

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY**

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

1. Carrier violated the Clerks' Rules Agreement and Memorandum of Agreement No. 9 when on July 21, 1955, and numerous subsequent dates listed below, it failed and refused to utilize Auto Mail Clerk Robert D. McCutcheon in accordance with his seniority to perform overtime on Auto Mail Clerk Positions No. 273 and No. 650.

2. Carrier shall compensate Auto Mail Clerk Robert D. McCutcheon for eight (8) hours at the rate of time and one-half for each of the following dates: July 21, 22, 25, 26, 27, 28, 29, August 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, 31, September 1, 2, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20 and October 18, 1955 and all subsequent dates junior employees or outsiders were utilized to fill Auto Mail Clerk Position No. 273.

3. Carrier shall compensate Auto Mail Clerk Robert D. McCutcheon for eight (8) hours at the rate of time and one-half for August 20 and 21, 1955 account utilizing an outsider without properly established seniority to fill Auto Mail Clerk Position No. 650.

EMPLOYEES' STATEMENT OF FACTS: Employee Robert D. McCutcheon was regularly assigned to Auto Mail Clerk Position No. 274 at Galewood. His assigned hours were 11 P. M. to 7 A. M. Tuesday through Saturday with rest days of Sunday and Monday; rate of pay, \$13.2880 per day. His seniority date is September 21, 1950.

The Carrier certainly cannot be expected to continue to call an employe to fill a position the duties of which he has repeatedly demonstrated he cannot properly and satisfactorily perform and the Carrier respectfully requests that the claim be denied.

All data contained herein has been presented to the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: There is a conflict in the record whether Claimant Robert D. McCutcheon had sufficient fitness and ability to perform the duties and maintain the schedule of Auto Mail Clerk, Position No. 273, on the dates in dispute. This Board has no way in which it can reconcile such conflicts.

This Division has repeatedly held that the burden of proving that he has sufficient fitness and ability is upon Claimant, after Carrier's determination to the contrary. Claimant failed to meet that burden here.

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 the Agreement was not violated.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of May, 1961.