

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
THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY**

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

- (1) That the Carrier violated, and continues to violate the clerks' schedule by failing and refusing to assign Mr. R. E. Smithlin, Clerk, Colorado Springs to position of Ticket Clerk No. 3 advertised by bulletin issued July 22, 1947, and
- (2) That Mr. Smithlin be assigned to Ticket Clerk Position No. 3 and compensated for any and all wage loss sustained subsequent to July 28, 1947.

EMPLOYEES' STATEMENT OF FACTS: Mr. R. E. Smithlin entered the service of the Denver and Rio Grande Western Railroad Company on September 26, 1940 and holds seniority in the agent's district, Colorado Springs, as of that date.

On July 22, 1947 position of Ticket Clerk No. 3 at Colorado Springs was bulletined. Mr. Smithlin was the senior bidder on the position, but the position was awarded to Mr. W. H. Maness with seniority date of May 31, 1945.

Protest was made by Mr. Smithlin and the case was carried to the court of last resort on the property, and the Carrier refuses to join the organization in submission of this dispute. Therefore, it is being filed ex parte with Third Division, National Railroad Adjustment Board.

POSITION OF EMPLOYEES: Employees base their position on Rule 8 which provides:

"(a) Employees entitled to bulletined positions will be allowed thirty (30) days in which to qualify and, failing, shall retain all their seniority rights, may bid on any bulletined position, but may not displace any regularly assigned employee.

(b) When it is definitely determined an employee will not qualify for position, he may be removed before the expiration of thirty (30) days. An employee who fails to qualify on a temporary vacancy may immediately return to his regular position. It is understood supervisors will cooperate with employees who are making an effort to qualify."

"Denver, Colorado,
Sept. 17, 1947,
CL-22-1947.

Mr. W. D. Ryan,
General Chairman, BofRC,
Denver, Colorado.

Dear Sir:

Referring to your letter of August 7th and our conference of August 19th, in regard to request of Mr. R. E. Smithlin, Clerk, Colorado Springs, that he be assigned to position of ticket clerk.

The position of ticket clerk requires a bond, and we would be unable to secure bond for Mr. Smithlin thru the Surety Company handling our bonds.

Yours truly,

(Signed) J. E. Kemp,
Manager of Labor Relations."

and again under date of December 13, 1947, as follows:

"December 13, 1947,
CL-22-1947

Mr. W. D. Ryan,
General Chairman, BRC,
Denver, Colorado.

Dear Sir:

Following my letter Oct. 27, 1947, and our several subsequent conferences, in regard to request of Mr. R. E. Smithlin, Clerk, Colorado Springs, that he be assigned to position of Ticket Clerk.

Upon further handling, am convinced that the Company furnishing our Fidelity Bond would decline to approve bond for Mr. Smithlin. Am further advised Mr. Smithlin would not be successful in negotiating acceptance of bond for the other Carriers who jointly use our facilities at the Colorado Springs passenger depot.

Under these circumstances, regret that Mr. Smithlin's request must be declined.

Yours truly,

(Signed) J. E. Kemp,
Manager of Labor Relations."

The information given in the above quoted letter was based on the fact that the Company furnishing our Fidelity bond has consistently declined to approve bond for employees involved in cash irregularities. The Carrier has one master bond covering all employees and once an employee has been involved in mishandling of funds, the Fidelity Company has never approved the re-employment of such employee in a bonded position. Colorado Springs is a joint ticket office, handling tickets for the AT&SF Railway, the Colorado & Southern Railway and the CRI&P Railway, in addition to D&RGW ticket sales.

In any event, in view of the definite understanding reached at the time Mr. Smithlin was reinstated on June 11, 1946, it is the Carrier's position that that letter is controlling in this case and Rule 8 of the current agreement of May 1, 1946, is in no manner applicable.

OPINION OF BOARD: Claimant entered the service of the Carrier on September 26, 1940, and holds seniority as of that date in the Colorado Springs seniority district. On July 22, 1947, the position of Ticket Clerk No. 3 at Colorado Springs was bulletined. Claimant was the senior bidder.

The Carrier declined the bid because of a letter agreement bearing the date of June 11, 1946, wherein it is stated:

"As a result of our discussion it is understood and agreed that Mr. R. E. Smithlin will be reinstated without pay for time lost and with seniority rights unimpaired, except that he will not be permitted to exercise his rights on any position requiring a bond."

The foregoing letter agreement resulted from an occurrence which took place in 1946. The record shows in respect thereto that Claimant was dismissed from the service for "failure to report actual amount of money received from sale of a ticket on March 8, 1946". After negotiation between the parties, Claimant was reinstated in accordance with the letter agreement of June 11, 1946.

It is evident from the record that the dismissal of Claimant from service became final. Thereafter he had no rights whatever under the Clerks' Agreement. The Carrier, however, agreed to reinstate Claimant under the conditions set forth in the letter agreement of June 11, 1946. The Organization attempts to construe and limit the force of the agreement to the date of his reinstatement only. The letter will not sustain such a construction. It clearly implies that he will not at any time be permitted to exercise his seniority rights on a bonded position.

It is urged that there was a gentleman's agreement made at the time the reinstatement was agreed upon. It is fundamental that a written agreement embodies all negotiations and oral agreements made at the time and prior to the execution of the written agreement. All the rights that Claimant now has under the Clerks' Agreement arise through the letter agreement. What motivated the Carrier and the Organization in entering into the letter agreement is not important here. The Carrier has a clear right to insist upon the letter agreement being carried out as made. This Board has no more right to destroy agreements than it has to create them. No basis for an affirmative award exists.

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

The Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 28th day of April, 1949.