

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

UNION RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees on the Union Railway that the Carrier violated the Clerks' Agreement:

1. When on August 31st, 1942, it awarded the position of "Accountant," rate \$185.00 per month, in the Auditor's office to an employee who does not come under the Clerks' Agreement and failed and refused and continued to refuse to award the position to an employee that does come under the agreement and who was qualified and filed application for same.

2. That Clerk, Mr. W. L. Crittendon shall be placed upon the position of Accountant and reimbursed for wage loss suffered to the extent of difference in the amount of \$185.00 per month and \$6.44 per day, or \$164.22 per month, equalling \$20.78 per month retroactive to August 31, 1942.

EMPLOYES' STATEMENT OF FACTS: On August 20th, 1942, the Auditor at Memphis, Tenn. issued a notice, copy submitted and designated as Exhibit "A," addressed to Messrs. W. Wicker, R. Smith, K. G. Williams and G. F. Painter advising of changes upon clerical positions in his office, namely,

Accountant—Rate \$185.00 per month

Secretary to Auditor—\$155.00 per month

Stenographer-Clerk—\$140.00 per month

and that applications would be received not later than August 25th.

In the second last paragraph of Mr. Pennebaker's notice he said:

"This notice is given in compliance with our agreement with the Clerks' organization to notify heads of other departments of vacancies in this department, but it is only fair to state that positions in this department generally will be filled first, if possible, from employees now in this department and we are the sole judge of the qualifications of those chosen to fill such positions."

On August 24th, 1942, per copy submitted and designated as Exhibit "B," Clerk, Mr. W. L. Crittendon wrote Mr. Pennebaker and filed application for the position in which he said:

"Please accept this as my application for position as Union Railway Accountant, vacated by Mr. Pybus."

of other classifications and expert operation of a typewriter. All vouchers and bills are made by this accountant, together with their proper distributions as well as pay roll distributions, various other statistical statements, custodian of leases, contracts, etc., and varied other duties.

Mr. Crittendon's experience on positions held in the local freight office did not give him any experience whatever to qualify in any way whatever for this position. On the other hand, the party to whom the position was awarded had had more than six years of experience in the office where many of the duties of the "Accountant" position were observed and learned and sufficient knowledge of the Interstate Commerce Commission classifications gained to qualify for the position. It is the policy of the joint accounting department that all employees therein, as soon as employed, begin learning the classifications of accounts in order to be prepared to qualify for vacancies in the office, for as previously stated, there are no other sources of supply readily available.

Clerks in the Mechanical Department and Store Department and in the Engineering Department who make pay roll and material distributions under the supervision of the accounting department and in accordance with the I. C. C. classifications mentioned, do gain some experience which might qualify them for minor positions in the joint accounting department, but no work in the local freight office would give employees there experience to qualify them for these positions.

Carrier therefore contends that:

1. Rule 1 clearly and definitely excepts this position from all provisions of the agreement without qualification, including rules governing seniority, rates of pay, etc.
2. It completely followed the agreed practice as outlined in Mr. Roll's letter of October 5, 1941 in filling this position as well as in anything that might be covered by Rule 14.

Therefore, the claim of the Clerks' Organization should be denied in full.

OPINION OF BOARD: This case involves the filling of a vacancy in position of accountant, an excepted position under Rule 1 of the Clerks' Agreement. The Carrier assigned Pearl Goddard to the position, a person having no seniority rights under the Clerks' Agreement. The Clerks' Organization contends that the position should have been awarded to W. L. Crittendon, a clerk with seniority dating from November 11th, 1927, under the Clerks' Agreement. The claim is grounded on Rule 14 of the Clerks' Agreement and an agreed-to interpretation of the rule made on October 5th, 1941.

The applicable part of Rule 14 states: "When vacancies occur in official or excepted positions, which are not covered by agreements with other employees, such positions will be open to employees coming under this agreement."

The pertinent part of the agreed-to interpretation of October 5th, 1941, says that "our officers at Memphis have agreed . . . in the future when there is a vacancy for a clerk on a position not covered by the agreement, to handle the matter with the head of each department for the purpose of selecting a clerical employee from one of the departments to fill the excepted position, if the employee with the necessary qualifications is available and desires the position referred to."

It is the contention of the Carrier that the position was open to clerks under the agreement and that the three clerks who applied, including Crittendon, were not qualified for the position. The Carrier insists that it is entitled to assign a person outside the Clerks' Agreement to the position under such circumstances.

We think the rule and agreed-to interpretation means that employes under the Clerks' Agreement are eligible to apply for this excepted position. It means also that if employes under the Clerks' Agreement qualify, one of them will be assigned in preference to a person not under the Clerks' Agreement. It likewise means that if no employe under the Clerks' Agreement can qualify, the Carrier may fill the position from any available source. It can readily be seen that the issue must turn on the question whether or not Crittendon was qualified for the position.

Whether an employe is qualified for a position is a matter exclusively for the Carrier to determine, and such a determination once made will be sustained unless it appears that the action of the Carrier was capricious or arbitrary. See Award No. 2299. The very fact that such positions were excepted from the Clerks' Agreement indicates that it was the intention of the parties that seniority and other rights protected by the Clerks' Agreement were not to affect a position such as we have here. The qualifications of applicants were to be considered and the Carrier in the exercise of its managerial judgment is the party charged with making the final choice; and if it appears that such decision is supported by evidence and is not the result of capricious or arbitrary action, this Division cannot substitute its judgment for that of the Carrier by assigning an employe to the position whom it considers qualified but which the Carrier does not.

The record before us will not support a finding that the Carrier acted capriciously or arbitrarily in denying the applications of the employes under the Clerks' Agreement. This being true, an affirmative award cannot be made.

The Clerks' Organization asserts that the Carrier acts capriciously in filling excepted positions and then defends its action on the basis of a want of sufficient qualification on the part of the ignored employes. The potentialities of a situation of this kind are great when in the hands of an unscrupulous employer. But on the other hand, the exercise of managerial judgment is a mental process hidden within the mind, difficult of discernment or proof. And yet the parties left this right of decision with the Carrier,—a matter which we as interpreters of the Agreement cannot change. The difficulty encountered in showing capricious or arbitrary action does not warrant us in construing the Agreement differently. We must merely assume that the parties considered these difficulties of proof when they executed the Agreement as they did.

Much is said in the record about the following language contained in the auditor's letter of August 20, 1942: "* * * but it is only fair to state that positions in this department generally will be filled first, if possible, from the employes now in this department * * * ." This is, of course, a misinterpretation of the Agreement. But this statement, made before it acted upon the sufficiency of the qualifications of the applicants, is not sufficient to overcome the action of the Carrier upon the information it had before it. We cannot overturn a proper result merely because the Carrier may have misconstrued the Agreement on some previous occasion. We are obliged to say that the record does not affirmatively show a violation of the Agreement by the Carrier.

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 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 there was no violation of Rule 14 of the Clerks' Agreement and its agreed-to interpretation of October 5th, 1941, established by the record.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of October, 1943.