

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
ATLANTIC COAST LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atlantic Coast Line Railroad that C. G. Schall, senior qualified applicant for the position of car distributor at Sanford, Florida, which was advertised for bids on January 8, 1947, but whose application was not accepted and who was denied the assignment shall be assigned thereto, and

That C. G. Schall shall be compensated in full for all monetary losses sustained as a result of not having been assigned to the position of car distributor at Sanford, Florida, for which position he was and is qualified to fill and to which he is entitled.

EMPLOYEES' STATEMENT OF FACTS: An Agreement, bearing date of November 1, 1939, as to rules of working conditions, and rates of pay is in effect between the parties to this dispute together with increases received since that date. Article 12-(n) of the Agreement reads:

"When vacancies occur in position of car distributor or new positions as such are created they will be advertised in the regular manner to employees on the entire district of the Superintendent on which such positions are located. In making appointments the right of selection will rest with the Superintendent, however, consideration will be given to the seniority of the applicants Employees filling position of car distributor will be exempt from displacement in the exercise of seniority by other employees under provisions of paragraph (g) of this article." (Underscoring supplied).

On January 8, 1947, the following bulletin was placed on this position by the Superintendent reading as follows:

"ATLANTIC COAST LINE RAILROAD COMPANY
JACKSONVILLE DISTRICT

Sanford, Florida, January 8, 1947.

File 16-887

EMPLOYEES: Force—Car Distributor—Sanford, Florida.

ALL AGENTS AND OPERATORS—Jacksonville District.

Position of Car Distributor, Chief Dispatcher's Office, Sanford, Florida, hours of assignment 8:00 A.M. to 5:00 P.M. with one hour for lunch, seven days per week, salary \$313.45 per month, is open for bids.

employees, it was his contention that the senior employe making application for the position at Sanford should have been appointed thereto, notwithstanding the clearly worded provision of the Agreement leaving the right of selection to the Superintendent.

This Board has repeatedly held that its function is to consider disputes growing out of grievances, or out of interpretation or application of agreements covering rates of pay, rules and working conditions, and that it has no power to make rules or to interpret rules that have not been negotiated between the parties at interest. The instant case involves interpretation of a rule which is so clearly worded that it is almost impossible to interpret it to mean other than the clear meaning of the words as written. In addition, it is the well established rule that evidence of the practical construction given to an instrument of writing by the parties thereto may be admissible to explain its meaning when explanation is necessary. This rule does not, however, extend so far as to permit the overthrow of plain terms of a contract, and an unambiguous contract cannot be varied by evidence of a construction by the parties different from that which the language clearly imports. The employees in this instance are attempting to read into the rule a meaning that was not intended when the rule was negotiated, and as further evidence that it was so understood by the employees is the fact that the rule has been in effect for a number of years, during which time many employees have been selected exactly in accordance with the provisions of the rule, and only within the last few months has any question arisen as to the meaning of this particular provision of the Agreement.

The Carrier contends that the claim advanced by the employees is without merit and respectfully requests the Board to dismiss the case.

The respondent Carrier reserves the right, if and when it is furnished with the ex parte petition filed by the petitioner in this case, which it has not seen, to make such further answer and defense as it may deem necessary and proper in relation to all allegations and claims as may have been advanced by the petitioner in such petition and which have not been answered in this, its initial answer

OPINION OF BOARD: Claimant occupied a position of car distributor at Sanford, Florida, for some time before November 27, 1946, which was the effective date of his assignment to a position of Agent at Ocoee, Florida. This latter position was obtained by him by reason of his being the qualified bidder under bulletin in October 1946. As a result, the vacancy in his former position of car distributor was advertised for bids on October 23, 1946. There being no bid from telegraphers on the property, one J. C. Hampton was assigned to the position. After Mr. Hampton's appointment to the car distributor position, the General Chairman objected to the October 23 bulletin as being inadequate in detail. As a result of handling on the property, a second bulletin advertising the position was issued on January 8, 1947. Claimant then bid on the position but the Carrier's Superintendent awarded it to Mr. Hampton.

The Employees cite Article 12, Section (n) of the effective Agreement as having been violated by the Carrier in refusing to award the position to Claimant. Said Article 12, Section (n) reads as follows:

"(n) When vacancies occur in position of car distributor or new positions as such are created they will be advertised in the regular manner to employees on the entire district of the Superintendent on which such positions are located. In making appointments the right of selection will rest with the Superintendent, however, consideration will be given to the seniority of the applicants. Employees filling position of car distributor will be exempt from displacement in the exercise of seniority by other employees under provisions of paragraph (g) of this article."

The Employees contend that it was the understanding of the Committee when the above rule was negotiated that seniority would prevail when the ability of two or more applicants for the position of car distributor were the same. That the Claimant had the ability whereas Mr. Hampton did not.

It is the contention of the Carrier that the rule leaves to the District Superintendent the absolute right of designating the employe to be assigned to the position.

With respect to the meaning to be ascribed to the rule, we believe it is clear that it cannot be said that the Superintendent has the absolute right to designate the employe to be assigned to the position. It is to be noted that the rule places positions of car distributors in a different category than other positions listed in the Scope Rule, with respect to the relative weight to be given seniority in making appointments. Clearly, the language of the rule indicates that the Carrier in agreeing thereto, has limited its discretion in selection of employes to fill such vacancies to a much lesser extent than it has in the rules applying to other positions in the Scope of the Agreement. However, it has not retained unlimited or absolute discretion. To so hold would render the words "consideration and will be given to the seniority of the applicants" completely meaningless and superfluous. Proper rules of construction require that full effect be given to all the words of a written instrument and therefore we cannot completely ignore that phrase, as we would have to, were we to sustain the Carriers view as to the meaning of Section (n). The Superintendent is, therefore, required to take into account the seniority of applicants in formulating his judgment with respect to his final choice of the individual to fill car distributor positions. This does not mean that he is required to give the appointment to the senior man just because he has sufficient fitness and ability to fill the position. However, when the best qualified applicants are in the Superintendent's judgment of equal fitness and ability, then the senior employe should be given preference.

The evidence of record outside of the flat statement that assignment of the position was made in strict accordance with the provisions of Article 12, Section (n) does not reveal what consideration was given by the Superintendent to the Claimant's seniority. We can gather little support for a conclusion that consideration was given to Claimant's seniority in that statement, in view of Carrier's contention that the Superintendent had the absolute right of appointment. The record made by the Employes clearly establishes Claimant's fitness and ability as being at least equal to Mr. Hampton's. There being no evidence of record establishing that Claimant's seniority was given any weight in the judgment of the Superintendent in making his final selection, we hold that a sustaining award is in order.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 28th day of March, 1950.