Award No. 2556

Docket No. TE-2579

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ATLANTA, BIRMINGHAM AND COAST RAILROAD

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atlanta, Birmingham and Coast Railroad:

(a) That the carrier violated the terms of the telegraphers' agreement when it refused to assign E. C. Cox, the senior competent applicant, to the position of agent-telegrapher at Talladega, Alabama, bulletined for bids August 6, 1942, and instead assigned a junior employe to the position, who prior to and up until the time this vacancy occurred held an appointive position not incorporated in the telegraphers' agreement; and

(b) That E. C. Cox shall now be assigned to the position of agent-telegrapher at Talladega and be paid the difference between what he has earned since the violation occurred and what he would have earned had he been promptly and properly assigned to the position.

EMPLOYES' STATEMENT OF FACTS: An agreement is in effect between the parties bearing date of July 1, 1941, as to rules, and March 18, 1942, as to wage rates.

The position of agent-telegrapher at Talladega, Alabama, rate of pay, $189.00 per month, is covered by said agreement. A vacancy on this position occurred and was bulletined on August 6, 1942. Mr. E. C. Cox was the senior applicant but was denied the position.

Mr. G. F. Childs, who was junior in service to Cox, was awarded and assigned to the position bulletined. Prior to and up until the time this vacancy occurred Childs held an appointive position which was not covered by the telegraphers' agreement.

POSITION OF EMPLOYES: The position of agent-telegrapher at Talladega, Alabama, rate of pay, $189.00 per month, became vacant and was bulletined for bids on August 6, 1942, in accordance with the following governing rules of the telegraphers' agreement:

> "Article 3-(b). When vacancies occur or new positions are created, they will be bulletined within five (5) days and the employes will be given five (5) days in which to apply therefor. Such positions will be permanently filled within fifteen days after the vacancy occurs or new position is created."

The following applications for the position were received:

Name	Seniority
E. C. Cox	March 13, 1925
B. N. McCrary	August 9, 1926
G. F. Childs	October 4, 1927 (Employed as Traffic Agent)

which is made a part hereof, a copy of a letter dated March 26, 1943, from the Commercial Agent at Talladega to Mr. F. Astin, Manchester, Georgia, Superintendent.

POSITIONS OF CARRIER: 1. The Railway Labor Act as amended does not contemplate a delay of ten months between the denial of the appeal and the service of notice of intention to file an ex parte submission with the National Railroad Adjustment Board and the lapse of this period of time is an acquiescence of the correctness of the decision of the carrier which deprives the Board of jurisdiction.

2. The exercise of discretion by the Superintendent is contemplated under Article 2 (a) of the contract and there was no abuse of this discretion.

3. E. C. Cox does not have qualifications which are sufficient to justify his appointment to the position.

ARGUMENT

If a railroad is to tbe permitted to operate efficiently and render satisfactory service to the public, its officers must not be deprived of discretion in the choice of personnel, especially where the right to make such choice is reserved to the management by contract. See Award No. 396, Docket TE-329, decided March 2, 1937.

It is not the function of this Board to compel appointment of a senior employe who is lacking in necessary qualifications. See Award No. 346, Docket TE-191. It is neither fair, just nor equitable for an employe or his representatives aggrieved by a failure of a carrier to appoint him to a position to wait ten months after the denial of the appeal before serving notice of intention to file an ex parte submission of the case with this Board. Especially is this inequitable when a difference in pay would make it necessary for the employer to pay money for a service which it does not receive.

The facts set forth and as shown by the exhibits amply justify the carrier in its position and it is most respectfully submitted that no violation of the agreement has occurred.

OPINION OF BOARD: This proceeding involves an interpretation of Article 2 (a) of the Telegraphers' Agreement effective July 1st, 1941 and its application to a vacancy which occurred in the position of Agent-Telegrapher at Talladega, Alabama on August 6, 1942. The rule is as follows:

> "Employes will be considered in line for promotion to positions covered by this agreement, and where qualifications are sufficient, seniority will prevail; the superintendent to be the judge subject to appeal."

Under the agreement seniority is a valuable contract right belonging to the eligible employes, which yields only to a corresponding right on the part of the Carrier to require that applicants shall be sufficiently qualified. The right of the Carrier, acting through its superintendent, to determine the sufficiency of the qualifications of such applicants calls for the exercise of a sound discretion, since unreasonable or arbitrary action under such circumstances would destroy seniority. The inquiry must be whether the applicants, considered in the order of their seniority, possess sufficient qualifications to satisfactorily perform the functions of the position to be filled. The Carrier may not advance a junior applicant over his qualified senior merely because it is believed that the junior possesses superior qualifications. See Third Division Award No. 2534. This Board possesses power of review in such cases, not for the purposes of substituting its judgment for that of the Carrier official, but to ascertain whether there has been an abuse of discretion. In passing upon such an issue the Board will consider the facts properly in the record. The practice requires that all data submitted in support of the posi-

tion of a party must affirmatively show the same to have been presented to the adversary and made a part of the particular question in dispute. See Circular No. 1 issued October 10, 1934, reprinted February 1, 1939. This rule is as binding upon the Board as it is upon the parties.

When the position of Agent-Telegrapher at Talladega was bulletined for bids the following applications were submitted:

Name	Position	Seniority
E. C. Cox	Clerk-Telegrapher	March 13, 1925
B. N. McCrary	Clerk-Telegrapher	August 9, 1926
G. F. Childs	Traffic Agent	October 4, 1927

Subsequently, the General Superintendent advised the petitioner that Mr. Childs had been appointed because he was "better qualified for the job than Mr. Cox."

The record discloses that during his long term of service with the Carrier, Mr. Cox was, on nine separate occasions extending over a period of ten years, personally commended by the Superintendent for competency and efficiency and that he received no reprimands or demerits. In addition, Cox endeavored to qualify himself for promotion by taking correspondence school courses in traffic management and business law. Upon learning of this fact the Superintendent wrote:

> "I wish to advise that Mr. Cox is one of our valued employes and with the information furnished by you (to the effect that Cox had satisfactorily completed the course in traffic management) it will go a long way in consideration for promotion should conditions arise where we could give him something better than he has now."

It is enough to say in this connection that, standing alone and undisputed, the showing made by the petitioner would disclose, prima facie, that Mr. Cox was qualified for the position for which he applied.

Much of the evidence relied upon by the Carrier cannot be considered on account of its failure to comply with the express terms of Circular No. 1 heretofore referred to. While this rule may appear technical and harsh the sound reason for it is disclosed by the file before us. The Carrier rests its case principally upon the ex parte affidavit of its General Agent, made after the petitioner had given notice of its intention to file; and upon numerous letters written by citizens of Talladega a considerable time after the vacancy had been filled, commending the appointment of Mr. Childs. Such evidence is self-serving in character and does not aid the Board in determining the issue before it, which is, whether the Carrier's Superintendent abused the discretion with which he was clothed, as of the time he made the appointment in controversy. Subsequent events are not calculated to throw much light upon that subject. When the incompetent evidence in the record is discarded the conduct of the Carrier in advancing Mr. Childs over Mr. Cox is indefensable.

In view of the conclusions reached it is unnecessary to consider the petitioner's contention that under Articles 2 (c) and 3 (a) of the agreement, Mr. Childs was ineligible to bid while serving as a Freight Traffic Agent under an appointment not covered 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 the carrier violated the agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 11th day of May, 1944.