

NATIONAL RAILROAD ADJUSTMENT BOARD**THIRD DIVISION****(Supplemental)**

Daniel House, Referee

PARTIES TO DISPUTE:**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES****THE CINCINNATI UNION TERMINAL COMPANY****STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood (GL-5237) that:

(1) Carrier violated the Rules Agreement at Cincinnati, Ohio, when effective with January 5, 1962, it assigned Lead Clerk position No. N6, an X(3) position in the Ticket Office, to Mr. John C. Grefer in lieu of assigning it to Mr. Melvin Rawlings, and

(2) That Melvin Rawlings (the senior qualified applicant) be paid for the difference in rate of pay for the days per week not used as Lead Clerk as long as the present rate applies and for any change in rate in the future so long as this violation continues, and

(3) That Melvin Rawlings be paid for a full day's pay at the Lead Clerk rate for every one of his rest days, Sunday and Monday, account his being off while a junior man works these days, so long as this violation continues, and

(4) That Louetta Perkins, Catherine Gerdes, Lillian Wilson, Jerry J. Kuley, Robert Mitchell, Thomas Collins, Rebecca Mayo, and E. A. Cromwell be paid the difference in pay allowed each and the pay each would have received had Melvin Rawlings been awarded the Lead Clerk position.

EMPLOYEES' STATEMENT OF FACTS: Under date of December 27, 1961, Lead Clerk Position No. N6 (an X(3) position) was advertised for bid on Bulletin No. 7 in accordance with prevailing practice. The applicants were as follows:

Melvin Rawlings	— Seniority date 5/30/42
Louetta Perkins	— Seniority date 8/20/42
James S. Dorger	— Seniority date 4/23/43
Sara E. Armsey	— Seniority date 9/ 1/43
John C. Grefer	— Seniority date 10/ 1/51
Russel J. Ross	— Seniority date 11/15/56

The claim was docketed by General Chairman, E. J. Hoffman, as item No. 5 in his letter dated June 14, 1962 (Carrier's Exhibit No. 12), which was acknowledged in Manager G. S. Gray's letter dated June 21, 1962, (Carrier's Exhibit No. 13), and final conference was held on June 26, 1962.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier argues that because the Claim was erroneously and improperly handled, the Board should dismiss it for want of jurisdiction. The improper filing and untimely expansion claimed by Carrier do not raise, strictly speaking, jurisdictional questions, and are not such questions that they may be raised for the first time at any stage of the proceeding. Carrier argues: that Item 4 of the Claim, when it was part of the original and concededly timely filed claim, was improperly and indefinite money claim in behalf of improperly unnamed Claimants; then, that as the claim progressed on the property, it was belatedly changed and expanded by the naming of some, but not all, of the Claimants' named in the claim as it was again expanded in presentation to us. The record shows that Carrier did not on the property raise any question that it was prejudiced in meeting the issue by the alleged indefiniteness either as to money or as to the identity of the Claimants.' That portion of the claim as it comes to us, we find, is in substance the same as it was in the original presentation: the addition of names to the identifying information originally in the claim does not create a new issue which Carrier had no full opportunity to meet on the property and the addition of names in no way expanded the claim prejudicially to Carrier. We will deal with the case on its merits.

Under date of December 27, 1961 Lead Clerk Position No. N6 (an X(3) position) was advertised for bid. Claimant Rawlings was the senior applicant; Grefer, a less senior employee, was awarded the position effective January 5, 1962. The position was vacant because the previous incumbent Wintermeyer, had voluntarily surrendered it; on granting his request to surrender the position, Carrier posted the bulletin of December 27th advertising the vacancy. Wintermeyer bumped Rawlings from his position; Rawlings bumped Claimant Perkins, who bumped Claimant Gerdes, who bumped Claimant Wilson, who bumped Claimant Kuley, who bumped Claimant Mitchell, who bumped Claimant Collins, who bumped Claimant Mayo, who bumped Claimant Payne, who bumped Claimant Cromwell. The record does not show whether Wintermeyer bumped Rawlings before or after or at the same time that Rawlings was refused the promotion to the position Wintermeyer was vacating. To support Item 4 of its Claim, Employees must not only prove that Rawlings was improperly denied the promotion, but also that he initiated the series of bumps after being bumped by Wintermeyer **because he had been refused the promotion**; Carrier's refusal to grant him the promotion might be said to be the direct cause of the series of bumps after Wintermeyer's bump of Rawlings if he had been refused the promotion before he bumped Perkins. Failure of Employees to introduce evidence to prove this essential fact in their case for Item 4 defeats that part of the Claim.

The record shows that starting with the letter of Employee's Division Chairman filing the initial claim and repeatedly thereafter on the property, Employees asserted that Rawlings was the senior **qualified** clerk, and that Carrier nowhere on the property denied that he was senior and qualified: we find that Rawlings was the most senior of the qualified applicants. Carrier posed the basic issue they argued in this case in Manager Gray's letter of May 25, 1962, reaffirming his previous decision to deny the Claim:

"We advised you in conference we were not in violation of the terms of the agreement as an X-3 position permits the Carrier to assign the best qualified applicant after conference with a duly accredited representative."

The issue joined on the property is not whether Rawlings was qualified, but whether Carrier had the right to select from among the applicants, the best qualified even though he was not the senior qualified applicant.

A special provision of the Agreement for X(3) positions appears under Rule 1:

"X(3). All Rules except Rules 13 and 17 will apply to positions designated as X(3). Note: Vacancies on positions designated as X(3) will be filled by the proper officer after conference with the duly accredited representative. Senior qualified employee in the district will be given preference."

The above quoted rule does not have the effect, as argued by Carrier, of removing X(3) promotions from the procedures and requirements of other rules in the Agreement dealing with promotions; by its terms, the application only of Rules 13 and 17 are exempted for X(3) positions, and all other rules are applicable. What the "Note" in Rule 1 does is add to the procedure for promotion, in the case of X(3) positions, that a conference be held with a duly accredited representative of the employees before Carrier on the basis of Rule 11 selects the applicant to fill the position. Rule 11 reads:

"Employees covered by these rules will be in line for promotion. Promotions, assignments and displacements shall be based on seniority, fitness and ability, fitness and ability being sufficient, seniority shall prevail. Management to be the judge, subject to appeal.

NOTE: The word 'sufficient' is intended to more clearly establish the right of senior employees to bid in a new position or vacancy where two or more employees have adequate fitness and ability. Employees declining promotion or declining to bid for a bulletined position, shall not lose their seniority."

There is nothing in the text of either Rule 1 or of Rule 11 to suggest that in the case of X(3) promotions, as distinguished from other promotions, Carrier has the right to pass the senior qualified applicant in favor of the best qualified applicant; there is no evidence in the record to show that the parties to this agreement so intended in the case of X(3) promotions. The record does show that Carrier never denied the correctness of Division Chairman Manning's repeated recital of the parties' agreement and practice in implementing the X(3) section of Rule 1:

"... the employee would make his wishes known that he desired an X3 position by submitting a bid for same in the usual proper manner. The department head and the duly accredited representative would then hold a conference and agree upon the senior qualified employee who submitted a bid. This has held good over the years and has worked out very well." (Emphasis by Referee.)

We find therefore that Carrier violated Rules 1 and 11 of the Agreement in failing to assign Claimant Rawlings, the senior qualified applicant, the X(3)

position in question, assigning it instead to Grefer because in its judgment he was the best qualified applicant.

Had Rawlings been properly promoted to the X(3) position it may be presumed that he would have worked that position on the days assigned to the incumbent of that position; the measure of his damages is properly the difference between what he would have been paid by Carrier for so working the X(3) position and what he was paid by Carrier for working as he did for the period beginning January 5, 1962, until the violation is cured. In making our award sustaining the Claim we will modify Items 2 and 3 of the Claim to award damages to Claimant Rawlings as set forth above.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Carrier violated the Agreement.

AWARD

Item 4 of Claim denied: Items 1, 2 and 3 sustained as modified in the Opinion above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of February 1967.