Award No. 2491
Docket No. CL-2519

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

LEHIGH VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Carrier violated and continues to violate the Clerks' Agreement:

1. When on November 9, 1942, it arbitrarily appointed Joseph A. Messitt to vacancy on position of Asst. Chief Clerk in the Superintendent's Office located at Wilkes Barre, Pa., and failed and refused to appoint one of the senior qualified applicants to said position in accordance with agreement rules, and

2. Said position shall now be filled by appointing one of the senior qualified applicants to the position.

3. That such senior qualified applicant and all other employes affected by reason of said arbitrary violation be reimbursed for all monetary loss suffered retroactive to November 9, 1942.

EMPLOYES' STATEMENT OF FACTS: Effective October 16, 1942, Mr. William Keiber, Chief Clerk to Superintendent Mitten, retired on pension; the Chief Clerk vacancy was filled by the appointment of Assistant Chief Clerk, Mr. William L. McGarry. The vacancy created on the Assistant Chief Clerk position, which is known as a "Star" position and included on the list of agreed upon excepted positions, required that it be filled in accordance with the provisions of rule governing "Star" positions, reading as follows:

> "Star"—"Rules of agreement March 1, 1939 apply to these positions except Rule 42 (Bulletins). Vacancies will not be bulletined but will be filled after agreement between the Head of Department and the Representatives."

On October 15, 1942, Superintendent Mitten sent the following telegram to General Chairman Buckley, reading:

"CAK Wilkes Barre, Pa. 10-15-42

J. J. Buckley
124 Dundee St.,
Buffalo, N. Y.

Would like to arrange prompt meeting to discuss vacancy as Assistant Chief Clerk in my office.

F. S. Mitten."

tunately, the Superintendent has since died, but we have his written statement under his personal signature that this was the case. There was no violation of the Clerks' Agreement in the appointment of Mr. Messitt to this position, but, on the contrary, the rules of their agreement were carried out. Therefore, the claim should be denied.

OPINION OF BOARD: On October 16, 1942, the position of Assistant Chief Clerk in the Superintendent's Office at Wilkes-Barre, Pa., became vacant. Three employes, Chris G. Rafferty, Ambrose J. McGarry and Joseph A. Messitt, with seniority in the order named, were applicants for the position. The carrier appointed Messitt and the Clerks' organization contends that the appointment was in violation of the current agreement.

The position to be filled was designated as an excepted position. The agreed upon excepted list contained the following provision:

> "Rules of Agreement of March 1, 1939, apply to these positions, except Rule 42, Bulletin. Vacancies will not be bulletined, but will be filled after agreement between the head of department and the representatives."

The employes contend that Messitt was not agreed upon and that Rafferty or McGarry had sufficient fitness and ability, and they being senior to Messitt, one of them should have been appointed to the position.

As to the contention of the carrier that Messitt was agreed upon, the record shows that conferences were had by the carrier and the Clerks' organization. The organization urged the selection of Rafferty, the senior applicant but the carrier declined to appoint him on the ground that he did not have sufficient fitness and ability. The carrier presented the names of McGarry and Messitt and now contend that the Clerks' organization agreed that if Rafferty could not be appointed, then either McGarry or Messitt were satisfactory. The carrier relies upon a letter signed by Superintendent Mitten, now deceased, who stated therein that such an agreement was made at the conference. The employes' representatives at the conference deny that any such understanding was had. The burden of proof being upon the carrier to establish the agreement, we are obliged to say that an agreement upon the appointment of Messitt was not established.

The record further shows that the carrier declined to appoint Rafferty because he lacked fitness and ability to fill the position. Mr. Rafferty's service record is in evidence together with a showing that he filled the position of Assistant Chief Clerk for about two months and was then displaced. The carrier says that he was unable to handle the work and would have been disqualified if the displacement had not occurred. The carrier is the first to determine fitness and ability, and when fitness and ability of an employe are found wanting, the employe has the burden of overcoming that decision by proof. The record is not sufficient to sustain that burden as to Rafferty.

As to McGarry, it is urged that he had sufficient fitness and ability as shown by his service record and by the fact that the carrier stated that he was so qualified in a letter appearing in the record. The carrier later asserted, however, that he was not qualified by sufficient fitness and ability and did not appoint him. The record in our judgment is insufficient to show that the carrier erred in refusing to appoint McGarry.

But assuming that one of the two senior applicants had sufficient fitness and ability to fill the position as the employes contend, we are still of the opinion that an affirmative award cannot be made. The position in question was an appointive one to be made after agreement by the head of the department and the representatives of the employes. This is in direct conflict with and supersedes the seniority provisions of the agreement. It does not appear that a failure to agree upon an appointee was contemplated as no procedure for filling the position was provided when such a situation arose. We are

convinced therefore that no basis for claim exists unless an employe agreed upon was denied the position or unless prejudice, favoritism or bad faith is shown.

Under this interpretation of the rule, the question of sufficient fitness and ability and the incidental questions pertaining to seniority of employes not appointed is pertinent only in determining whether prejudice, favoritism or bad faith was present. Conferences were held in an attempt to agree upon an employe for the position without success. It appears to us that these conferences were instigated and participated in by the carrier in good faith and without such prejudice or favoritism as would discredit the action taken.

It must be borne in mind that the carrier is primarily charged with the efficient and safe operation of its railroad. In its managerial capacity, it is charged with the selection of competent employes. Except where it has limited itself by contract, the right of selection is wholly within the discretion of the management. Effective management cannot tolerate a situation where a failure to agree, such as we have here, could indefinitely hinder or delay the work assigned to important positions. Certainly it is not the province of this Board to fill such positions when the parties fail to agree. Such a procedure could result in tremendous harm. It is just as well settled that the employes do not have the right ex parte to dictate who shall occupy the position. A rule of necessity requires that the carrier shall have the right to fill the position under such circumstances and unless it appears that the appointment was the result of prejudice, favoritism or bad faith, we cannot say that the contract has been violated.

It may be as we have indicated that the contract did not contemplate a situation arising such as we have here and for that reason provisions governing such a situation were not included. But we cannot supply that which the parties have not put in the agreement. We can only interpret the contract as it is and treat that as reserved to the carrier which is not granted to the employes by the agreement.

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 the current agreement by the carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 6th day of March, 1944.