

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

(Edward F. Carter, Referee)

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) Carrier violated and continues to violate the rules of our current agreement, when it refused and continues to refuse, to grant employes W. H. Kline, R. K. Kerr, Sr., and S. L. Freeman, investigation requested under the provisions of Rule 50 of our current agreement with the Carrier, in connection with filling position of Stationmaster at Tucson, Arizona.

(b) Employes W. H. Kline, R. K. Kerr, Sr., and S. L. Freeman be granted investigation under the provisions of Rule 50, in the order of their seniority.

(c) If investigations held in seniority order under the provisions of Rule 50, develop that any one of the three employes involved, Kline, Kerr, or Freeman, possess sufficient fitness and ability to fill the position of Stationmaster at Tucson, he shall be assigned to the position and reimbursed for any wage loss sustained because of prior non-assignment, retroactive to August 1, 1943.

EMPLOYEES' STATEMENT OF FACTS: An agreement bearing date of October 1, 1940, as to rules and working conditions is in effect between the parties to this dispute. The employes involved in this instant claim are covered by that agreement.

Under date of July 16, 1943, Mr. J. J. Sullivan, First Assistant Manager of Personnel for the Carrier addressed the following letter to General Chairman Erickson:

"San Francisco, California
July 16, 1943

Mr. L. M. Erickson, General Chairman
Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station Employes,
1208 Humboldt Bank Building,
San Francisco (3), California.

Dear Sir:

Referring to our discussion on the telephone July 10th and during conference with your full Committee on July 16th, concerning the possibility of the management desiring to establish position of Stationmaster at Tucson and Phoenix, Arizona, due to the unusual travel situation existing at those points by reason of the war.

After going into more or less detail what the problem was and what we desired to do, particularly the necessity for placing the best qualified

tion of Rules 27 and 28 has the right to an investigation under Rule 50 of the current agreement on the basis of unjust treatment, the carrier submits that if such right does not exist it would accrue to but one unsuccessful applicant. Where there is only one position to be filled, only one employee can be assigned to such position; it follows, therefore, that if there was unjust treatment involved in not assigning an unsuccessful applicant, such unjust treatment could only affect one employee. Such being the case it likewise follows that but one unsuccessful applicant would be entitled to an investigation under Rule 50.

It will be noted that in its statement of claim the petitioner alleges that each of the claimants is entitled to investigation under Rule 50 in seniority order. In other words, the petitioner is contending that the carrier had the obligation to accord the senior unsuccessful applicant an investigation under Rule 50 first, and then, if it was determined that he was not qualified for the position, each of the other unsuccessful applicants would be accorded an investigation in seniority order to determine if they were qualified. Otherwise stated, it is the petitioner's position that in the event applicants for position excepted from the application of Rules 27 and 28 are not awarded the position each of said unsuccessful applicants, regardless of the number, has the right to an investigation under Rule 50. Under this position if there was but one position involved to be filled and there were fifty (50) unsuccessful applicants each of the fifty (50) unsuccessful applicants would be entitled to an investigation under Rule 50 in seniority order, that is, of course, if each successive investigation developed that the employee requesting such investigation were found not to be qualified.

The carrier submits that the petitioner's interpretation of Rule 50 in this respect is by no means reasonable and is contrary to the spirit and intent of said rule.

The carrier further submits that if the Division should find, the carrier is confident that it will not, that any of the claimants had a right to an investigation under Rule 50 because of not being awarded the stationmaster position at Tucson, the Division will likewise determine that but one of the claimants was entitled to said investigation and that it was incumbent upon the petitioner to determine which of the unsuccessful applicants (claimants) was qualified for said position and to have requested an investigation only for such (one) unsuccessful applicant.

CONCLUSION: The carrier submits that it has conclusively established that the claim in this docket is without basis or merit and therefore respectfully requests that it be denied.

OPINION OF THE BOARD: The Carrier, desiring to establish the position of Stationmaster at Tucson, Arizona, conferred with the Organization and obtained a letter agreement permitting the Carrier to establish the position at a monthly salary to cover all services required and to except the position from the promotion, assignment and displacement provisions of Agreement Rules 27 and 28. The Carrier assigned J. A. Ray to the position, he being an employee of the Traffic Department holding no seniority rights on Roster No. 3 of the Tucson Division, in which seniority district the position in question was established.

Claimants Kline, Kerr and Freeman held seniority rights on Roster No. 3. Each applied for the position of Stationmaster at Tucson but their applications were disregarded and the position given to Ray. Each requested an investigation in accordance with Rule 50 of the current Agreement "to determine our qualifications for position of Stationmaster at Tucson." The Carrier offered an investigation to any one of the three that the Organization would designate but refused it as to all. The Organization declined the offer.

It is first contended by the Carrier that all Stationmasters on its property were excepted from the current Agreement and that the conference result-

ing in the letter agreement of July 16, 1943, was only in deference to the Organization. It is true that the Agreement lists several specific Stationmaster's positions as being excepted from the scope of the Agreement. It must be borne in mind that the Agreement does not declare that all Stationmasters are excepted but proceeds to name those that are excepted. This evidences an intent that any positions of stationmaster subsequently established shall be under the Agreement unless they are also specifically excepted. By naming those excepted, all others must necessarily be considered included. Award No. 2009. We conclude therefore that the position of Stationmaster at Tucson was within the current Agreement except to the extent it was exempted therefrom by the letter agreement of July 16, 1943.

Rule 33 (f) requires that in assigning new positions, preference will be given to employees within the scope of the roster where the new position was created. The letter agreement did not remove the applicability of this rule from the position of Stationmaster at Tucson. The letter agreement did, however, relieve the Carrier from giving effect to Rules 27 and 28. The effect of this was to free the position from any right to promotion based on seniority, fitness and ability. It likewise freed the position from the necessity of the Carrier to make the assignment on the basis of seniority, fitness and ability. The net result is that the Carrier was limited in making the assignment to an employee within the scope of the Agreement, with employees on Roster No. 3 having a preference to the position. It naturally follows that Claimants were not entitled to an investigation under Rule 50 to determine their fitness and ability for the position because after the elimination of Rule 28, fitness and ability as used in the Agreement was no longer a condition precedent to the assignment.

We do think that Rule 50 still applies to the position of Stationmaster at Tucson. An investigation might be properly requested if preference was not given to the Claimants because of ill-will, fraud, or similar reasons. No such allegations appear and consequently the Carrier cannot be said to have acted unfairly toward the Claimants in refusing an investigation as to fitness and ability.

The record shows that a similar position was filled at Phoenix, Arizona, at about the same time with an employee on Roster No. 3. It also shows that Ray was subsequently removed from the Stationmaster's position at Tucson and Kline, one of the Claimants here and an occupant of a Roster No. 3 position, was appointed in his stead. It might be urged that failure to give Kline the position in the first instance indicates failure on the part of the Carrier to give the required preference. We do not think so. There must be some evidence of bad faith on the part of the carrier before a violation of the preference rule can be properly asserted. We find no such evidence here.

An oral understanding is alleged by the Claimants to the effect that the Carrier agreed at the conference resulting in the letter agreement to assign a Roster No. 3 employee to the position. The oral agreement cannot be given effect. The letter agreement must be considered as merging therein all mutual meetings of the minds of the parties at the time of and prior to its execution. If this were not so, written agreements could have no more dignity than an oral one.

For the reasons stated, we find no basis for an affirmative award.

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 parties waived oral hearing hereon;

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 no basis for an affirmative award exists.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary.

Dated at Chicago, Illinois, this 27th day of June, 1945.