

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

PARTIES TO DISPUTE:

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

WHEELING AND LAKE ERIE RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of Frank J. Kreps, Frank Keever, and Edward Kornowski that the rules of agreement had been violated by the Wheeling and Lake Erie Railway Company declining to consider their application for position, rate \$185.00, in District No. 5.

"Also claim that said position be now filled by the senior qualified employe making application therefor, and that employes be reimbursed for wage losses suffered as a result of the actions of the carrier."

EMPLOYEES' STATEMENT OF FACTS: "Mr. F. T. West, Freight Claim Adjuster, employed in the Freight Claim Department of the Wheeling and Lake Erie Railroad took his retirement from service as of December 31, 1938. On December 20, 1938, Mr. West's position, paying \$199.50 per month, was bulletined and awarded to Mr. I. G. Stewart on the same date.

"On December 21, 1938, Mr. I. G. Stewart's position, paying \$199.50, was bulletined and awarded to Mr. O. L. Horwath on the same date.

"On December 22, 1938, Mr. Horwath's position, paying \$185.00 per month, was bulletined and awarded to Miss Laura Jirele on December 23, 1938.

"On January 1, 1939, Miss Laura Jirele's position of stenographer (excepted from our agreement) was then assigned to Mr. Melvin Dodge, a non-employe.

"On January 23, 1939, Miss Laura Jirele requested Management to return her to her former excepted position and on February 1, 1939, Miss Jirele was so returned and the position held by her was then awarded to Melvin Dodge on February 1, 1939.

"Applications for position vacated by Miss Jirele on February 1, 1939 were filed with Mr. H. Kaser, head of the Freight Claim Department, under date of February 2, 1939 by Frank J. Kreps (holding seniority dating as of February 1, 1920) and Frank Keever (holding seniority dating as of June 1, 1920) both from Seniority District No. 2 and an application from Edward Kornowski (holding seniority dating as of March 6, 1929) from Seniority District No. 3; both of these districts being identified with the General Office in which District No. 5 where the vacancy existed is located.

"These applications were declined by Mr. Kaser, head of the Freight Claim Department.

"Protests were made, hearings were held, and appeals taken up to and including the Assistant General Manager, who sustained the decision of

"In view of the above, the Committee contends that inasmuch as the exception to Rule 1 sets up a specific list of positions not covered by our agreement and inasmuch as Rule 20 provides for displacement rights **only** for the employees holding excepted or official positions in cases where their positions are abolished, disqualified, or displaced; the Committee, therefore, feels that such employees, who are not covered by our promotion, bulletin, filing application, or transfer rules, should hold no priority rights over any employees who are covered by our agreement.

"This being a fact, then Mr. Horwath's position (in the absence of any other employees in District No. 5 under our agreement being available for filling of said position) should have first been accorded employees covered by agreement from other districts who filed application for this position, before giving consideration to non-employees or employees excepted from our agreement.

"The Committee further holds that Management in ignoring the application of employees coming within our agreement by assigning non-employees or employees holding excepted positions to the position vacated by Mr. Horwath has in fact violated Rules 4, 8, 9, 16, 17 and 20 of our Agreement.

"The Committee, therefore, prays that your honorable Board will concur with our holdings and that you will allow our claim as set forth in our petition.

"It is affirmed that all data submitted herein, in support of employees position, have been submitted to the carrier and has made part of this claim, which is supported by our attached exhibit covering the correspondence between Assistant General Manager, H. H. Henderson, and General Chairman of the Brotherhood of Railway Clerks, Wm. J. Winston."

POSITION OF CARRIER: "1. Under the terms of the agreement between the carrier and its clerks effective May 1, 1937, there is no merit in this claim. Strictly speaking no question of seniority rights is here involved. Rule 16 provides that employees in one seniority district seeking positions in another district, shall, if qualified, be given **consideration over non-employees**. Claimants were not employed in Seniority District No. 5 and consequently their rights, if any, are defined by Rule 16. Claimants' applications for the position of claim investigator were given consideration but were passed over in favor of Mr. Dodge's application because of the numerous considerations involving the small size of this department, including, among other things, the fact that Mr. Dodge had had experience through previous employment in the department and had become familiar as stenographer with the work of all the other members of the department.

"An additional reason for awarding the position to Mr. Dodge was his ability to do the stenographic work during the absence of the only stenographer employed in this department.

"2. The claim for wages is entirely too broad. If the National Railroad Adjustment Board should make an award according to the terms of the claim, the award would require payment to more than one employee. As only one position is involved which could have been held by only one employee, the damage, if any, has been suffered by only one employee and can amount to no more than the difference between the pay of a claim investigator and the pay actually received by the person entitled to the position."

OPINION OF BOARD: Under the provisions of Rule 16, each of the three claimant employees in this dispute should have been given consideration over non-employees for the position of Claim Investigator, for which they each had filed an application. This rule needs, however, to be considered in conjunction with other rules in the application of the agreement to the circumstances of this case.

It is not disputed that the position of Claim Investigator in District No. 5, here involved, comes under the scope of the agreement as provided by Rule 1.

Rule 9 prescribes the method by which employees in District No. 5 may exercise their seniority rights to this position of Claim Investigator. Rule 17 (b) provides the manner in which this position may be filled by employees from other seniority districts who desire same, if no applications are received for such positions after bulletining per Rule 9.

It must be concluded that the agreement does provide that after no applications as prescribed in Rule 9 were received for this position in District No. 5, when employees from other districts requested assignment to the position, they were entitled to consideration for assignment thereto.

Being eligible for consideration to this position, which comes under the agreement, but lacking seniority rights therefor by reason of its existence in the district in which these claimants were without seniority, they were, nevertheless, entitled to consideration for the position, and on that basis one of them should have been given preference in the assignment over Dodge, who held no rights under the agreement to the position.

The Board, therefore, holds that one of these three claimant employees should have been assigned to the position of Claim Investigator, rate \$185.00 per month, when it was awarded to Melvin Dodge, February 1, 1939. The carrier, having the obligation and the privilege in the first instance to select one of the claimant employees, if capable, for the position from districts other than District No. 5, shall now proceed to do so, it being understood that the particular claimant to whom the position is awarded shall be considered as having been entitled to it as of February 1, 1939, and shall be compensated for wage loss suffered to the extent of the difference between that which he would have earned on the position of Claim Investigator, at the rate of \$185.00 per month, since February 1, 1939, and the amount which he earned in other employment.

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 employee 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 one of the claimants for the position of Claim Investigator, rate \$185.00 per month, in District No. 5, should have been given preference in assignment thereto over Melvin Dodge, assigned thereon February 1, 1939, and the carrier shall now select and assign such claimant, if capable, to that position and reimburse him for wage loss sustained as outlined in the above opinion.

AWARD

Claim to be disposed of as outlined in opinion and findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 1st day of March, 1940.