

**Award No. 10029**

**Docket No. DC-9339**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**John Day Larkin, Referee**

---

**PARTIES TO DISPUTE:**

**JOINT COUNCIL DINING CAR EMPLOYEES LOCAL 370**

**THE NEW YORK CENTRAL RAILROAD**

**STATEMENT OF CLAIM:** Claim of Joint Council Dining Car Employees Local 370 on the property of the New York Central System for and on behalf of Second Cook George Francis, that he be paid rate of second cook, round trip New York to Chicago, Train 67-68, February 15, 1955 when Carrier violated the agreement in not promoting claimant to vacancy, in violation of rule 4 (g) (7).

**EMPLOYEES' STATEMENT OF FACTS:** On February 18, 1955 Organization filed the instant claim (Employees' Exhibit A). On February 24, 1955, Carrier's Superintendent Dining Service denied the claim (Employees' Exhibit B). That denial was appealed by Organization's General Chairman to Carrier's Manager Dining Service, the highest officer designated on the property to consider such appeals (Employees' Exhibit C). The denial of the claim was confirmed by the official appealed to on April 15, 1955.

The facts in this claim are undisputed. They are:

(1) A vacancy occurred in regularly assigned crew train 67 on February 15, 1955 in the position of second cook. Claimant was the regularly assigned third cook.

(2) Carrier did not advance claimant to fill the vacancy one grade from third cook to second cook.

In handling on the property, Carrier alleged that its reason for not complying with the requirements of Schedule Rule 4(g)(7) was that claimant lacked fitness and ability to work as second cook on train 67. Claimant is rostered on Roster of Second Cooks, published January 1, 1955 as No. 45 with a seniority date of November 9, 1938; August 3, 1937 as third cook; June 25, 1937 as fourth cook on which date he entered Carrier's employ. The roster of that date contains a total of 118 second cooks.

**POSITION OF EMPLOYEES:** Rule 4(g)(7) of that agreement between the parties on file with this Board and incorporated herein by reference provides:

"In regularly assigned crews, vacancies expected to be of less than 30 days' duration in the classification of chef and second cook

**Award No. 6829, Third Division**

"In cases of this nature we cite the following as pertinent and applicable. 'It is the general rule, as established by awards of this Division, that in the first instance the employer must be judge of the fitness and ability of an employe if there is nothing in the rules of the parties' agreement abrogating it.' Award 6143, 5603, 4918, 2350, and 2031 of this Division."

**Award No. 6877, Third Division**

"It must be borne in mind that the decision as to Claimant's fitness and ability is made by supervisory officers of the Carrier who are responsible for placing employes with fitness and ability in important positions. It is a function of management to make all such decisions except as it may have limited itself by agreement. The effect of the controlling rules is—(1) that a reasonable basis must exist for denying promotion to an employe on the ground that he lacks fitness and ability, and (2) if fitness and ability exist, that the senior qualifying employe is entitled to it."

**Award No. 7037, Third Division**

"Whether an employe has sufficient fitness and ability to fill a position is usually a matter of judgment and the exercise of such judgment is a prerogative of the management. We have regularly held that unless it has exercised that judgment in an arbitrary, capricious or discriminatory manner, we will not substitute our judgment for that of the management."

**Award No. 7184, Third Division**

"It is unquestioned that a carrier has the right to determine the job content of a position as well as the qualifications required to fill a position."

It will be noted moreover that in the instant case the applicable agreement provides specifically (See Rule 4(a) quoted on Sheet 1 hereof) that "The exercise of seniority under any provision of this agreement is contingent upon the employes who seek to exercise such rights having fitness and ability for the position sought; the management to be the judge thereof."

**Conclusion**

For the reasons hereinbefore cited, Carrier respectfully submits that the claim of the Employes in this docket is without merit and should be denied.

All facts and arguments herein presented were made known to the Employes during the handling of the case on the property.

(Exhibits not reproduced.)

**OPINION OF BOARD:** Carrier's Train known as the Commodore Vanderbilt, with overnight Pullman service between New York and Chicago, is one of the higher class trains operating between these two major cities. It features a twin unit dining car on which an effort is made to provide superior food and beverage service.

At the time the present claim arose, the Kitchen Crew consisted of Chef Henry Franklin, Second Cook H. Jackson, Third Cook George Francis (the Claimant), and Fourth Cook R. Abrams.

On February 15, 1955, Second Cook Jackson was assigned to a temporary vacancy as Chef in another crew, thus creating a vacancy on the Second Cook position of the Commodore Vanderbilt. Claimant being the currently assigned Third Cook, with seniority as a Second Cook dating from November 9, 1938, expected to be advanced to fill Jackson's regular position as Second Cook. Because of reports which Carrier had received from Chef Franklin and other sources about the poor and indifferent work of Claimant Francis, he was not given the assignment. Instead, Fourth Cook Abrams, whose seniority as a Second Cook dated from June 18, 1943, was temporarily assigned to the Second Cook position. From this assignment, the claim now before us arose.

The pertinent provisions of the parties' Agreement are as follows:

"Rule 4 (a) Qualifications. The principle of seniority is recognized, but it will not be applied in such a way as to result in impairing the efficiency of dining service. The exercise of seniority under any provision of this agreement is contingent upon the employees who seek to exercise such rights having fitness and ability for the position sought; the management to be the judge thereof."

"Rule 4 (g) (7) In regularly assigned crew, vacancies expected to be of less than 30 days' duration in the classifications of chef and second cook (or third cook in a four man crew) will be filled by advancing each employee of a lower class one grade, if he possesses the required fitness and ability. The resulting vacancy will be filled from the extra list. Vacancies in these classifications which, account their lack of fitness or ability, cannot be filled by advancing employees in the crew, will be filled in accordance with the procedure set forth in Paragraph 9 hereof.

"In applying this rule, employees without seniority in the higher class will not be advanced in preference to available employees holding seniority in the higher class but currently working in a lower classification.

"Rule 4 (g) (9) In making up extra crews, vacancies expected to be of less than 30 days' duration in the classification of chef, second cook or third cook will be filled by assigning the senior available qualified employee then working in a lower classification, it being understood that an employee then working in a similar classification may be used. It is also understood that, for the classifications of second or third cook, an extra man may be used providing he holds seniority in such classification."

The language of Rule 4 (a) reserves to management the right to judge the fitness and ability of those employees who seek to exercise their seniority in filling such assignments. Thus, not only length of service, but also quality of service may be taken into account in making assignments of the kind here involved. That is not to say that one must always have the highest possible qualifications; but it does mean that the Carrier may exercise reasonable discretion in selecting the qualified employee who will not impair the efficiency of the dining service. The record before us does not suggest that this discretion was abused in this case.

It is evident that the Carrier did give consideration to Claimant's seniority as well as his fitness for the work to be done. On the basis of reports from fellow employes, who were in a position to know of Claimant's poor standards, the decision was made. There is no indication in the record that the Carrier had any other purpose in mind in making this assignment than the proper maintenance of "the efficiency of the dining service".

**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 Employee involved in this dispute are respectively Carrier and Employee 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 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois this 4th day of August, 1961.