

Award No. 3538

Docket No. CL-3494

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Edward F. Carter, Referee

**PARTIES TO DISPUTE:**

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

**DULUTH, MISSABE AND IRON RANGE RAILWAY  
COMPANY**

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

(a) The Carrier violated the Clerk's Agreement, when on December 19, 1945, it continued in its service, Mr. Douglas Stalker, Jr., seniority date November, 1945, on the position of Clerk in the Payroll Accounting Department, District No. 1, and failed and refused to allow Miss Jeanne Almy, a senior employee, the right to exercise her seniority on the position.

(b) That employee Almy be compensated for monetary loss suffered as a result of the Carrier's refusal, from January 25, 1946 until January 31, 1946, during which time an employee junior to her, in point of seniority, was continued in the service of the Carrier, namely Douglas Stalker, Jr.

**EMPLOYEES' STATEMENT OF FACTS:** On January 19, 1945, employee Almy, Seniority date October 8, 1945, was displaced from her position, by the return to the service of the Carrier of a senior employee. She remained out of service until January 25th, at which time she requested in writing, in a letter addressed to Mr. Douglas M. Stalker, Sr., Comptroller, that she be allowed to exercise her seniority on the position of Clerk, in the Payroll Accounting Department, held by Douglas Stalker, Jr., an employee junior to her, in point of seniority.

Her request was denied and on account of the Carrier's refusal to allow her to exercise her seniority on the position, she was reduced to the furloughed list, on January 25, 1946.

Employee Stalker, Jr., continued in the service of the Carrier until January 31, 1946, at which time he was furloughed, on account of finishing the work that he was engaged in.

**POSITION OF EMPLOYEES:** There is in evidence an Agreement between the parties bearing effective date of April 16, 1941, from which the following rules thereof read:

**"RULE 6.**

(a) Seniority rights of employees covered by these rules may be exercised only in case of vacancies, new positions or reduction in forces, except as otherwise provided in this Agreement.

(3) Mr. Stalker who was performing this work had not only been on the work for some time, but was in a position to continue without daily personal instruction which could not be given due to the fact that the clerk in charge was in the hospital.

(4) There is no provision in Rules 6, 10 or 13 relied upon by the employes taking from the Carrier its rights to honestly pass on the fitness and ability of Miss Almy.

**OPINION OF BOARD:** On January 18, Claimant was displaced from her position by a senior employee. On January 25, 1946, she requested the Carrier in writing that she be allowed to exercise her seniority on the position of Clerk in the Office of the Comptroller held by an employee admittedly junior to her. The request was refused by the Carrier because the service being performed by the occupant of the position was temporary work which would be completed on January 31, 1946. It is now contended that Claimant did not have the fitness and ability to perform the work, the applicable rule being:

"Employees covered by these rules may use their seniority as provided in any rule in this Agreement subject to their fitness and ability to perform the work; fitness and ability being sufficient, seniority shall prevail, except, however, that this provision shall not apply to the excepted positions." Rule 8, current Agreement.

The fact that the position sought by the Claimant was temporary and of short duration does not remove it from the operation of seniority rules. Claimant was clearly entitled to the position if she had the necessary fitness and ability to perform the work.

Claimant was employed as a machine operator in the Payroll Accounting Office at the time she attempted to exercise her seniority on the position in question. Her duties consisted of posting the mileage of enginemen and trainmen, the rate per mile and the totals earned.

The duties of the position claimed consisted of charging off to 1945 operating accounts the balance of the cost of investments in road and equipment property which had been incurred in defense work and terminated by executive order of the President of the United States on September 29, 1945. The work further consisted of refiguring depreciation on certain road property accounts back to January 1, 1945, as a result of a retroactive Interstate Commerce Commission order. This work was performed under the direction of a supervisory officer and involved rather simple mathematical processes. This is evident from the fact that it was being performed by a young employee who had been employed as mail boy on November 1, 1945, and promoted to the position in question fifteen days later.

The record shows that the Carrier did not decline to assign the Claimant to the position because she lacked fitness and ability. The reason given was that the work of the position was of a temporary nature which would be completed on January 31, 1946, six days later. The implications are clear that consideration of the fitness and ability of Claimant was not given and that this defense to the claim is an after-thought. The record further shows that the occupant of the position was the son of the Comptroller, the official charged with the duty of deciding the question of Claimant's fitness and ability. A presumption of undue favoritism to the son arises under such circumstances and casts the burden on the Carrier to overcome it with affirmative evidence showing that Claimant did not have the necessary fitness and ability to perform the work of the position. This, it has not done by a preponderance of the evidence.

We think that Claimant, under the evidence in this record, was deprived of the position because of a failure of the Carrier to properly apply the Agreement.

**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 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 herein; and

That the Agreement was violated as charged.

**AWARD**

Claim sustained.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of Third Division

**ATTEST:** H. A. Johnson,  
Secretary

Dated at Chicago, Illinois, this 2nd day of May 1947.