

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

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

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that the Carrier violated the Clerks' Agreement:

- (1) When on November 30, 1946 it denied Mr. D. W. Baines with seniority date of September 5, 1939 the right to exercise seniority to position held by Morris V. Hoffman, seniority date September 22, 1941.
- (2) Then on March 19, 1947 abolished position held by Morris V. Hoffman without serving five day notice as provided by agreement, and transferred work to employees excepted from agreement.
- (3) That Mr. D. W. Baines shall be paid the rate of position of Clerk, A.F. E. Bureau, formerly held by Morris V. Hoffman from December 2, 1946 until such time as the work is returned to employees fully covered by the agreement.

EMPLOYEES' STATEMENT OF FACTS: Effective December 2, 1946 D. W. Bains was displaced from clerical position at Laboratory, Seniority District 32-1, due to reduction of forces. Mr. Baines served notice that he wished to displace on position of Clerk in A.F.E. Bureau, MP&M Department, then held by Morris V. Hoffman. Chief Clerk Boyer and Personnel Assistant J. Eriksen ruled that Mr. Baines did not have sufficient background to qualify him for position of Clerk, A.F.E. Bureau. See Employees' Exhibit 1 attached.

Mr. Morris V. Hoffman held seniority in Auditor of Disbursements Office by virtue of agreement, Rule 15 (Positions in Other Seniority Districts). March 19, 1947 Mr. Hoffman was offered an accepted position of Head Clerk, MP&M Bureau, in his former seniority district (Auditor of Disbursements Office). This left Clerk position in A.F.E. Bureau vacant. This vacant position was not filled, but abolished by notice dated March 19, 1947. The work of the abolished position was transferred to employees on Rule 1 (d) or the so-called excepted positions.

POSITION OF EMPLOYEES: Effective agreement carries following rules:

- (b) The Carrier offered to conduct a fair test to enable Claimant Baines to demonstrate that he possessed fitness and ability for this position, which offer was arbitrarily declined.
- (c) The position was abolished in conformity with rules of the controlling agreement, because the increased work for which it was created no longer existed. No work was transferred to employees outside the scope of that agreement.

(Exhibits not reproduced.)

OPINION OF BOARD: Petitioners contend that the Carrier violated the Agreement between the parties by arbitrarily and capriciously denying D. W. Baines the position of Clerk, AFE Bureau, which position Claimant Baines sought to acquire by displacement of a junior employee. Petitioners further contend that the Carrier violated the Agreement by assigning work within the scope of the Agreement to employees not within the scope of the Agreement.

Rule 6 of the Agreement, effective April 1, 1945, is, in part, as follows:

"The exercise of seniority in the reduction or restoration of forces, or the displacement of junior employees, is subject to the provisions of Rule 8."

Rule 8, referred to in Rule 6, provides that:

"Rule 8. Promotion. Employees covered by these rules shall be in line for promotion. Promotion shall be based on seniority, **fitness and ability**; fitness and ability being sufficient, seniority shall prevail except, however, that this provision shall not apply to the **positions listed in Rule 1(d) and (e)**. **NOTE: The word 'sufficient' is intended to establish more clearly the rights of the senior employee to a new position or vacancy where two or more employees have adequate fitness and ability.**" (Emphasis added.)

The Carrier found that Claimant Baines did not possess sufficient fitness and ability as prescribed by Rule 8 to fill the position which he sought to acquire. The Carrier offered to conduct a test to enable Claimant to demonstrate that he possessed fitness and ability for the position, but Claimant declined the offer. Such refusal has been held by this Board to be grounds for denying a claim. See Awards 2458, 1888 and 82. The record shows that the **position of Clerk, AFE Bureau had duties which required initially a fundamental knowledge of the accounting regulations prescribed by the Interstate Commerce Commission; Claimant did not possess this knowledge.** In Award 2031 this Board said:

"* * * It is a general rule that in the first instance the Employer must be the judge of the fitness and ability of an employee **and that to hold otherwise would destroy the basic attributes of management**, and there is nothing in the agreement to contradict this elementary rule, but the very fact that there is an agreement **touching on the subject necessarily modifies it to some extent**, and as to that modification we are of the opinion that it requires the Carrier's action to be free from fraud, caprice and unreasonableness. Within the limits of honesty and good faith and without the absence of fraud, caprice or unreasonableness the Carrier must be permitted to determine the question of fitness and ability.

It follows from this statement of the rule that if an employee complains of Carrier's decision and seeks to have a review or upset by this Board he has the burden of coming in and showing to us that fairness and good faith have been violated, or that the decision has been fraudulently, capriciously or unreasonably made. * * *

Claimant has failed to establish that the Carrier's determination that he **lacked sufficient fitness and ability was arbitrary or unreasonable.** See also Awards 4040, 3887, 3273, 2031 and 1147.

Petitioners contend in Claims (2) that work was transferred to employees excepted from the Agreement in violation of the Agreement. The Awards of this Board on this matter fall into two groups. Where it has been found that work of an abolished position was assigned to a position within the scope of the agreement, although excepted from certain rules thereof, it has been held that there was no violation of the agreement; see Awards 4235, 3867, 3866, 3563 and Interpretation No. 1 to Award 3563. On the other hand, where it has been found that work of an abolished position was assigned to a **position which was wholly excepted from the agreement, even though the incumbent of the position might retain seniority rights under the agreement,** it has been held that the occupant of the excepted position may not properly perform work within the scope of the agreement. The instant case falls within the latter group; see Awards 3192, 3191, 1209 and 751.

In the instant case the positions to which the work of the abolished position was assigned come within the following provision of the Agreement:

"The following positions and/or incumbents thereof are subject only to the application of Rules 10, 15, and 22. * * *"

So it is seen that **both the position and the incumbent are subject only to Rules 10, 15 and 22;** these three rules are concerned with seniority rights. In Award 3191, which considered a question similar to that involved here, this Board held that a provision very similar to the one quoted immediately above had exclusionary effect to the extent that the positions covered by the provision were wholly excepted from the agreement.

Carrier contends that before the position of Clerk, AFE Bureau, was created, the work of the position was performed by the same employees to whom it was transferred when the position was abolished. In Award 751 this Board said in answer to such a contention that **when the position in that case was established, it and its work automatically became subject to the agreement and that the work could not thereafter be removed unilaterally from the scope of the agreement.** Also see Award 754.

In Claim (3) Petitioners ask that a penalty be levied against the Carrier and that the payment be made to D. W. Baines. As stated by a Presidential Emergency Board in its report of February 8, 1937:

"The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case, yet, experience has shown that if rules are to be effective there must be adequate penalties for violation."

This Board has often held that the penalty for a violation of an agreement is the important thing, and that the claim on behalf of a particular individual is merely an incident which is of no concern of the Carrier. See Awards 3890, 3376, 2282 and 1646. D. W. Baines shall be paid the rate of the position of Clerk, AFE Bureau, had that position not been abolished, less the amount earned by Baines on his own position, from the time that work was wrongfully removed from the scope of the Agreement until such time as the work wrongfully removed is returned to employees within the scope thereof. Since the penalty applies from the time the work was transferred to excepted employees the matter of failure to give a five-day notice of abolishment of the position is immaterial to the disposition of the case.

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 involved herein; and

That the Carrier violated the Agreement as indicated in the Opinion of the Board.

AWARD

Claim (1) denied; Claims (2) and (3) sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 30th day of March, 1949.

DISSENT TO AWARD NO. 4370, DOCKET NO. CL-4349

We wholly disagree with the conclusions of this Award in disposition of Item (3) of the claim. This disposition denies the reparation claim for the period December 2, 1946 to March 19, 1947 because claimant was found in Item (1) not qualified to perform the work of the involved position, and the award then extends reparation after March 19, 1947 to the same claimant despite the prior finding that he was not qualified to perform the work.

This incongruous disposition of the monetary claim transgresses any reasonable application of the principle that the claim on behalf of a particular individual is merely an incident which is of no concern of the Carrier.

/s/ R. F. Ray
/s/ R. H. Allison
/s/ A. H. Jones
/s/ C. P. Dugan
/s/ C. C. Cook