

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

I. L. Sharfman, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees on the Western Pacific Railroad that L. F. McAdams be compensated for all time lost since January 18, 1939 account Railroad (a) suspending him from service without investigation and (b) refusing to allow him to exercise displacement right to position of general clerk at Stockton Freight Station."

EMPLOYEES' STATEMENT OF FACTS: "L. F. McAdams, regularly assigned as janitor at San Francisco Freight Station, was granted leave of absence for January 16, 17 and 18, 1939. Upon returning from his leave on January 19 and phoning Agent J. D. Feeny, McAdams was informed that he could not return to work until a clearance had been secured from Superintendent J. H. Leary. McAdams reported to Superintendent Leary, but was not able to see him until January 23rd. At that time McAdams was cleared of any charges against him. McAdams was not advised in advance of the charges against him, did not have the right of representation, and was not granted formal investigation. McAdams lost five days' pay account being held out of service, an extra man filling the position of janitor during that period.

"While in Superintendent Leary's office on January 23rd, McAdams learned he had been displaced as janitor at San Francisco Freight Station. He had no previous advice, either verbal or written, that he had been displaced. On January 23rd, Frank McDonald, who had displaced McAdams, performed his first service as janitor at San Francisco Freight Station. Under date of January 26th McAdams advised Superintendent Leary of his desire to displace on position of general clerk at Stockton Freight Station, held by a junior employee. He was not allowed to make the displacement, the reason being given that he had not exercised his right within five days from January 18th. McAdams had no notice of his displacement, and was not actually displaced until January 23rd."

CARRIER'S STATEMENT OF FACTS: "While L. F. McAdams, with seniority date of April 1, 1937 as clerk, was away on leave of absence January 16, 17, 18, 1939 from his assignment as janitor at San Francisco Freight Station he was displaced as janitor by F. McDonald, with seniority date of February 16, 1937.

"January 19, 1939, instead of reporting for his assignment as janitor, McAdams telephoned Carrier's agent, J. D. Feeny, who informed McAdams that he (McAdams) had been displaced by McDonald and that McDonald was in San Francisco to take over the duties.

report for duty, or to give satisfactory reason for not doing so within seven days from date of notification and those who decline to accept employment or fail to bid on positions (for which they are qualified) shall be considered out of service.'

"Carrier's record indicates that between January 19, 1939, the date on which McAdams was notified by Carrier's agent that he had been displaced from an assignment, and June 6, 1939, the date on which he was next assigned to a regular position, Carrier's superintendent had advertised a number of vacancies in positions for which McAdams was qualified and for which McAdams made no application.

"July 7, 1939 in an informal discussion between Organization's General Chairman and Carrier's Assistant to General Manager, the Clerks' representative was informed that by failure to exercise displacement right within five days from January 19, 1939 McAdams had become an extra man and as such if he had failed to bid on position for which he was qualified, his seniority should have been forfeited. General Chairman stated he had not checked back on this feature, but if any positions for which McAdams had been qualified, had been bulletined in the meantime and McAdams had failed to bid on same, it was his hard luck; that if McAdams had just laid low for the purpose of collecting a claim he was out of luck, because he (General Chairman) did not do business that way.

"Inasmuch as receipt of copy of President Harrison's letter December 18, 1939, is the first intimation given to Carrier it was the intention of the Clerks' Organization to appeal to your honorable Board in this dispute, we respectfully request opportunity of discussing and answering in detail, any statements made by employees in connection with this dispute and opportunity to submit evidence and arguments in connection with statements of the employees.

"The only schedule violations in this dispute were on the part of McAdams and Carrier requests that the Board decline the claim of the employees."

There is in evidence an agreement between the parties bearing effective date of October 1, 1930.

OPINION OF BOARD: While there is considerable conflict of evidence concerning the precise nature of some of the happenings involved in this proceeding, the record is clear with respect to the following controlling factors: first, that the claimant was held out of service January 19th to 23rd, 1939, inclusive, because of certain unspecified charges made against him; and second, that he was not permitted to exercise his displacement rights to the position at Stockton upon application written January 26th and received by the carrier on the 28th. These factors bear upon the two phases of the claim as submitted.

Since the claimant was apparently cleared of the charges filed against him—no discipline being assessed in the premises—he was, under Rule 46 of the Agreement, entitled to be paid for time lost as a result of the suspension. Rule 46 specifies that an employee may be held out of service under such circumstances, but it also provides that if the employee is suspended and the charges against him are not sustained, "he shall be reinstated and paid for net wage loss, if any, suffered by him."

This unjustified suspension from service also bears upon the time within which the claimant might properly exercise his displacement rights, under Rule 42 of the Agreement, in connection with the position at Stockton. Rule 42 specifies that "employees whose positions are abolished or transferred shall exercise their seniority rights over junior employees within five days thereafter, or if on leave of absence within five days of date of return, ability and fitness being sufficient." No question as to the claimant's ability and fitness for the position at Stockton has been raised; the sole issue in this phase of the proceeding is as to whether the claimant exercised his displacement rights

soon enough. The carrier contends that the claimant was notified on January 19th that his position as janitor was to be transferred to another, and that in any event his successor actually assumed his duties on the 21st; the claimant insists that he did not learn that he had been displaced until the 23rd, at the time he was cleared of the charges filed against him. While these conflicts of evidence cannot be reconciled, it appears to be clear under the circumstances of this proceeding that the claimant exercised his seniority rights seasonably in doing so within five days after the period within which he was held out of service had been terminated. Since the claimant's suspension proved to be unjustified, the carrier cannot be heard to complain that the claimant did not exercise his seniority rights before the expiration of that period. If, in the case of a leave of absence, presumably granted for the benefit of the employe, the five-day period is extended under the rule, it would be manifestly inequitable not to extend the period where, as here, because of the fault of the carrier, the claimant was held out of service during part of the interval following the transfer of the claimant's original position to another. In these circumstances the claimant's displacement rights must be held to have been exercised within the requirements of Rule 42.

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 employe involved in this dispute are respectively carrier and employe 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 evidence of record discloses a violation of Rule 46 and the seniority provisions of the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of August, 1940.