

Award No. 2366

Docket No. CL-2317

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Henri A. Burque, Referee

**PARTIES TO DISPUTE:**

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

**LEHIGH VALLEY RAILROAD COMPANY**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood that the Carrier violated the Clerks' Agreement.

1. By refusing to allow displacement privileges to Mr. J. P. Gavin, to a position in A. A. R. Bureau, at Bethlehem, Pa.
2. That Mr. Gavin and others be compensated for any wage loss suffered since May 4, 1942.

**EMPLOYEES' STATEMENT OF FACTS:** Due to the position of Chief Clerk, Car Record Department, being discontinued on May 4, 1942, Mr. Gavin was displaced on the position of Interchange Inspector and on May 1, 1942, filed displacement notice (Employees' Exhibit A) expressing his intention to displace Mr. Waidner, the incumbent of the position in the A. A. R. Billing Bureau, Mr. Gavin's seniority is May 1, 1911, Mr. Waidner's seniority is Sept. 1, 1916, on the Bethlehem General Office, Operating and Maintenance Roster.

**Duties:** The duties of the position in question consist of pricing for Lehigh Valley Car Repair bills rendered against car owners and checking repair bills from the repair points on the System. In performing the duties of this position, the occupants are required to familiarize themselves with the A. A. R. Rules of Interchange covering cost of labor and material. Mr. Gavin, in his capacity as Interchange Inspector, was familiar with the rules of interchange as he was required to have this knowledge for the handling of per diem and reclaim accounts. Mr. Bretz, Auditor of Disbursements, replied under date of May 1, 1942 (Employees' Exhibit B) displacement could not be allowed on account of this position being protected by a Star \* and was so indicated on the Excepted List (Employees' Exhibit C).

**POSITION OF EMPLOYEES:** There is in effect an agreement between the parties bearing an effective date of March 1, 1939, from which the following rules are quoted:

Rule 1 (b). "These rules, except as otherwise specified, shall not apply to the positions listed on agreed-upon excepted lists."

The "Excepted Lists" referred to in this rule is shown as Employees' Exhibit C and the star \* position is defined as follows:

"Rules of Agreement March 1, 1939 apply to these positions except Rule 42 (Bulletins). Vacancies will not be bulletined but will be filled after agreement between the Head of Department and the Representatives."

"Rules of agreement March 1, 1939 apply to these positions except Rule 42 (Bulletins). Vacancies will not be bulletined, but will be filled after agreement between the head of the department and the representatives."

This position had been filled in accordance with this provision, and there was no vacancy when the claim to the position was made by Mr. Gavin.

**POSITION OF CARRIER:** There was no violation of the Clerks' Agreement in declining to permit Mr. Gavin to take the position in question, but the action taken was in full accord with the agreement.

If the claim of the System Committee were allowed, it would result in practically nullifying the rule, as, after the head of the department and the representatives of the Clerks had agreed upon an employe for an excepted position, the man selected could be displaced the next day by anyone claiming the position because he was displaced for any reason, even though not approved by either the management or the employes. We, therefore, request that the claim be denied.

**OPINION OF BOARD:** The facts of record are that, due to the discontinuance of the position of Chief Clerk, Car Record Department, effective May 4, 1942, the Claimant employe, J. P. Gavin, was displaced by the occupant of that position from his position as Interchange Inspector. Mr. Gavin, knowing of his forthcoming displacement, on May 1, 1942, made written request that he be permitted to displace J. L. Waidner, a junior employe in the service. On that same date, the Carrier made written reply to Mr. Gavin, stating:

"Your request is entirely out of order and I respectfully refer you to the Operating Department roster, which indicates clearly that the incumbent on the position you wish to exercise displacement rights is protected against displacement, being an excepted position as indicated by the 'star' shown on the roster. Under the circumstances, displacement as requested cannot be made."

Later, to wit, June 10, 1942, in answer to a letter of June 9, 1942, apparently forwarded to an officer of the Carrier, the Representative who had written this letter received the following reply:

"Your letter of June 9th, 1942, in the matter of displacement rights of Mr. J. P. Gavin for the clerical \* position held by Mr. J. L. Waidner, in the A. A. R. Bureau of Bethlehem.

". . .

"For the purpose of the record, I would state that apart from any consideration of your interpretation in the matter of displacement rights to \* positions, we would not permit Mr. Gavin to exercise displacement rights on the position in question for the reason that he has not had any experience in handling technical matters relating to A. A. R. accounting and, therefore, does not possess the necessary qualifications."

The result was that Mr. Gavin had to displace a position paying \$190.00 a month, instead of \$195.00 a month which the position he sought to displace paid. No issue is raised on the question of seniority.

The applicable rules in this case are:

Rule 1—

"These rules shall govern the hours of service and working conditions of all the following employes, subject to the exceptions noted:"

Group 1 includes clerks. Exceptions to the rule are: "(b) . . . positions listed on agreed-upon excepted lists."

A list of agreed-to excepted positions is submitted in the record and the list includes \* positions. As to these \* positions, it is said:

"Rules of agreement March 1, 1939 apply to these positions except rule 42 (Bulletins). Vacancies will not be bulletined but will be filled after agreement between the Head of Department and the Representatives."

These "agreed-upon excepted lists" include the positions held by Mr. Gavin and Mr. Waidner, both designated as \* positions.

Rule 42 reads:

"(a) All Group 1 new positions and vacancies, except those of less than thirty (30) calendar days' duration, will be promptly bulletined, etc."

The rule, as is seen, specifically refers to "new positions and vacancies" and to no others, and it is this rule that is excepted in the list of excepted positions.

The Carrier seems to argue that this case involved a vacancy. Vacancy means unoccupancy. The position sought by Mr. Gavin was not vacant, unoccupied or unfilled. In fact, it was occupied and filled prior to and at the time, and has been occupied and filled ever since. So it cannot be said we are dealing with a vacancy. All that is said in the record and in submitted argument relating to the filling of vacant positions is not in point and consequently irrelevant.

The applicable rules then are:

Rule 38—

"Seniority rights of employes covered by these rules may be exercised in case of vacancies, new positions or reduction of force as provided in this agreement."

Rule 39—

"Employes 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.

NOTE: The word 'sufficient' is intended to more clearly establish the right of the senior employe to bid in a new position or vacancy where two or more employes have adequate fitness and ability."

Rule 47 (a)—The pertinent provisions are:

"When reducing forces seniority rights shall govern. . . . Employes whose positions are abolished may exercise their seniority rights over junior employes. Employes displaced, whose seniority rights entitle them to regular positions, shall assert such rights within five (5) working days."

Rule 39 brings up the question of fitness but the Petitioner claims that Mr. Gavin was not refused the right to displace because of unfitness, but because he had no right to displace. This is true to a certain extent. Certainly, from May 1, 1942 to June 10, 1942 this was the only ground advanced and given by the Carrier for refusing to displace, and the only ground upon which it can be said the refusal to displace rested. But on June 10, 1942 the Carrier presented its refusal to displace on the additional ground that Mr. Gavin did not have the proper qualifications to fill the position. Even though it may be said this might be an afterthought, an attempt to over-

come the Carrier's first position, which it might have thought questionable, nevertheless from that time on it was a claim properly set up and must be considered, even though no reference is made to it in the Carrier's first exparte submission filed April 12, 1943. Reference is made to it however, at least by implication, in its reply to Employees' Rebuttal.

The Claimant Gavin is entitled to reimbursement for loss sustained from May 4, 1942 to June 10, 1942.

In view of the fact that a displacement is not a vacancy within the purview of the rule governing excepted positions, the case must be controlled by applicable rules in the 1939 Clerks' Agreement. Claimant's right to compensation for loss sustained from June 10, 1942, if any there be, therefore, depends upon Rule 50, which reads:

"(a) Employees . . . exercising displacement rights will be allowed thirty (30) working days in which to qualify. Employees failing to qualify . . . , when exercising displacement rights, shall retain all their seniority rights, etc.

(b) When it is evident that employees will not qualify for positions, they may be removed before expiration of the time limit, the Representative being given reasons therefor in writing . . . .

(c) When positions require experience which cannot be obtained in thirty (30) working days, applicants shall be allowed additional length of time in which to qualify, same to be determined by the Management.

(d) Employees shall be given full cooperation in their efforts to qualify."

None of the above provisions of Rule 50 were complied with. The Carrier just took the position then and still takes the same position now, that Gavin was not qualified; that the work performed by Waidner was specialized, complicated work, necessitating special and comprehensive knowledge of A. A. R. rules in connection with billing and checking of bills for foreign railroad car repairs, etc., requiring long study, practice and experience before he can perform the work efficiently.

The Petitioner calls attention to Mr. Gavin's experience and class of work he performed, thirty-two years' service on many technical and responsible positions in the Bethlehem Office.

The record does not provide sufficient evidence for us to pass on the question of Mr. Gavin's experience and qualifications for the position involved, so that we cannot decide this issue. We can say, however, that Mr. Gavin was entitled to a trial of at least thirty days to determine whether he was qualified, and probably a reasonable additional length of time thereafter, to be determined by the Management as per Rule 50. In that event, we are of opinion, he is entitled to recover compensation for the loss of pay he sustained for at least thirty (30) days after June 10, 1942.

In the absence of proof of fraud, caprice or unreasonableness, we cannot say that the Carrier did not act within the limits of honesty and good faith. It appears that sometime prior to July 2, 1943, Mr. Gavin was restored to his former position of Interchange Inspector, for which it is admitted he has all the necessary qualifications. This is proof of the confidence the Carrier places in Mr. Gavin's ability for that position, and would seem sufficient to disprove any claim of bad faith on the Carrier's part in not recognizing Mr. Gavin as qualified to fill the position in the A. A. R. Billing Bureau, which he sought to displace.

**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 we conclude the Carrier has violated the Agreement to the extent stated in the Opinion.

#### AWARD

Claims 1 and 2 sustained to the extent appearing in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 15th day of November, 1943.