

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Hubert Wyckoff—Referee

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**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 in July 1953 when it filled a temporary vacancy with a junior employe and refused senior employe R. L. Naftel the right to fill the vacancy. Also
- (b) Claim that Mr. Naftel now be compensated for loss resulting from Carrier's action.

**EMPLOYES' STATEMENT OF FACTS:** Effective Tuesday, July 7, 1953 position of Assistant Accountant No. 84 became temporarily vacant.

During the remainder of the week the position remained vacant and the work thereof performed by other regularly assigned employes on an overtime basis.

On Friday, July 10, 1953 the Carrier made arrangements to fill the temporary vacancy beginning Monday, July 13, 1953, and an employe junior to Mr. Naftel was placed on the position.

Mr. Naftel had no knowledge the temporary vacancy was to be filled until sometime Monday morning, July 13, 1953, following which he immediately requested permission to work the position.

Mr. Naftel's request was denied.

**POSITION OF EMPLOYES:** The principle issue presented to your Honorable Board is whether a senior employe can be denied promotion to a temporary vacancy simply because the Carrier places a junior employe on the vacancy before the senior employe knows the position is to be filled.

Inasmuch as the position had not been filled the week of July 6, 1953 it was a logical assumption that it would not be filled the following week.

The controlling rules are set out in Memorandum of Agreement of July 3, 1950 appearing on pages 50-51 of the printed agreement. Paragraph (a) thereof reads—

Mr. Newbill's letter of July 27 stated that Naftel had no way of knowing the position was vacant, and a similar statement is contained in Mr. Dyer's letter of November 24. While Carrier cannot positively state that Naftel was aware of the vacancy, it does state that it is difficult to understand how he could have failed to know about it since he was working his own job across the aisle from Mrs. Harpole's desk on July 6, the day she left her assignment in the middle of the day, and continued to work his job at same location July 7, 8, 9 and 10, the four days during which her position remained vacant. But even if Naftel was unaware of the vacancy until after it was filled, Carrier finds no provision in either the agreement or the memorandum agreement that would give him displacement rights under such circumstances.

While it is the Carrier's position that Naftel, even had he been fully qualified, had no right to displace Mrs. Wooten, Carrier calls to the attention of the Board the fact that he had never performed any work in the Accounting Department at this freight office. It is believed that Division Chairman's reference to a "comparable position several years past" concerns work done at the I-GN Freight Office prior to its discontinuance in 1950.

While it probably proves nothing, since Employees might contend, without fear of contradiction, that Naftel was in the mood to work an accountant's position only from July 14 until Mrs. Harpole returned, Carrier thinks it significant, and probably indicative of Naftel's awareness that he was not qualified to work in the Accounting Department and did not wish to attempt to qualify, that he had access to a vacation schedule but did not notify the Chief Clerk, as did Mrs. Wooten, that he chose to participate in the rearrangements to afford vacation relief. The regular occupants of Positions 81 and 83 both took their vacations, according to schedule, in July, and in both cases employees junior to Naftel filled the vacancies under the rearrangement provision of the Memorandum Agreement, having voluntarily qualified and indicated their desire to do so.

While the claim for compensation in this case is of course insignificant, Carrier believes that there is no basis whatsoever for it, either in the agreement, other applicable agreements or understandings, or by reason of practice or custom. Carrier further believes that to permit displacements on temporary vacancies on one day's (or less) notice solely because of seniority standing would create a condition not only unduly burdensome to Carrier and harmful to service, but unfair to the employees themselves—to permit such displacements as Naftel attempted could mean as many as twenty such displacements on one temporary vacancy (one of less than thirty days). When it is further considered that each such displacement could and probably would mean a new rearrangement, and that a single rearrangement under Paragraph (a) of the Memorandum Agreement often involves half a dozen employees, the absurdity of starting such a practice becomes readily apparent.

Therefore, the Carrier respectfully requests that the Board deny the Employees' claim in its entirety.

(Exhibits not reproduced.)

**OPINION OF BOARD:** The occupant of an accountant position laid off and for several days the work of the position was performed by other accountants on overtime. Finally the Carrier acted under paragraph (a) of the Memorandum of Agreement dated July 3, 1950 which reads:

"(a) All temporary vacancies caused by regularly assigned employees laying off will be filled by the rearrangement of the remaining regular assigned force in that office, with senior employees being given their choice."

In doing so, the Carrier did not offer Claimant a choice and filled the vacancy with a clerk who was junior to him.

In denying the claim, the Carrier took the position: first, that Claimant made no request to protect the vacancy until after it had been filled; and second, that Claimant "never performed duty as an accountant at this freight office."

**First.** When the Agreement says that senior employees will be given their choice, this puts the initiative on the Carrier to offer the choice.

The Carrier knows who the senior employees are and also alone knows precisely when the vacancy is to be filled. Claimant had no opportunity to make a seasonable request here because, not having been offered a choice, he had no means of knowing when, if ever, the Carrier proposed to discontinue the overtime work and resort to rearrangement.

Section (a) of the Memorandum of Agreement was therefore violated, unless Claimant was not qualified under Rule 7. (Award 5255.)

**Second.** The responsibility for the selection of employees and their promotion is the Carrier's; and we should not substitute our judgment based on paper for the Carrier's first hand judgment except upon a showing of abuse of discretion (Award 5292 and awards cited).

Although Claimant had not performed accounting work in this particular office, he had held accounting positions on other railroads and also positions as general clerk, demurrage clerk, claim clerk, delivery clerk, OS&D clerk and statistician.

The junior who filled the vacancy was an Expense Bill Clerk. The only showing of what her fitness and ability was in the statement that she had filled a temporary vacancy in an accountant position in this office the week before.

The record taken as a whole establishes the conclusion that the Carrier did not address itself to consideration of relative fitness and ability; and that the determination to exclude Claimant from a choice was based solely upon comparisons of experience within the office. Such a determination is destructive of right to promotion and constitutes abuse of discretion (See Awards 2427, 2534, 3139, 4026, 5265, 5348 and 5637).

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties to this dispute 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

The Agreement was violated.

#### AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon  
Secretary

Dated at Chicago, Illinois, this 24th day of June, 1955.