

Award No. 1172
Docket No. TE-999

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

I. L. Sharfman, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers, Southern Pacific Company, Pacific Lines, that Telegrapher J. G. Reistetter be assigned to position of telegrapher-teletype Clerk No. 6, 'H' Office, Sacramento, as advertised by Circular No. 274, July 1, 1937, account senior applicant and that he be compensated for any wage loss suffered account Carrier's refusal to make such assignment."

EMPLOYEES' STATEMENT OF FACTS: "Telegrapher J. G. Reistetter with seniority date of January 22, 1920 made application for position of Telegrapher-Teletype Clerk No. 6, 'H' Office, Sacramento, Calif., as advertised in Circular No. 274 of July 1. Telegrapher R. L. Lochridge, with seniority date of October 19, 1936 and junior to Reistetter, was assigned."

CARRIER'S STATEMENT OF FACTS: "'H' Telegraph Office, located at Sacramento, California, is under the jurisdiction of Superintendent of Telegraph, A. W. Flanagan.

"On June 27, 1937, position of Telegrapher-teletype Clerk was established in 'H' Office, Sacramento, hours 12:00 Midnight to 8:00 A. M. There was no employe on the Sacramento Division seniority roster coming within the scope of Telegraphers' Agreement who had the necessary qualifications to properly operate a teletype machine, available when this position was established, and it was therefore necessary to place an inexperienced man (Hecker) on the position on a temporary basis, until such time as a qualified employe became available.

"On July 12, 1937, Telegrapher J. G. Reistetter lost his position as telegrapher at Roseville through the abolishment of said position, and on July 15, 1937, although not having passed examination test on the teletype machine, he was permitted to displace Extra Telegrapher Hecker from position of telegrapher-teletype clerk in 'H' Office, Sacramento. On July 19, 1937, or just as soon as it was possible to do so, Telegrapher Reistetter was given a standard examination test on teletype machine for the purpose of permitting him to demonstrate his ability or inability to handle teletype work. This examination test demonstrated that he did not have sufficient ability to handle the work properly.

"On July 20, 1937, Telegrapher Lockridge, junior to Telegrapher Reistetter was assigned to said position of Telegrapher-teletype Clerk in 'H' Office, Sacramento by bulletin, he being the senior qualified applicant for the position. However, due to the necessity of using Telegrapher Lockridge on more important duties, and there being no qualified extra telegrapher available to

"Rule 19-(b) provides that the Carrier shall determine the fitness of telegraphers to fill all positions covered by the Agreement, there being no mention made of how that determination shall be arrived at, therefore, before assigning an employe to a position attached to which are duties of a nature not previously coming within the scope of his experience, it is clearly the right of the Carrier to require such an employe to demonstrate his ability. For this Board to hold otherwise, would contravene the provisions of Rule 19-(b) of Telegraphers' Agreement and add to said Agreement and Rule, language which had not been arrived at through the medium of negotiation by the parties at interest. That the Board is not vested with such authority cannot be controverted, as the members of the Board have themselves so held as reflected by Awards 237, 238, 239 and 240, wherein it is stated:

"This Division is without authority to supply a rule, where the parties have neglected to negotiate one—"

"Carrier also directs Board's attention to Awards 346, 396 and 692, National Railroad Adjustment Board, which have a direct bearing on this dispute.

CONCLUSION

"The Carrier requests the Board to deny this claim on the following basis:

"1. The Carrier was within its rights in requiring Reistetter to demonstrate his fitness before assigning him to the position, which he failed to do.

"2. To sustain claim of Petitioner would impair Rule 19, Paragraphs (a) and (b), and change an agreement which has been negotiated by the parties at interest."

OPINION OF BOARD: While it is explicitly specified in the Agreement that "the Company, through the proper official, will determine the fitness of telegraphers to fill all positions in this agreement," the fitness thus to be determined is obviously related to the basic provision, immediately preceding, that "where ability is sufficient, seniority will govern." The controlling standard involved, therefore, by which both carrier and employes are bound, is one of sufficient ability, rather than any arbitrary standard of competence based upon the maximum performance or relative capacities of different employes; and in view of the varying degrees and kinds of skill necessary for different positions, the sufficiency of an applicant's ability must obviously be judged by the requirements of the particular position subject to bid. This interpretation of the governing rules does not deprive the carrier of such exercise of discretion as is contemplated by the Agreement, nor, though the rules make no mention of tests, does it render improper, in the absence of other evidence of sufficient ability, the carrier's resort to such tests as may enable it to determine whether or not the applicant possesses the necessary fitness for the position in question.

In the instant proceeding the position involved is one of telegrapher-teletype clerk. The bulletin specified that the "successful applicant . . . must be first class Morse operator qualified to do general office work and operate the sending side of the Teletype." It is thus clear that the applicant's capacity as a telegrapher, as well as his competence to operate the teletype on the transmitting side, is relevant to the determination of the sufficiency of his ability for the position; and the sufficiency of his competence with respect to the teletype portion of his duties must be governed by the relatively limited requirements in this connection of the particular position at issue rather than by the much greater requirements of an exclusive teletype position in the general telegraph office. Since, though telegraph duties constituted by far the major portion of the applicant's tasks, no question has been raised as to his ability as a telegrapher, and since, in addition, he has actually held the position involved, performing teletype as well as telegraph duties, for a period of 42 days without any convincing showing of a lack of reasonable and hence sufficient competence, the fact that he did not attain the estab-

lished grade in the formal test on the teletype, as required for other and non-combination positions as well as the one here involved, cannot be deemed to overturn the conclusion of this Board that he has proved by actual performance of the duties of the position that he possesses **sufficient ability**, as specified in the controlling rule of the Agreement. In other words, under the particular circumstances of this case it must be held that the carrier exceeded the legitimate discretion reserved to it to determine the applicant's fitness for the position; and since his ability is thus found to be sufficient, seniority must govern.

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 employe involved in this dispute are respectively carrier and employe 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 evidence of record discloses a violation of Rule 19-(a) of the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 2nd day of August, 1940.

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**INTERPRETATION NO. 1 TO AWARD NO. 1172
DOCKET TE-999**

NAME OF ORGANIZATION: The Order of Railroad Telegraphers

NAME OF CARRIER: Southern Pacific Company (Pacific Lines)

Upon application of the representatives of the Carrier and the Employees involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

Reistetter's unjustified disqualification deprived him not only of Position No. 6, but of Position No. 5, involving the same duties at the same place and at the same hours, which resulted from the readjustment of positions effected December 25, 1937. There is no reason to believe that Reistetter would not be occupying Position No. 5 at the present time if he had not been improperly disqualified for Position No. 6; and since his protest against disqualification, which finally resulted in Award No. 1172, was pending at the time Position No. 5 (as well as Position No. 4) was bulletined, he should not justly be estopped from asserting his claim to that position because of failure to apply for it. He appears, therefore, to be entitled to Position No. 5 and to all wage losses sustained since his original disqualification. Raborn's displacement rights in these circumstances, as of the present time, must be governed of course by the rules of the Agreement.

Referee I. L. Sharfman, who sat with the Division, as a member, when Award No. 1172 was adopted, also participated with the Division in making this interpretation.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 14th day of January, 1941.