# Award No. 10036
# Docket No. CL-12264

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

J. Harvey Daly, Referee

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## PARTIES TO DISPUTE:

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

## PACIFIC ELECTRIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4852) that:

(a) Carrier violated the Clerks' Agreement when it improperly assigned employe R. E. Gale to Job 39—Car Clerk—Los Nietos, under date of May 14, 1959, and,

(b) Carrier further violated the Clerks' Agreement when it arbitrarily dismissed employe R. E. Gale from the service of the Carrier on June 17, 1959, as a result of investigation held by the Carrier on June 10, 1959, and,

(c) Carrier shall be required to reinstate employe Gale to the service of the Carrier with seniority and all other rights unimpaired, and,

(d) Carrier shall be required to compensate employe Gale for all wage loss sustained as a result of this dismissal, from May 14, 1959 until restored to service by the Carrier.

OPINION OF BOARD: The Claimant, Richard E. Gale, became a Carrier employe on January 17, 1957, and at the time the claim arose he was a Car Clerk, extra unassigned employe on the Butte Street Yard Extra Board.

On May 6, 1959, the following notice was posted on the Bulletin Board:

"NOTICE NO. SUPT. — 48

"ALL CONCERNED

"The following position is open for assignment and bids will be accepted from employes on Roster 3, Operating Department, current issue.

"Bids must be received in the office of the undersigned by 12:00 noon, Tuesday, May 12, 1959.

| "Pos. No. | Title and Location | Daily Rate of Pay | Hours of Assignment | Days Off |
|---|---|---|---|---|
| 93 T | Car Clerk<br>Los Nietos | $19.00* | 4P-11:59P | Tues.<br>Wed. |

"T—Temporary, effective May 11, 1959

"*—Rate includes $1.04 cost of living adjustment.

"D. W. YEAGER
Superintendent"

No bids were received on the above bulletined position.

On May 14, 1959, the Carrier issued the following notice.

"ALL CONCERNED:

"The following are results of bids for positions advertised in Notices Nos. SUPT - 46, SUPT -47 and SUPT - 48, closing 12:00 noon, Tuesday, May 12, 1959 and Notices Nos. SUPT - 49, SUPT - 50 and SUPT - 51, closing Wednesday, May 13, 1959.

"Position of Regular Relief Agent No. 2, is hereby awarded to L. W. Gordon, Seniority December 30, 1949.

| "Pos. No. | Title and Location | Senior Qualified Applicant |
|---|---|---|
| 89 | Train Clerk<br>Los Nietos | Glen L. Wallis<br>Seniority—8-22-55 |
| 93 T | Car Clerk<br>Los Nietos | R. E. Gale 29-I<br>Seniority—1-24-57 |
| 11 | Rate and Revising Clerk<br>PE Central Accounting Bureau<br>Room 262, PE Building | No Qualified Bidders |
| 2 T | Rate and Revising Clerk<br>Gardena | No Qualified Bidders |
| 4 T | Rate and Revising Clerk<br>Whittier | No Qualified Bidders |
| 3 T | Chief Yard Clerk<br>Butte Street | S. H. Weisberg<br>Seniority—8-18-41 |
| 44 T | Interchange Clerk<br>Butte Street | E. G. Brinkman<br>Seniority—12-7-45 |

"D. W. YEAGER
Superintendent"

On May 12, 1959, Superintendent D. W. Yeager sent the Claimant a telegram instructing him to contact Mr. L. H. Cobb, Chief Yard Clerk, Butte Street Yard, before 4:30 P. M., on May 13, 1959.

On May 13, 1959, at 9:55 A. M., the Claimant called Mr. Cobb and was told by the latter to report to Los Nietos Yard at 3:00 P. M. (PST) to take over the duties of Position 93-T, effective May 14, 1959.

On May 14, 1959, the Claimant telephoned and informed Mr. Cobb that he would be unable to report for duty on Position 93-T on May 14, 1959, because he did not have a car and there was no public transportation out to Los Nietos.

On May 14, 1959, the Carrier's record showed that the Claimant has been assigned to position 93-T under Rule 29 (i).—which reads as follows:

> "In event no bids are filed for bulletined positions the Carrier may assign the junior qualified unassigned employe within the scope of the roster where the vacancy exists or where the new position has been created and such employe will thereafter be considered the employe regularly assigned to such position."

Under date of June 4, 1959, the following registered letter was sent to the Claimant:

"Mr. Richard E. Gale
2048½ West 73rd Street
Los Angeles, California

"Dear Sir:

"This is to advise that you are hereby suspended from the service of Pacific Railway Company, effective Thursday, June 4th, and until further notice.

"The specific charges being:

"That you failed to report for duty on Thursday, May 14th, at 3:00 p.m., P.S.T., on Car Clerk's position at Los Nietos Yards which was assigned to you under Rule 29-I on Superintendent's Bulletin No. 48, dated May 6, 1959, with bid closing at 12:00 noon, Tuesday, May 12, 1959;

"That you were absent from duty without permission from proper authority from May 14th to June 4th and that you failed to call in to explain this continued absence.

"The investigation concerning the about subject will be held in Room 224, Pacific Electric Building, Los Angeles, at 10:00 a.m., D.S.T., Wednesday, June 10th, at which time and place you are requested to be present.

"The above investigation will be conducted pursuant to provision of Rule 42—2-A of current agreement between Pacific Electric Railway Company and Employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

"You are entitled to representation at outlined in the above agreement. You are also entitled to secure any necessary witnesses, if you so desire.

"Yours truly,

/s/ D. W. Yeager

"cc: Mr. L. R. McIntire
Mr. L. H. Cobb
Mr. R. V. Rachford"

The Claimant and his representative, Mr. J. A. Lewis, Assistant General Chairman, BRC, attended the investigation which was conducted by Mr. E. F. Harrison, Supervisor Freight Protection, Merchandise and Station Service. The Claimant testified in his own behalf.

Under date of June 17, 1959, the Carrier sent the following letter to the Claimant:

"PERSONAL

"Mr. Richard E. Gale
2048-½ West 73rd Street
Los Angeles, California

"Dear Sir:

"This has reference to investigation held in my office June 10, 1959, in connection with charges preferred against you in Mr. Yeager's letter dated June 4, 1959, relative to your failure to report for duty on Thursday, May 14, 1959, on Car Clerk's position at Los Nietos Yards which was assigned to you under Rule 29-I.

"The Pacific Electric Railway Company finds that the charges in this case have been sustained and this is to notify you that you are hereby dismissed from the service of the Company, effective as of this date. Copy of transcript is enclosed as per your request.

"Yours very truly,

/s/ E. F. Harrison

"copy: Mr. R. V. Rachford—Copy of transcript attached.
Mr. L. R. McIntire— " " " "

Under date of July 28, 1959, the following letter of appeal was directed to the Carrier:

"Mr. D. W. Yeager, Superintendent
Pacific Electric Railway Company
610 South Main Street, Room 224
Los Angeles 14, California

"Dear Sir:

"This is an appeal from decision of Mr. E. F. Harrison, SFPM& SS, dismissing from service of Carrier Mr. Richard E. Gale, Clerk,

Roster No. 3, by letter dated June 17, 1959, pursuant to investigation held Wednesday, June 10, 1959 concerning charges preferred in your letter dated June 4, 1959.

"If you will review the transcript of investigation, you will note that the Organization proved beyond controversy the fact that Mr. Gale was improperly and illegally assigned to the Position of Car Clerk, Job No. 93-T, at Los Nietos by the Carrier, pursuant to Bulletin SUPT - 48 dated May 6, 1959.

"The position of the Organization as outlined by Assistant General Chairman J. A. Lewis on Pages 15, 16 and 17 in particular is here reiterated. In brief, it is the position of the Organization that the Carrier, having violated Rule 29(i) in the manner proved in the investigation, as a result of misapplication and violation of other rules therein cited, commits an abuse of discretion in dismissing the employes.

"Kindly advise that Mr. Gale will be returned to service of the Carrier with all seniority rights unimpaired, and compensated for wages lost as result of his suspension from service and subsequent dismissal, or set date for conference.

"Yours very truly,

/s/ R. V. Rachford
General Chairman

"cc—Mr. E. F. Harrison"

The record contains evidence that further conferences were held and correspondence exchanged between the parties in as ascending level of importance until all grievance and appeal procedural rules were complied with.

**DISCUSSION:** In this case the Carrier claimed that their actions were in conformity with all current regulations; and that the Claimant failed to report for duty on an assigned position; and that the Claimant was absent without proper permission from May 14th to June 4th, 1959.

The Organization contended that the Carrier violated Rule 29(i) by improperly and illegally assigning Claimant to Position 93-T—because there were properly qualified employes, who were junior to the Claimant, on Roster 3; that one of them, specifically Mr. William G. Friend, should have been assigned to the position in question; that the Claimant did not refuse to fill the position; and that the Claimant was properly relieved from duty by Mr. Cobb.

Some contentions which appeared in the Ex Parte Submission or in the Briefs of the Carrier and the Organization were disregarded because they were not raised on the property.

First—let us consider whether or not the Carrier violated Rule 29(i) which reads as follows:

"In event no bids are filed for bulletined positions, **the Carrier may assign the junior qualified unassigned employe within the scope of the roster** where the vacancy exists or where the new position has been created and such employe will thereafter be considered the em-

ploye regularly assigned to such position." (Underscoring supplied by Referee.)

The record indicates that on May 14, 1959, when the Carrier posted its notice, (Employes' Exhibit No. 2),—assigning the Los Nietos position to the Claimant—that the names of J. F. Yanez and W. G. Friend were on Roster 3. The record further indicates that both the Messrs. Yanez and Friend were not only qualified to work Position 93-T at Los Nietos but also were junior to the Claimant in seniority. The seniority dates of the three men are as follows:

(Claimant) R. E. Gale—1-24-1957

J. F. Yanez—3-4-1957

W. G. Friend—3-9-1957

Mr. Martin in his testimony for the Carrier stated that the Messrs. Yanez and Friend had been dropped from the Roster, "for failing to return to duty after being notified." However, Mr. Martin failed to explain that the Messrs. Yanez and Martin were on the Roster at the time Position 93-T was assigned to the Claimant, and they (Yanez and Friend) were not dropped from the Roster until May 21, 1959.

Therefore, from the Roster existing on the date in question (5/14/59)—it is evident that Position 93-T should have been assigned to Mr. Friend. It is also equally clear, that the Carrier did not comply with the provisions set forth in Rule 29(i).

Although the Board's determination regarding the Carrier's violation of Rule 29(i) makes it unnecessary to consider the question of whether or not the Claimant failed to report for duty on an assigned position. The Referee would, however, like to comment that it was indeed unfortunate that Mr. L. H. Cobb, Chief Yard Clerk, and the man who could have answered that question, was not called on to testify.

In fact, in answer to Mr. Lewis' initial question that Mr. Cobb be available as a witness Mr. Harrison replied: "Mr. Cobb will not be available for any questioning at this investigation and we do not intend to use him as a witness." Again when Mr. Lewis persisted and said "that we have some questions to ask Mr. Cobb which may be pertinent to the defense * * *" Mr. Harrison replied: "As I stated before, we do not intend to have Mr. Cobb here as a witness for the company * * *"

Did Mr. Cobb accept the Claimant's excuse for not reporting—namely—that the Claimant had no private or public means of transportation to Los Nietos? If he did—the Carrier's refusal to call Mr. Cobb as a witness is understandable. If he didn't accept the Claimant's excuse—the Carrier's action is not having Mr. Cobb testify is baffling.

After carefully and objectively studying, analyzing and evaluating the record, briefs, awards cited and presented, the Board rules that the Carrier violated the Clerks' Agreement—specifically Rule 29—(i)—when it improperly assigned the Claimant to Position 93-T.

The Claimant must, therefore, be reinstated to the service of the Carrier with seniority and all other rights unimpaired. However, no back compensation will be paid the Claimant because he was an unassigned employe on the Extra

Yard Clerk Board and one cannot determine with certainty where, when, and how much he would have worked. In such situations—the question of physical fitness and ability to work must be considered in relation to jobs' available. Furthermore, there was no proof offered as to the Claimant's compensatory loss.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 violated.

AWARD

The claim is sustained as outlined above.

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.