

Award No. 2990

Docket No. TE-2944

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Mart J. O'Malley, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY**

(Wilson McCarthy and Henry Swan, Trustees)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers, Denver & Rio Grande Western Railroad, that W. C. Pickens, the senior applicant for the position of Manager Wire-Chief, Salt Lake City, Utah, advertised for bids August 16, 1944, who was arbitrarily denied the position, shall be given a reasonable opportunity to demonstrate his "faithful performance of his duties and fitness for increased responsibility" in connection with said vacancy; that he be assigned thereto and be paid the difference between the position he now occupies and that of Manager Wire-Chief at Salt Lake City beginning thirty days from the date the Manager Wire-Chief position was advertised, and continuing until he is placed on the position.

EMPLOYES STATEMENT OF FACTS: A permanent vacancy of Manager Wire-Chief in the "UN" Salt Lake City Telegraph Office was advertised for bid to all employees of the Communications Department by Superintendent of Communications, Mr. W. W. Pulham's Bulletin No. 95 of August 16, 1944. Hours of service 7:30 A. M. to 3:30 P. M., rate of pay \$1.13 an hour. Expiration date of Bulletin August 26, 1944.

The following applications for the above stated position were received:

W. C. Pickens	seniority date	August 1, 1917
L. C. Mathewson	" "	June 30, 1923
A. C. Darrow	" "	October 8, 1923
E. T. Viebrock	" "	August 19, 1937
U. G. Horr	" "	January 26, 1938

E. T. Viebrock was permanently assigned to this position by Mr. Pulham's Bulletin No. 97 of September 15, 1944 over the protest of the Organization.

POSITION OF EMPLOYES: This claim is predicated on Rule 25-a of the current agreement which reads as follows:

"**RULE 25—PROMOTION AND SENIORITY.** (A) Employees will be regarded as in line of promotion dependent upon the faithful performance of their duties and fitness for increased responsibility; where these are sufficient, in the judgment of the officers, seniority will have preference.

(B) Employees transferred at their request and proving incapable of holding such position will, if retained in the service, be placed on extra list with no change in their seniority rights."

Record of Telegrapher W. C. Pickens—Age 53.

Phone Operator, A. T. & S. F. Ry., Swink, Colo.	8- 8-12 to 6-14-14
Student Operator (Telegraph School)	6 14-14 to 12- 5-15
Station Helper D. & S. L. Ry., Craig, Colo.	12- 5-15 to 7-16-17
Telegrapher D. & R. G. W. R. R. Ogden, Ctah	8- 1-17 to 5-13-18
U. S. Army	5-23-18 to Nov. 1918
Telegrapher, D. & R. G. W. R. R., Ogden, Utah	1-16-19 to date

The normal force at Ogden, Utah, at present consists of three telegraphers (one on each eight hour shift) under the direction of Local Freight Agent, as compared with a force in the Salt Lake Office of from ten to twelve telegraphers, three clerks and two messengers. Salt Lake City is a "relay office," which is not true with Ogden; and a comparison of the two offices may be gained from the following figures:

Communications Handled—Week Dec. 17-23, 1944:

Salt Lake City	22,275
Ogden	666

from which it will be noted that business at Ogden is only about three per cent of the volume handled at Salt Lake City. The Carrier wishes to stress particularly the fact that Claimant Pickens has had no experience whatever in a relay office, which fact alone is ample evidence of his inability to qualify for the Salt Lake City position.

Notwithstanding Claimant's obvious inexperience in certain phases of the work, particularly relay office experience and testing of Morse, printer and carrier circuits and equipment, his application was, however, given prudent consideration, not only by his immediate supervisors and the Division Superintendent, but as well by the Superintendent of Communications, who, in addition to obtaining the recommendations of local officers, personally interviewed the claimant. It was the weighted judgment of these officers, and obviously so, that Claimant Pickens did not possess fitness for assumption of responsibilities of the position of Manager-Wire Chief at Salt Lake City.

The Carrier further holds, under the rule involved, that the determination of whether an employe is qualified for a position is a prerogative entirely within its hands, this being particularly true where, as in the instant claim, no showing has been made that the Carrier was arbitrary in its action.

In discussion on the property, the Employes cited National Railroad Adjustment Board, Third Division, Awards 96, 98, 108, 253, 254, 1655, 2427, 2441, 2534 and 2556 in support of their position in this case. The Carrier has carefully reviewed the above awards, and feels the Board will agree with the Carrier's conclusion that none of the awards is applicable, as all involve entirely different circumstances, and the awards are based on rules entirely different from the rule involved in this case. On the other hand, the Carrier contends National Railroad Adjustment Board, Third Division Award 2692, and Fourth Division Award 249, sustain its position.

OPINION OF BOARD: On August 16, 1944, the Carrier bulletined the position of Manager Wire-Chief at Salt Lake City, Utah. The Claimant was the senior telegrapher bidding for the position, but the Carrier appointed a telegrapher who was much younger in point of service.

The rule claimed to be violated is as follows:

RULE 25**Promotion and Seniority**

"(A) Employes will be regarded as in line of promotion dependent upon the faithful performance of their duties and fitness for increased responsibility; where these are sufficient, in the judgment of the officers, seniority will have preference.

(B) Employees transferred at their request and proving incapable of holding such positions will, if retained in the service, be placed on extra list with no change in their seniority rights."

The awards are seemingly not in complete agreement on the application of this rule. Nevertheless, we feel that the discordance is more apparent than real.

In Award No. 96 it is said:

"Under the rules and in the first instance, the carrier has the responsibility of determining the fitness and ability of the employees, and this Division should be reluctant to interfere with the decision so made by the carrier so long as it acts in good faith, is without bias or prejudice and indicates no disposition to purposely or carelessly evade or disrespect the rules as well as the spirit and intention thereof."

In Award No. 110 this Board said:

"The only issue in this case is whether Mr. Russell has sufficient ability and merit. The issue is one of fact and not a construction or interpretation of rules."

Where reasonable minds might differ in determining the question of fitness and ability, this Board must accept the determination made by the carrier. Award No. 324. It has been held that fitness for increased responsibility under the rule, must be commensurate with the requirements of the position to be filled. Award No. 346. See also Award No. 592. Time and again it has been held that we cannot substitute our judgment for that of the carrier, if any reasonable ground has been shown for its action. See Award No. 772. Unless the action of the carrier is capricious, or arbitrary, its decision will be sustained. Award No. 2350. The Carrier having determined the fitness and ability of the applicant, the burden of overcoming that decision is on the claimant. Award No. 2031.

Applying the facts in this claim to the declared policy of this Board as announced in the above awards, we feel that the Carrier took into consideration the length of service and the fitness and ability of the Claimant for increased responsibility. His record was before them, his immediate superiors were acquainted with his strength and weaknesses. He admitted that he was not familiar with "carrier currents," one of the things vital in a modern office of this type. His claim is that he could learn the work if given the opportunity. That may have been true, but the position under consideration was one of importance to the Carrier; it had the right to expect some measure of fitness and ability commensurate with the responsibilities and needs of the new position.

The Employees assert that for a great number of years the custom without exception has been that the man who has seniority was awarded the position claimed, and that this particular case evinces a departure from that custom. The fact that the Carrier rarely selected other than the oldest employee for promotion, is an argument that the Carrier has attempted to observe both the spirit and the letter of the contract. Under this contract, the Carrier does not have the right to appoint the "best qualified" of a group of applicants seeking promotion. The Carrier does have the right to demand and secure from the applicants some measure of fitness for the desired position. If fitness for increased responsibility is shown to such extent that the applicant should perform the new duties in a satisfactory manner, then the Carrier must appoint the senior applicant who possesses such qualifications.

The Employees complain that the personal interview of this Claimant was short; that not many questions were asked, and but slight information obtained. However, we cannot know the mental workings of either the interviewer or the interviewed. It may be that much information was given with little having been said. The mental process cannot be examined by this Board, and that is merely one additional reason for not disturbing the action of 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 Employees involved in this dispute are respectively carrier and employees 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 Claimant has failed to show that the action of the Carrier was capricious or arbitrary and in violation of Rule 25 (A) and (B).

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary.

Dated at Chicago, Illinois, this 26th day of November, 1945.