.

These changes in rest days under Agreement provisions—Rule 13 (e):

"Changing an assigned rest day of a position shall constitute abolishment of such position and the creation of a new one subject to bulletin in accordance with the provisions of Rule 8. Regular assigned rest days shall not be changed without at least 36 hours' advance notice to the employee affected."

had the effect of Job abolishment of such changed positions as to work assignments and had the effect of creating new positions which were required to be

(b) that even if there had been a violation no compensation would be due because the claimant failed to mitigate the alleged damage by taking other employment available to him in the exercise of his displacement rights.

(Exhibits not reproduced.)

OPINION OF BOARD: We are dealing here with rights of one who, after attaining employment status with the Carrier, was denied a position to which entitled by seniority, because certain military obligations as a Navy Reserve assumed before his date of hire, and kept over a period of about two years while working for Carrier, could not be met on all of the assigned rest days of the new position.

The Carrier acknowledges that Claimant's date of hire, and the prerequisite requirements of fitness and ability under the rule, entitled him to the position as against the successful bidder, but says his "outside obligations" disqualify him.

Those "outside obligations" made it necessary for Claimant to report one Saturday and Sunday of each month for training a member of the United States Naval Reserve. The assigned rest days of the new position were Thursday and Friday.

The Carrier concedes, in effect, that fitness and ability as provided by rule, *refers to work performance and not to other working conditions or job requirements*. Thus the rule at issue is one for placement of persons in Carrier's employment and does not require that the one claiming the position be in all things qualified before being placed.

Placement is no assurance to the person that he is wedded to the position. He takes same at the known peril that if he can't meet all job requirements, and cannot reasonably and adequately protect the service, he is subject to removal or perhaps discipline and discharge.

The successful bidder, however, does not undertake to protect the position under any and all known or unknown eventualities and at any and all times. If he did, assignments in most cases would be of short duration and rules and practices governing in matters of relief would not have taken on the importance that they have in railroad employments.

In view of Carrier's frank admission that Claimant had and enjoyed the prerequisite seniority and the skill and ability required by controlling rule for placement on the advertised position, there is no escape for holding the Agreement violated.

What may seem like a harsh application of the agreed-on rules can only be explained by saying that this Board has no power to relieve either party of what the rule exacts, of each, by way of a duty to comply. There are and always will be instances where one party or the other finds the bargain it has made to be a burdensome one, and sometimes even oppressive and onerous, but we are powerless to do equity as between them.

In the same vein, we treat of the Carrier's plea that it be relieved of sanctions or reparations for the violation due to what it says was Claimant's failure to mitigate his loss.

It is shown in the docket that when Claimant's bid for the position in question was rejected, he was invited to and did exercise his rights on another position but under protest, giving notice at the time that he would protect later. He never did work the position. During all the time he was out of service, he continued to file time claims for the position in dispute. The period covered is September 26 to October 26, 1953, when he went into military service.

It appearing that Claimant was not obliged by rule to protect on the position, the potential earnings of which Carrier says should be offset against

the claim, there is no basis for indirectly imposing any such burden upon him in this proceedings, and we shall not do so.

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 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

The Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 18th day of February, 1955.