

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 38380  
Docket No. CL-39343  
08-3-NRAB-00003-06216  
(06-3-216)

The Third Division consisted of the regular members and in addition Referee Robert E. Peterson when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union  
(CSX Transportation, Inc.)

STATEMENT OF CLAIM:

"Claim of the System Committee of the TCU (GL-13128) in behalf of Yolanda Smith.

1. I was awarded position 0191-R02, effective November 25, 2004, based on my seniority. Then for some unknown reason, CSX denied the position.
2. CSX gave no written notice, cited any Guidelines, Rules or Regulations as to why a legitimate awarded bid that was placed in CSX Transportation computer system was denied.
3. CSX then gave my awarded position away to J. R. Lauren who had NO active seniority days at the time I was awarded position 0191-R02.
4. Accord to Northwest Seniority Roster, J. R. Lauren seniority did not start until 11/29/04, 4 days after I was awarded position 0191-R02.

I complied with all the procedures to obtain this position. I followed all the Guidelines, Rules and Regulations when I bided on position

0191-R02, only to have taken away unfairly, which is UNJUST TREATMENT.

Copies of all documents will be submitted as proof."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This dispute involves the contention of Claimant Y. D. Smith that after being awarded a position based on seniority, she was thereafter denied the position for "some unknown reason," with the Carrier giving the position to a new employee who had no seniority at the time, and that such Carrier action constituted unjust treatment.

On September 1, 2004, the Carrier determined that it had a need for an employee to fill a position of Clerk/Shipper-Receiver in its Purchasing and Materials (P&M) Department at Cleveland, Ohio. The Carrier thus posted a bulletin advertising the position to then current employees. Position No. 0191-R02 went no bid when the advertisement expired. The P&M Manager thereafter filed a request with managerial officials for authority to fill the position with a new hire. Approval of the new hire request was subsequently granted, and the Human Resources Department commenced the hiring process.

On November 5, 2004, the position was offered to a new hire, J. R. Lauren. In acceptance of the position, Lauren was provided opportunity to give three weeks notice to his then employer of a termination of that employment relationship. Lauren reported for work on the Clerk/Shipper - Receiver position on November 29, 2004 and his name was placed on the clerical seniority roster.

Due to administrative error, and notwithstanding the P&M Department had requested a new hire to fill the no bid position, the position continued to be advertised through September and October, without bid. However, when it was again advertised on November 17, 2004, for the 12<sup>th</sup> time, the Claimant, the incumbent of a Relief Clerk position in Cincinnati, Ohio, bid for and was awarded the position by bulletin dated November 24 effective November 25, 2004. When the advertising error came to light on November 28, the bulletin and award were cancelled. On November 29 a Manpower Support Clerk spoke with the Claimant and informed her of the administrative error and the reason for her removal from the position.

On December 17, 2004, the Claimant submitted a formal complaint to the Manager Manpower Support alleging that her seniority rights had been violated and she had been unjustly treated. The Carrier conducted an Unjust Treatment Hearing in pursuance of Rule 44 on January 31, 2005, with the Claimant and a representative of the Organization in attendance.

That the Claimant had been fully informed as to the reason for the bulletined position being cancelled is evident from the transcript of the Unjust Treatment Hearing. A statement from the Clerk who had put out the bulletin was read into the record. This statement, addressed "To Whom It May Concern," reads as follows:

"On November 29, 2004, I received a phone call from employee Y. D. Smith, id #519020. She wanted to know why her award was cancelled. I told her that it was cancelled, per Labor Relations, because CSX has hired someone in that area and the position should not have been advertised for the 12th time. Therefore, the bulletin and the award had to be cancelled because it was no longer a vacancy. I apologized for the inconvenience and told her to keep an eye out for other jobs that might be advertised in Cleveland. Ms. Smith did not seem upset

on the phone and she was very courteous. She thanked me for the information and we discontinued the phone conversation.”

The Hearing transcript does not show the Claimant to have taken exception to the content of the above quoted statement.

In presentation of the basis for her complaint, the Claimant asserted a belief that “the job was in the computer;” she got the job “fair and square” under the applicable Rules Agreement; and, in taking her off the position and giving it to a new hire she was unjustly treated. In this latter regard, the Claimant presented into the record a 15-page document that she had compiled, offering the following as a part of her testimony:

“Okay. This is my statement of unjust treatment. I thought long and hard before I bided on the Cleveland position. I was given up the balance of my five-party money, which is \$10,000, for a chance to go back home. When I was awarded the position, accepted November 25, 2004, I was really happy. It has been over 12 years and now I am finally going home; however, CSX did the unthinkable. They denied me the position I bid upon fair and square. That is why I, Yolanda Smith, and my seniority June 6, 1978, were both unjustly treated based on the following facts:

One, I was awarded Position 0191-R02, Clerk-Shipper/Receiver located at Cleveland, Ohio, effective November 25, 2004, based on my seniority.

If you look at page one you will see that it is an employee bid entry. My name is on it, \* \* \* \* \*

I feel that CSX officials misused their authority as officers of the Company to deny me the legitimate position 0191-R02 that was accepted and awarded fairly under Rule 5C. Also, CSX did not comply with Rule 5A, which is Bulletin of New and Vacant Positions, or 14A, Seniority Date Established. Looking through the new CSXT

North Clerical Agreement, I found no rule or rules giving CSX the right to take a legitimate awarded position away from a senior clerk and then hand over that same position to a person who was not on any CSXT seniority roster. In my opinion, \* \* \* \* \* Not only has CSX willfully violated my seniority, CSX has discriminated against me.”

Following the Unjust Treatment Hearing, the Assistant Division Manager, who had served as the Hearing Officer, issued a decision wherein he concluded:

“The transcript clearly shows that there was no discrimination intended against you. Instead an administrative error was corrected in the most expeditious manner possible. In addition there was no loss of wages or employment opportunities. You remained on your position in Cincinnati. You lost no time. You were again placed in line for the final Five Party payment of \$10,000.00 that you would forfeit by bidding to Cleveland.

There has been no showing of any unjust treatment toward you when the company corrected an error under the collective bargaining agreement.”

In progression of the claim, the Organization presented the following argument to the Carrier in a letter of December 13, 2005:

“The Organization does not agree with the Carrier’s statement that Claimant Smith was not discriminated against by the Carrier. The Organization and the Carrier have negotiated a set of rules known as the Collective Bargaining Agreement. These rules were negotiated to help the Carrier and Employees on operating in day-to-day business. When these rules are broken by the Carrier or the Employee, there is a penalty to be paid or served.

The Carrier put the position up for bid and the Carrier awarded the position to Claimant Smith. Claimant Smith followed the procedures and guidelines under the Agreement. The Carrier admitted it had

erred, and as such should be subjected to a penalty for their mistakes. Mrs. Smith followed the rules of the Agreement, and the Carrier did thereby discriminate against her. The CSXT Agreement calls for Claimant Smith to be placed on the position awarded to her, and her rights were violated.

Furthermore, the Organization does not understand why Claimant Smith was given an unjust treatment hearing when this Agreement violation clearly falls under Rule 45 – Claims for Compensation. Rule 44 states:

‘An employee who considers himself unjustly treated, otherwise than covered by these rules.’

The Carrier once again has erred by granting an unjust treatment hearing for a clear rules violation covered by the Agreement.”

As concerns this latter Organization argument, the record shows that upon receipt of the Claimant’s December 22, 2004 letter, arrangements were made for an Unjust Treatment Hearing. The Unjust Treatment Hearing was held on January 31, 2005, or over five weeks after the complaint of unjust treatment was filed. In an opening statement, the Hearing Officer clearly stated that it was being convened pursuant to Agreement Rule 44. Neither the Claimant nor her chosen representative is shown to have expressed any exception at the Hearing to the complaint being handled as an unjust treatment matter under the provisions of Rule 44. Further, it is evident that opportunity was provided at the Hearing for a full and complete showing of facts that formed the basis for the complaint and the rationale for the actions of the Carrier.

In the circumstances, it must be recognized that by pursuing the complaint as “unjust treatment” under Rule 44 there was mutual acknowledgment that the issue was not being progressed as a compensatory claim under Rule 45 of the Agreement. This, notwithstanding that various Agreement Rules were introduced or referenced at the Unjust Treatment Hearing in support of the complaint.

As to the merits of the complaint of unjust treatment, there is no question in study of all arguments and contentions of the parties that this case differs somewhat from the usual failure to assign the senior bidder to an advertised position. Although the Board is aware that the Carrier should have handled certain actions differently under the Agreement, we find that the Claimant was not discriminated against or unjustly treated. In making this decision recognition is given to the fact that the Carrier had attempted to fill the position at issue commensurate with the Agreement. It was only after the position went no bid by then current employees that the Carrier took steps to fill the needed position by hiring a new employee. Unfortunately, through unforeseen or unusual administrative error, the position continued to be advertised while the Carrier was recruiting and placing a new hire on the position. It must also be recognized that it was only after a 12<sup>th</sup> and inadvertent bulletining of the position, or over two months after the initial posting had gone no bid, that the Claimant then decided to bid for the position in alleged desire to return to Cleveland after reportedly having been away from that work location for 12 years.

Accordingly, based on the record in its entirety, the Board concludes that an affirmative award is not warranted. This decision is not to be construed as establishing a precedent in cases where different factual circumstances are involved. Certainly, had the Claimant made a more timely exercise of seniority such as, for instance, placing a bid for the position prior to the recruitment and hiring of a new employee or not having waited more than two months until the posting of a 12<sup>th</sup> bulletin to bid on the position, the Board's decision in this case may well have differed.

### AWARD

Claim denied.

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**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of December 2007.