

Award No. 18607
Docket No. CL-18943

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

J. Thomas Rimer, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6818) that:

1. Carrier violated the rules of the Clerks' Agreement when, beginning January 18, 1969, it failed and refused to utilize senior furloughed employee A. A. Morales, to fill the vacancy on Group II position of Caller 1494, Kingsville, Texas.

2. Carrier shall now be required to compensate senior furloughed employee A. A. Morales eight (8) hours' pay, at straight time rate each day Saturday through Wednesday of each work week beginning January 18, 1969 through February 16, 1969, inclusive.

EMPLOYEES' STATEMENT OF FACTS:

1. The Crew Dispatcher's office at Kingsville Texas, consists of various positions, as follows:

Title	Hours	Rest Days	Days Worked Per Week
Crew Dispatcher No. 015	8:00 A. M.- 5:00 P. M.	Saturday & Sunday	7
Caller No. 1493	5:00 A. M.- 2:00 P. M.	Tuesday & Wednesday	7
Caller No. 1494	2:00 P. M.-11:00 P. M.	Thursday & Friday	7

Each of the above positions has a regular assigned meal period of one (1) hour each work day.

2. On January 18, 1969, Caller Abel Rios who was assigned to position of Caller 1494 was held out of service pending an investigation.

Dear Sir:

Please refer to your files G-3440 and G-3441 and our exchange of correspondence in connection with claim of furloughed Clerk A. A. Morales for eight (8) hours at the straight time rate each Saturday through Wednesday for the period January 18 through February 16, 1969, when it is alleged the Clerks' Agreement was violated because a junior employe was used to fill a vacancy on position No. 1494 (Caller) at Kingsville, Texas, and claim of furloughed Clerk A. A. Morales for eight (8) hours each work day beginning February 17, 1969, and continuing thereafter until he is assigned to position of Swing Clerk 2108-R at Kingsville, Texas.

This dispute centers on a determination of whether Clerk A. A. Morales is qualified to satisfactorily perform the duties of the Caller position at Kingsville, Texas. Superintendent Blassingame advises as follows under date of April 16, 1970:

"The duties of the Caller at Kingsville on Position No. 1494 consist of permitting crew members to mark up on the extra board in their proper positions, calling crews to deadhead and protect outlying jobs, arranging for transportation, permitting men to lay off, permitting men to exercise their seniority rights or "bump," and various other duties. Working from the Kingsville board are some 32 road and yard train and engine crews. In performing the duties mentioned above, it is necessary that the callers at Kingsville be familiar with the working agreements of the train and engine men.

I personally made an investigation of this matter at Kingsville and in checking with some of the people who were working at time of the alleged violation, I talked to Mrs. McNabb, who is now retired, and she stated that the chief crew caller at the time of the incident was Mr. Carmichael, and stated that she definitely knew that Mr. Carmichael disqualified A. A. Morales from Caller Position No. 1494 at Kingsville after he had worked on the job about 2 days.

Mr. Morales has remained dormant for many years and has not attempted to break in or qualify himself on this or any other position.'

In view of these facts we believe you will agree that the claim is without merit and therefore should be withdrawn.

Yours truly,

/s/ O. B. Sayers"

OPINION OF BOARD: The claim asserts that a junior employe was recalled from furlough to fill a temporary vacancy as Caller 1494 and that the Claimant, the senior employe, also on furlough, possessed the necessary fitness and ability for the job and should have been assigned to the job opening.

The Organization relies on Rule 19 "Reducing Force," paragraphs (d) and (e) which read:

"RULE 19 — REDUCING FORCE

(d) When forces are increased or vacancies occur, furloughed employees shall be returned, and required to return, to service in the order of their seniority rights. When a bulletined new position or vacancy is not filled by an employee in service senior to a furloughed employee who has protected his seniority as provided in this rule, the senior furloughed employee shall be called and assigned to the position.

(e) Furloughed employees failing to return to service within ten (10) days after being notified (by mail or telegram sent to the address last given) or give satisfactory reason for not doing so will be out of service."

In addition, and with substantially more documentation and cogent argument, it cites Rule 7 "Promotions, Assignments and Displacements," paragraph (a) which reads:

"RULE 7. PROMOTIONS, ASSIGNMENTS AND DISPLACEMENTS

(a) Employees covered by these rules shall be in line for promotion. Promotions, assignments, and displacements under these rules shall be based on seniority, fitness, and ability; fitness and ability being sufficient, seniority shall prevail, except, however, that seniority shall not apply in filling the positions named in Paragraph (c) of this rule. (In filling positions listed in Paragraph (c) of this rule preference shall be given to employees coming under the provisions of this agreement.)"

(b) The word "sufficient" is intended to more clearly establish the right of the senior employee to bid in a new position or vacancy where two (2) or more employees have adequate fitness and ability."

It seems clear that the contract requires that preference be given the senior employee in filling an opening if he can meet the minimum requirements of the job and not that he must be adjudged to have superior qualifications relative to a junior employee. In fact, there is nothing in the record as to the fitness and ability of the employee awarded the job.

The Organization has shown by competent evidence that the Claimant had successfully bid on the job of Caller 1494 at the same location as here involved in March 1961 and previously at other locations on the job Swing-Porter Caller. It is stated the Claimant's record, examined by a representative of the Organization, fails to reveal any disqualification, reprimand or disciplinary action taken against the Claimant and that the Carrier has produced no evidence to the contrary. It is thus argued that he has performed the work here in question, after his bid was accepted by the Carrier, and that he must be considered as having "sufficient fitness and ability" as well as the seniority to qualify under Rule 7.

The Carrier states repeatedly in the handling of the dispute on the property that the Claimant "had never been considered as being qualified to handle a Caller position, never indicated a desire to learn Caller work, and

had never requested permission to do so * * *." This statement or some paraphrase of the statement was continued unchanged as the Carrier's defense through an exchange of several letters and in conferences with the Organization up to the appeal to the highest officer. The reply to that appeal quoted from a letter from the Superintendent, to the effect that he had investigated the claim and found (1) that the Caller position at Kingsville (the location here involved) required a high degree of knowledge, apparently beyond that required of Callers at other locations and (2) that he had talked with a former employe who recalled that the Claimant had been disqualified by the Chief Crew Caller as Caller at Kingsville after he had worked on the job two days. Elsewhere in the record the Carrier denies that the Claimant had ever occupied the position.

The Carrier argues that absent a showing of capriciousness, prejudice, or other subjective reasons for disallowing the claim of the senior employe, the Board should not, and has not in a long series of awards, attempted to set aside the judgment of management in a matter of this kind.

In this case, however, the Carrier has not placed in the record any documentation or other evidence of any value to support its position that the Claimant did not possess "sufficient" qualifications for the opening. It has merely asserted this to be a fact, which does not make it so. Neither has it produced any records from its own files to rebut or refute the records placed in evidence by the Organization.

It is the considered opinion of this Board, based on a preponderance of the evidence, that the Carrier did improperly deny the Claimant the position of Caller 1494, Kingsville, Texas, and that he should be compensated for the period of the denial as stated in the claim or for such other period of denial which can be substantiated and agreed upon by the parties.

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 as set forth in the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1971.

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