

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

DISPUTE.—

"Claim of the General Committee of The Order of Railroad Telegraphers, Southern Pacific Company (Pacific Lines), that J. D. Hunter, Agent-Telegrapher on the Western Division, is entitled to the assignment as Agent at Melrose, California."

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

The carrier and the employee 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.

The parties to said dispute were given due notice of hearing thereon.

As a result of a deadlock, Willard E. Hotchkiss was called in as a referee and upon request of carrier a second hearing was held on June 30, 1936, at which the case was argued before the Division with the Referee sitting as a member thereof.

The parties have jointly certified the following statement of facts and the Third Division so finds:

"In June 1931 the agency at Melrose, Western Division, was advertised in accordance with the provisions of Rule 19 (c), Telegraphers' Agreement.

"B. J. Fitzgerald, seniority date October 12th, 1922, was assigned. J. D. Hunter, seniority July 24th, 1909, bid on the position but the carrier declined to assign him to the position."

There is in evidence an agreement between the parties bearing effective date September 1, 1927, from which the following rules are quoted:

"RULE 19

QUALIFICATIONS FOR AND BULLETINING OF VACANCIES

"(a) Telegraphers will be regarded as in line of promotion advancement depending upon faithful discharge of duties and capacity for increased responsibility. Where ability is sufficient, seniority will govern.

"(b) The Company, through the proper official, will determine the fitness of telegraphers to fill all positions in this agreement.

"Any telegrapher feeling dissatisfied on account of such decision will have the right of appeal to his Superintendent and if still dissatisfied with decision may make written appeal of his case direct or through the Order of Railroad Telegraphers in regular order to the General Officials of the Company.

"(c) Telegraphers will be notified by the Company every thirty (30) days when positions are created or vacancies occur on the divisions where located, and telegraphers may file applications for the same within ten (10) days from the date of notification. All applications for vacancies to be made in duplicate, one copy of which will be returned to applicant previous to close of bulletin, as an acknowledgement of receipt. Assignment to be made within ten (10) days after close of bulletin, and except

in emergency successful applicant placed on position within thirty (30) days thereafter. If not placed thereon within the thirty (30) day period, employee will thereafter be compensated on basis of not less than the rate of position to which assigned.

"RULE 44

"CLASSIFICATION OF POSITIONS

"Positions marked with a star (*) are filled jointly by the Traffic and Operating Departments. These positions will be bulletined when vacancies occur, and telegraphers will have the right to make application for same, and their applications will be considered and given preference; all things being equal, fitness and ability, together with seniority, to govern.

"Where positions are designated by two stars (**) the concurrence of the Traffic Department shall be secured to appointments before assignments are made.

"Monthly rated positions are exempt from hours of service, overtime, and call rules. Positions followed by a cross (+) are exempt from hours of service, overtime, and call rules, but agents at such stations will not be required to perform service in excess of an average of eight hours per day in any one month, which, however, does not restrict such agents from attending meetings, etc., in connection with their official duties, outside of working hours."

Melrose is a two star agency located in Oakland, a city of some 300,000 population. When the agency at Melrose was advertised for bids eleven applications were received. Mr. Fitzgerald, to whom the assignment was made, was at the foot of the list in point of seniority and the claimant in this case, Mr. Hunter, was fifth on the list in seniority. Petitioners show that Hunter has been an employee of the company as telegrapher and agent since July 24, 1909, and contend that he has an experience record which qualifies him for the agency at Melrose.

The carrier contends that Paragraph (b) of Rule 19 reserves to the management the determination of the fitness of applicants for the position, and that the second paragraph of Rule 44, dealing with two-star stations, provides specifically that as to such stations the concurrence of the proper traffic official must be secured before an assignment is made. The carrier further contends that Hunter did not possess the necessary fitness for the position; that the positions he had occupied were at comparatively small stations, the most important of which provided less than one-twentieth of the revenue produced by the station at Melrose; and furthermore, that his experience had been at points in rural communities where there was not intensive competition, whereas Melrose is a highly industrialized center with aggressive competition.

There is an extensive documentary record and the case has been twice argued before the Division, once with the Referee sitting. While there has been more or less of mutual criticism between the parties as to their respective handling of certain details, the basic facts, rules, and principles upon which decision must rest are clear.

The rules, and similar rules of other agreements, have been frequently before the Division and several decisions concerning the circumstances in which management may or may not reject a senior employee in favor of an employee who is his junior have been rendered.

In Award 345 (TEE-188) this Referee held that this carrier was in error in passing over J. W. Hodge and assigning a man who was junior to Mr. Hodge as agent at Alturas. In that case the carrier itself had later assigned Mr. Hodge to the position and the Referee found that there was not sufficient change in either the duties of the position or the qualifications of the claimant to justify different action at the earlier date from that taken later. In Award 345 (TEE-188) the Referee quoted with favorable comment from the opinion of Referee Samuel in Award 108 (TE-91) in which he used this language: "Under the ordinary seniority rule it is reasonable to expect that employees will seek advancement and in most instances the applicants will not be entirely familiar with the position."

Earlier, in Award 44 (TE-14), under a rule reading "Applications will be considered according to ability and where qualifications are equal seniority will prevail" Referee Samuel had held that the senior claimant "should be given

opportunity to demonstrate his fitness though the junior possibly had more experience." The award in that case was conditioned upon continued satisfactory performance.

The principles laid down in these cases apply to typical and normal promotions and have the effect of preventing the rejection of a senior claimant on any minor or whimsical grounds. These decisions compel management to give *sincere and serious consideration to seniority rights*. However, agreements are not one-sided in respect to seniority. The current agreement as above noted, provides in Rule 19 as follows:

"(a) Telegraphers will be regarded as in line of promotion, advancement depending upon faithful discharge of duties and capacity for increased responsibility. Where ability is sufficient seniority will govern.

"(b) The Company, through the proper official, will determine the fitness of telegraphers to fill all positions in this agreement."

Rule 44 outlines special procedures in respect to star and two star stations, but the final decisions of management, under whatever procedure made, are subject to appeal, first within the company, and under the Amended Railway Labor Act, to this Board.

The essence of the seniority rule is that management shall give *genuine open-minded consideration* to the just claims of senior employees without being prevented from rejecting senior employees who are not suitably qualified for the positions they are to occupy in favor of junior employees who are so qualified, management to be the judge, subject to appeal.

In none of the cases above noted was the difference in the requirements and responsibilities of the position claimed and the positions previously held by claimants such as to create serious presumption that the claimant could not fill the position claimed in an acceptable manner. Moreover, there was no question of the fitness of the claimants in those cases from the standpoint of general ability and capacity for increased responsibility. Sound as the Referee believes the principles laid down in the cases under discussion to be, he considers it obvious that these principles cannot be invoked in support of a claim to pass over normal gradations of promotion to a position in an essentially different class from any position a claimant had previously held.

Considering the present claimant's record in the most favorable light and discounting any tendency the carrier may have shown to magnify the weaknesses of his record; considering also the obvious importance of the agency at Melrose in comparison with the positions previously held by claimant; considering further that the Melrose agency is not only far more important but a different type of agency position from those previously held by claimant, the Referee is of the opinion that no qualified and prudent official responsible for personnel would assign claimant to the Melrose agency except under the force of necessity or compulsion. The spirit and letter of the agreement contemplate that when a vacancy occurs senior employees will be given consideration ahead of junior employees and that the highest available person on the seniority roster will be assigned if qualified. However, the agreement does not contemplate that a person will be assigned whose record does not indicate a capacity for increased responsibility commensurate with the requirements of the position to be filled. It is not within the purview of the agreement, nor is it a function of this Board under the Amended Railway Labor Act to compel appointment of a senior employee who is lacking in necessary qualifications.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 17th day of November, 1936.