

Award No. 4470
Docket No. CL-4482

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC RAILROAD COMPANY OF MEXICO

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

Carrier violated Rule 25 of Clerks' Agreement when it refused to bulletin position of Chief Clerk, Nogales, Arizona, Freight Station.

JOINT STATEMENT OF FACTS: An agreement effective July 1, 1939, as to rules and working conditions is in effect between the parties to this dispute. Position of chief clerk, Freight Department, Nogales, Arizona, became a temporary vacancy March 2, 1947, and remained a vacancy until May 4, 1947, due to the illness of the incumbent.

On April 18th, after position had been vacant more than thirty days, Division Chairman requested the Carrier to bulletin it on a temporary basis. Carrier refused to bulletin the position.

POSITION OF EMPLOYES: Rule 25 (a) of our current Agreement with the Carrier reads:

"Rule 25. (a) All new positions and vacancies, except those of truckers and laborers, shall be bulletined at least semi-monthly.

NOTE: New positions and/or vacancies not exceeding thirty (30) days duration may be filled without bulletin, at option of employing officer. New positions and/or vacancies of doubtful duration need not be bulletined until the expiration of thirty (30) days, in connection with which, so far as practicable, the approximate duration of the work will be given."

This instant claim was initiated by our Division Chairman in a letter to Mr. P. E. Baffert under date of April 19, 1947, reading:

"Mr. P. E. Baffert
Terminal Superintendent
Southern Pacific of Mexico Co.
Nogales, Arizona

Dear Sir:

It has been called to our attention that position of Chief Clerk, Nogales Freight Station, has been vacant since March 2, 1947, due to illness of incumbent, Mr. Julio Arias.

provisions of Rule 22. The latter rule sets forth that assignments, displacements and promotions "shall be based on seniority, fitness and ability," with the expressed reservation that its provisions "shall not apply to excepted positions, namely, Chief Clerk, Freight Department * * *." In other words, by virtue of that reservation in Rule 22, the carrier has the sole right of selection in making assignments and promotions to excepted positions. In view of that fact, and since under the terms of Rule 22 it is conceded that seniority is not in any manner whatever a factor that must be given consideration in filling excepted positions, it is inconceivable from the carrier's viewpoint, in what manner and by what logic Rule 25 can be construed to be applicable in the filling of vacancies on excepted positions. Since it is recognized that seniority is not a consideration in the selection of an individual to fill an excepted position, and in the light of the fact that the current agreement gives no other preferential or asserted right to employees coming within its scope, insofar as the filling of excepted positions is concerned, the advertisement under Rule 25 for seniority applications from employees would be an unnecessary and useless procedure. It is manifest that there was no obligation upon the carrier by reason of Rule 25 of the current agreement to either advertise the vacancy existing on the position of chief clerk for seniority application or to make assignment thereto on the basis of such seniority application. The carrier's declination to comply with the request of petitioner's representatives in that regard clearly did not involve a violation of Rule 25 or any other rule of the current agreement.

During the handling of this matter with carrier's representative, the petitioner's general chairman cited Award 1046 of this Division in support of his contention that the position of chief clerk should be advertised for seniority application. That the reliance on Award 1046 is irrelevant is apparent upon review of the rules of the agreement in evidence in that award. Such review indicates that insofar as the rules pertain to the filling of excepted positions, they are dissimilar to those involved in the instant docket. This conclusion is substantiated by that portion of the Position of Employees in Award 1046, which is:

"Rule 4 is the promotion rule and it will be noted that special provisions are provided for the filling of excepted positions. This rule, insofar as the filling of excepted positions is concerned, is entirely different from the promotion rule in most agreements.

Under this rule the carrier does not have full control in the filling of excepted positions, but is required to give 'preference' to employees coming under the provisions of the agreement." (Emphasis ours.)

The Division's attention is invited to the fact that the current agreement between this carrier and its employees represented by the petitioner does not contain "special provisions" conveying to employees coming within its scope any preferential right in the filling of excepted positions, to the contrary, under the terms of Rule 22, the exclusive right of selection and the full control in the filling of such positions is recognized to be vested in the carrier.

The carrier submits that it has established that the alleged claim in this docket is without basis and respectfully requests that it be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The position of Chief Clerk, Freight Department at Nogales, Arizona, became a temporary vacancy March 2, 1947, and remained a vacancy until May 4, 1947, due to the illness of the incumbent. Employees assert that the vacancy should have been bulletined under the provisions of Rule 25 (a) of the current Agreement which appears in full in the position of the Employees, above. Carrier, on the other hand, asserts that it was not bound to bulletin the vacancy as the position is an excepted one and points to Rule 22 (promotion) which is also set forth in full in the Employees position.

It appears from the record that the incumbent of the Chief Clerk's position returned to service on May 4, 1947. Thus the state of facts extant on the

date the claim arose is no longer existent. This, in effect, is admitted by the Employees' General Chairman in a letter of May 27, 1947, from which we quote, in part:

"Inasmuch as Mr. Arias has returned to his position, there would be no need of carrying this dispute any further except because of your contention that the position of Chief Clerk, Nogales Freight Station, is not covered by the Agreement."

This case comes before us on a claim of violation of a particular provision of the Agreement, not as a request for an interpretation. Ostensibly, the case is presented to us for the determination of a claim, which is admittedly moot. Obviously, however, it comes to us for a different reason, disassociated from the facts giving rise to the claim in the first instance. Under the circumstances, we do not believe that any purpose would be served by the issuance of an Award herein.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 evidence discloses that the question in this case is moot at this time.

AWARD

Case dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 19th day of July, 1949.