

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Edward A. Lynch, Referee

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**PARTIES TO DISPUTE:**

**JOINT COUNCIL DINING CAR EMPLOYEES, LOCAL 495**

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY**

**STATEMENT OF CLAIM:** Claim of Joint Council Dining Car Employees Local 495 on the property of the Chesapeake & Ohio Railway Company for and on behalf of Waiter Walter H. Jones that he be paid the difference between the rate of waiter and waiter-in-charge from May 5, 1965, until Carrier awards bulletined position of waiter-in-charge to Claimant as provided in the scheduled rules, account of Carrier awarding assignment in said bulletin to a junior employe in violation of the Agreement.

**EMPLOYEES' STATEMENT OF FACTS:** The basic facts underlying this case are not in dispute. Claimant, with a seniority date of October 11, 1942, bidden on a permanent position of Waiter-in-Charge, which was, however, awarded to a junior employe. Under date of May 20, 1965, Employes filed time claim on behalf of claimant, which was denied initially and on final appeals on the property (Employes' Exhibits A, B, C, D, E and F).

(Exhibits not reproduced.)

**CARRIER'S STATEMENT OF FACTS:** There is on file with the Third Division, National Railroad Adjustment Board, agreement effective April 16, 1938, reprinted March 15, 1955, covering dining car cooks and waiters on the Chesapeake District of The Chesapeake and Ohio Railway Company. Such agreement is controlling in this case and is made a part of this record by this reference.

Walter Harrison Jones was employed by the Carrier as dining car waiter on October 11, 1942, and roster for such waiters prepared as of January 1, 1965, attached as Carrier's Exhibit 1, shows Jones' seniority as waiter from that date.

Attached as Carrier's Exhibit 2, Sheets 1 and 2, is Bulletin No. 33 of April 21, 1965, advertising vacancy as waiter-in-charge and addendum thereto awarding such vacancy. The vacancy for waiter-in-charge in this instance was on an important run on main line train Nos. 3 and 4 between Charlottesville, Virginia, and Charleston, West Virginia.

Application for such vacancy as waiter-in-charge was received from Waiter Jones within the prescribed time, along with similar applications from other employes. When the bidding period was up, the applications or bids were reviewed and it was found that from a standpoint of seniority, Jones was the senior waiter making application.

It was decided as a result of such further trial that the Carrier could not under any circumstances thereafter properly use Jones for waiter-in-charge work without great detriment to its services, operations, and patron interest.

When the bidding period under Bulletin No. 33 was up, Jones was found to be the senior waiter making application, but because of the conditions outlined above, he was found not to possess sufficient ability to properly fill the position of waiter-in-charge.

The next senior employe was C. M. Ray with a seniority date one day behind that of Jones. Ray, like Jones, had been given opportunity on several occasions to work temporarily or extra as waiter-in-charge. It had been found that Ray could do the necessary work of supervising others, ordering foodstuffs, materials, and supplies, and properly handle the revenues accruing to the Carrier on the diner to which assigned. Having sufficient fitness and ability, and being the senior applicant, the vacancy was awarded to Ray in the manner prescribed by the collective bargaining rules. Ray went to such assignment and has performed it in proper manner.

The facts in this case having thus been stated, the Carrier will now outline its position.

(Exhibits not reproduced.)

**OPINION OF BOARD:** The claim herein is based upon the fact that Claimant was not awarded a position of waiter-in-charge, for which he made application, but the position was awarded to a junior employe.

The Carrier defends the awarding of the position to the junior employe on the grounds that Claimant did not have sufficient fitness and ability to properly perform the work of waiter-in-charge.

Rule 10(a) of the applicable Agreement provides:

"(a) Rights to positions (except supervisory positions, including Traveling Chefs, Traveling or Instructing Waiters) shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority will govern—the Superintendent Dining Car Service to be the judge as to fitness and ability."

This Board has consistently held that whether an employe possesses sufficient fitness and ability for a position sought is a matter for determination by the Carrier and such a determination, once made, will be sustained unless there is a showing that the action was arbitrary or capricious. In this case the Petitioner has not established that the action of the Carrier was arbitrary, capricious, or designed to circumvent the Agreement. The claim will, therefore, be denied.

**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 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 29th day of September 1966.