

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES****THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5924) that:

(1) Carrier violated the current Clerks' Agreement when it refused to allow Mr. Harold L. Cox to exercise his seniority rights on a junior employe when his position was abolished.

(2) Mr. Harold L. Cox shall be reimbursed for wage loss sustained since December 23, 1963; and he be allowed to displace the junior employe.

EMPLOYES' STATEMENT OF FACTS: The seniority date of Mr. Harold L. Cox in the Auditor of Revenues Department of The Kansas City Southern Railway Company, Kansas City, Missouri, in Group 1 is February 2, 1960. The seniority date of Mr. G. J. Bakker, in the same department, group and location, is March 8, 1963.

On December 13, 1963, Mr. R. H. Booth, Auditor of Revenues, issued bulletin abolishing position of Revising Clerk No. 4, occupied by Mr. Harold L. Cox, effective termination of assignment December 20, 1963. Mr. Cox, on December 16, 1963, wrote Mr. Booth, advising he wished to exercise his seniority right by displacing Mr. G. J. Bakker, Revising Clerk No. 2, daily rate \$22.73, effective 8:00 A. M., December 23, 1963 (Employees' Exhibit No 1). On December 18, 1963, Mr. Booth, under File PR-766, wrote Mr. Cox, advising him that his entire experience in his office had been with grain tariffs, refused to allow him to exercise his seniority rights on the position he desired, and advised him he would allow him to place himself on Division Clerk No. 1 or Division Clerk No. 2, both positions carrying a daily rate of \$22.34 per day (Employees' Exhibit No. 2). Mr. Cox then exercised his seniority rights on Division Clerk No. 1, daily rate \$22.34, under protest, and was allowed to displace the occupant of that position effective December 23, 1963 (Employees' Exhibit No. 3).

You will recall that bid was entered by you for the position of Revising Clerk No. 2, my Bulletin A-15 of November 22, 1963, and in response to your letter of December 5, 1963, making inquiry as to my reasons for not assigning you to that position, I outlined fully why I did not consider you qualified to hold the position of Revising Clerk No. 2.

The conditions have not changed since then, so I must refuse to permit you to exercise your seniority rights on the position of Revising Clerk No. 2.

As pointed out previously, your entire experience in my office has been with grain tariffs and since there are two positions in the Recheck Department handling grain rates and divisions, Division Clerk No. 1 and Division Clerk No. 5, being bulletined today, both of which carry rates of \$22.34 daily, I am willing to let you exercise your rights on either of these positions if you desire.

Please advise me immediately what you wish to do so that the other interested employees may protect their rights.

/s/ R. H. Booth
Auditor of Revenue"

On December 28, 1963, Claimant exercised his seniority to position of Division Clerk No. 1.

(Exhibits not reproduced.)

OPINION OF BOARD: On November 22, 1963, Claimant made application for the position of Revising Clerk No. 2. The application was declined and by letter of December 1963, from Carrier's representative, Claimant was advised that he was not qualified to fill the position and the reasons for such decision were set forth. No appeal was taken by Claimant from this decision. Subsequently, on December 13, 1963, Claimant was notified that his position of Revising Clerk No. 4 would be abolished at the close of the assignment on December 20, 1963. On December 16, 1963, Claimant advised Carrier that he desired to exercise his seniority and displace the occupant of the position Revising Clerk No. 2 (the same position he had attempted to obtain when it was previously bulletined). Claimant was refused permission to exercise his seniority right on this position for the same reasons that had been theretofore outlined to him by the Carrier. However, Claimant was given the opportunity of exercising his seniority right on the positions of Division Clerk No. 1 or Division Clerk No. 5. He did exercise his seniority right on the position of Division Clerk No. 1 (under protest) and was allowed to displace the occupant of that position.

Rule 14(a) of the Agreement has no application to the present situation, for it provides that: "Employees awarded bulletined positions will be allowed thirty (30) days in which to qualify . . ." What we are faced with is an attempt by a senior employee to displace one junior to him and Rule 7(a) applies:

"(a) Employees covered by these rules shall be in line for promotion. Promotions, assignments, and displacements under these rules shall be based on seniority, fitness and ability; fitness and ability being

sufficient, seniority shall prevail. The word 'sufficient' is intended to more clearly establish the right of the senior employe to bid on a new position or vacancy where two or more employes have adequate fitness and ability."

The same question which we are involved with here arose on the same property between the same parties in Award 11941, Dorsey, in which it was held:

"Under the above rules the determination as to 'fitness and ability' to fill the relief position was within the judgment of Carrier. It found Claimant wanting.

Only if Petitioner proved by a preponderance of the evidence that Carrier exercised its judgment in an unreasonable, arbitrary, capricious or discriminatory manner could we consider whether the Agreement was violated. The burden of proof was Petitioner's. It did not meet it. We will dismiss the claim."

In accordance with this precedent on the property, the burden of proof was with the Claimant and he did not meet it. Consequently, the claim must be denied.

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 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

That the Agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of December 1966.