# Award No. 11335
# Docket No. CL-11026

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**William H. Coburn, Referee**

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**PARTIES TO DISPUTE:**

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

**THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated, and continues to violate, the Clerks' Agreement in the Marine Department at Hoboken, New Jersey, when:

(a) On December 5, 1957, it denied Frank Dolan the privilege to exercise displacement rights on the position of Westbound Boat Dispatcher, then held by Anthony Acciardi, a junior employe, and that;

(b) Mr. Dolan shall be re-imbursed in the amount of the difference between what he has been paid for service performed each 8 hours, under provisions of the Clerks' Agreement, and what he would have earned had he been properly assigned to the Westbound Boat Dispatcher position, and that;

(c) All other employes, involved in the succession of displacements that followed, shall also be re-imbursed for all monetary loss suffered since Mr. Dolan was forced to exercise displacement rights on a position other than the one of his choice, and that;

(d) All monetary claims mentioned herein shall be retroactive to December 5, 1957, and shall continue until such time as the violations have been adjusted.

EMPLOYES' STATEMENT OF FACTS: Frank Dolan entered the service of the Carrier on April 26, 1942, and established a seniority date as of that day, under our Rules Agreement, on the Group No. 1, M. & E., Operating Department, Division Roster. At a later date, by virtue of being awarded a position in the Marine Department, he also established a seniority date of October 25, 1948, in said Department. The seniority roster in the Marine Department is separate from the Operating Department Group No. 1 Division Roster.

As the result of a force reduction in the Marine Department, Frank Dolan was displaced from his position as Tug Dispatcher on December 5, 1957, by Mr. Wyman. At that time, Mr. Dolan signified his intention of displacing

of Mr. Grimes, the same position Mr. Rumble had previously occupied. This cannot be considered in any way as an arbitrary displacement by Mr. Rumble, but was an appointment by the General Traffic Manager.

There is no merit in any event to that part of the claim identified as "(c)", as when the claim was handled on the property General Chairman Carlo made it form as follows:

> "Therefore, I trust you will adjust this claim to the extent that he will be allowed the displacement claimed and he will be reimbursed in the amount stipulated herein". (Ultimate paragraph, Exhibit "A")

Claims not advanced to a conclusion on the property in all respects are not properly before this Board.

The Board's jurisdiction is appellate and it has frequently said that it will not entertain claims or parts thereof not handled to conclusion on the property.

CONCLUSION

The Carrier denies each and every allegation of the Organization and the validity of every argument advanced by it at variance with the Carrier's position and pleadings in this case.

(Exhibits not reproduced.)

**OPINION OF BOARD:** The pertinent facts are not in dispute. On December 5, 1957, Claimant was displaced in a force reduction from his position of Tug Dispatcher (an "X2" position under the Agreement). He then sought to displace an employe junior to him in seniority who held the position of Westbound Tug Dispatcher (classified as an "X1" position). Permission to do so was refused by the Carrier.

The sole question is one of contract interpretation; i.e., whether "X1" positions are excepted from those provisions of the Agreement relating to displacement (Rule 15).

The Scope Rule contains the following language under the heading "Exceptions":

> "The following is an agreed upon list of positions, negotiated under the provisions of Rule 1 of Agreement between the Delaware, Lackawanna and Western Railroad Company and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, and which are excepted, as indicated below, effective November 1, 1956, and which is made a part of the Agreement:
>
> X — These rules shall not apply to positions indicated by an 'X'.
>
> X1 — Positions indicated by an 'X1' are excepted only as to Rule 8. Such positions need not be bulletined when vacant and the management will be permitted to fill them by appointment.
>
> X2 — Positions indicated by an 'X2' are excepted only as to Rule 8. Such positions need not be bulletined when va-

cant but will be filled by agreement between the Management and the Committee."

Rule 8, referred to, relates to bulletins and assignments.

Petitioner's position is based upon two premises; first, that the language ". . . are excepted only as to Rule 8" means that all other provisions of the agreement, including the displacement rule, apply to the facts of the case; and, second, that Management's right to fill X1 positions by appointment becomes operable only when such positions are vacant. Therefore, Petitioner asserts, Claimant's right to displace the junior employe holding the X1 position was a right protected by the agreement; one which was violated when he was not permitted to take that job.

Respondent's defense is that Petitioner's interpretation of the rule is erroneous and would lead to an illogical and unreasonable result. It contends that the "X1" exception does not state that Management will be permitted to fill "X1" positions only when vacant; that if that were the intent the parties would have said so, relying on Awards 6044 and 10676, and citing the findings in Award 1279. Respondent also argues that Petitioner's interpretation, if adopted, would frustrate Management's unilateral right to appoint suitable employes to "X1" positions because unless an appointee's tenure of office is secure against termination by displacement, that right would be of no value. See Award 6723.

The Board is properly and necessarily confined to a consideration of the language of the applicable rule of the agreement in evidence. Where, as here, that language is clear and unambiguous, the issue must be decided upon a construction of the rule as written (Award 5926).

The only exception from the rule coverage of "X1" positions is, as specified, "only as to Rule 8". No other or further exceptions may properly be implied under well-established and accepted rules of contract construction (Awards 4646 and 6718). Rule 8 governs bulletining of new and vacant positions and how assignments to such positions will be made. The second sentence of the exception is explanatory of the first. It says that "X1" positions "when vacant" need not be bulletined and that Management then unilaterally may **fill them** — meaning such vacant positions — by appointment. Nothing more is expressed; nothing more may properly be implied. (Award 1279, cited by Respondent, involved resolution of an entirely different issue — Carrier's right to remove from an excepted position — and a dissimilar rule. It is not in point here).

Management's right to insist that "X1" positions be held by acceptable employes is not abrogated by our holding here. Rule 7(a) says, in pertinent part,

> ". . . displacements shall be based on seniority, **fitness and ability; fitness and ability** being sufficient, seniority shall prevail. . . ." (Emphasis ours.)

The rule provides adequate protection against the filling of an "X1" position through displacement by an employe considered unacceptable by Management. The situation here is entirely unlike that described in Award 6723 where it was said, under rules applicable in that case, the appointee to an excepted asterisk position if subject to displacement "could immediately thereafter be swept from the position by a senior employe **irrespective of his qual-**

ifications . . ." That is not true under the applicable rules here. (Emphasis ours.)

In view of the foregoing, the Board finds Claimant's displacement rights under Rule 15 were improperly denied and that parts (a) and (b) of the claim should be sustained; parts (c) and (d) are dismissed as not having been presented and handled on the property in accordance with Section 3, First (i), of the Railway Labor Act, as amended.

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

That the parties waived oral hearing;

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 to the extent indicated in Opinion.

AWARD

Parts (a) and (b) of claim sustained;

Parts (c) and (d) dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April 1963.