

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

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

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4934) that:

(1) The Carrier violated the rules and provisions of the Agreement when on March 7, 8, 9, 10, 11 and 14, 1960 they used a junior clerk from the furloughed list to fill the temporary position of assistant car record clerk on the Butte, Anaconda & Pacific Railroad at Anaconda, Montana.

(2) That the Carrier shall now be required to compensate senior furloughed Clerk Harold J. Loranger \$18.62 per day for each of the dates mentioned above.

EMPLOYES' STATEMENT OF FACTS: On March 4, 1960 Carrier advertised the position of assistant car record clerk in the auditor's office in Anaconda, Montana on Bulletin C-16-60. Concurrently therewith the Carrier issued a note attached to the bulletin assigning C. M. Jones, Furloughed Clerk, with a seniority date of November 10, 1955 to the temporary position pending the outcome of the bulletin. The Claimant, Mr. Loranger holds a seniority date of September 6, 1955. He was also assigned to the furloughed list and was qualified, ready and available to fill the temporary position. It is our contention that Mr. Loranger should have been used to fill the temporary position by virtue of the fact that he was qualified and senior to Mr. C. M. Jones.

There was another employe on the furloughed list by the name of Mr. King who holds a seniority date of August 7, 1955. This employe was senior to both Mr. Jones and Mr. Loranger, however the Carrier's representative, Mr. Kelly approached Mr. King and by an oral agreement Mr. King relinquished any claim to the temporary position which existed as a result of Bulletin C-16-60. This left Mr. Loranger senior and in line to fill the temporary position.

(3) The carrier respectfully submits to the Board that even if a violation of the working agreement is found, the claim still should be declined since it is not made in the name of the senior, available, qualified, furloughed clerk.

OPINION OF BOARD: The Carrier advertised the position of Assistant Car Record Clerk, and concurrently issued a note attached to the bulletin assigning a furloughed clerk, junior in seniority to the Claimant to the temporary position pending the outcome of the bulletin. From a review of the record, it appears that the Carrier first offered this position to another employe, who was in fact senior to the Claimant, but upon his declination, it was given to the employe junior to the Claimant.

The Carrier contends that the Claimant was not qualified. Petitioner counters by asserting that his qualifications were never questioned on the property, in consequence of which, the Carrier is now estopped from asserting this as a defense. We have carefully reviewed this record and do not find it essential to a final adjudication of this case to rule on this precise point. The question of whether the Petitioner was or was not qualified, was at best alluded to very slightly in this record. A very brief letter from the Carrier to the Claimant simply states that the claim is denied because the Petitioner was not "the senior available qualified person." The question of qualification is also mentioned in the Carrier's original submission to the effect that it was Management's judgment that he was not qualified because he never worked in any of the sub-departments of the Auditor's office or Accounting Department.

There is no question that Management can and must exercise its judgment as to an individual's fitness or capability. However, when it chooses to do so, they have the responsibility of presenting to this Board a substantive body of evidence to substantiate the position taken. The mere assertion that he had never worked in a particular department since he was employed by the Carrier, falls far short of the required evidence to enable this Board to sustain the Carrier's position. There is no dispute between the parties that the Claimant is senior to the employe selected by the Carrier. The burden of proof shifts, once the charge of unfitness for a position is made by Management, to Management to prove at least a prima facie case of incompetence or unfitness; it then becomes incumbent upon a Petitioner to refute by a preponderance of evidence, such a charge. We have diligently searched this record for evidence to justify the Carrier's position. We have been unable to find such evidence. The Carrier also defends its position by alleging past practice, but again we refer to the record for the required evidence in support of this defense and find it lacking. We therefore conclude in view of the foregoing reasons that the Petitioner rightfully should have been given this position in accordance with the seniority rules. We find the Carrier's action arbitrary and violative of the Agreement. Accordingly we sustain the claim.

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 Employes involved in this dispute are respectively Carrier and Employes 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

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1964.