

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

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

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY

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

1. Carrier violated rules of the Agreement governing the working conditions of the employees by denial of Senior Applicant, Mr. D. M. Curtin, for position of Assistant Chief Clerk, Office of the Superintendent, Portland, Oregon, vacated June 1, 1954, and assigning a junior applicant to the vacancy.

2. Mr. Curtin, senior to Mr. B. W. Potter, be awarded and assigned to Assistant Chief Clerk position, advertised by Bulletin No. 18, dated May 11, 1954, to become effective June 1, 1954.

3. Mr. Curtin be placed upon the Assistant Chief position that he applied for and that he be allowed wage loss sustained representing the difference between his earnings on other position or positions and what he would have earned on Assistant Chief Clerk position, approximating \$2.56 per day, retroactive to June 1, 1954.

EMPLOYEES' STATEMENT OF FACTS: As of June 1, 1954 the incumbent of position Assistant Chief Clerk, Superintendent's Office, Portland, Oregon, was promoted to an excepted position, Chief Clerk, Superintendent's Office, Portland, Oregon, therefore creating a vacancy in position of Assistant Chief Clerk. (See Exhibit 1(a).)

Applications for this vacancy were filed by the following:

Mr. H. C. Beckham	Seniority from 8-13-37	Rank 24
Mr. D. M. Curtin	Seniority from 9-11-46	Rank 58
Mr. B. W. Potter	Seniority from 8-15-49	Rank 74

Position Assistant Chief Clerk was awarded on May 20, 1954 to Mr. B. W. Potter (See Exhibit 1(b)) with seniority from August 15, 1949, and ranking 74 on the seniority list. The application from Mr. H. C. Beckham, the senior bidder with seniority from August 13, 1937 and ranking 24 on the seniority list; and Mr. D. M. Curtin, the second senior bidder with seniority from September 11, 1946, ranking 58 on the seniority list, were not given proper con-

devotion to duty against youth. This Carrier evidently prefers youth with its possibilities and we are unwilling to say it constitutes a breach of the Schedule in so doing."

It is self-evident that the same basis of determination is applicable to Rule 4 (b) in that "merit and ability" determinations are prerogatives of the appointing officer.

We now turn to Statement of Claim, paragraph 3. Here they claim the difference in wages between position held by claimant and what he would have earned on the Assistant Chief Clerks' position, approximating \$2.56 per day retroactive to June 1, 1954.

This part of the Organization's claim was first filed with the Carrier June 5, 1954, Carrier's Exhibit No. "9", and declined by Division Superintendent, June 7, 1954 (Carrier's Exhibit No. "10") with no further handling on the property.

The claim has not been progressed to the highest appeal officer designated by the Carrier and therefore is not correctly before your Board. Further, on August 21, 1954, the Carrier's Conference Committee, representing participating Carriers, and the employees' representatives of the Cooperating Labor Organizations, representing the nonoperating employees of the Carriers, signed an Agreement to provide "time limit" for presenting and progressing claims or grievances. Section 2 of Article V of this Agreement, effective January 1, 1955, reads in part:

" * * * With respect to claims or grievances filed prior to the effective date of this rule the claims or grievances must be ruled on or appealed, as the case may be, within 60 days after the effective date of this rule and if not thereafter handled pursuant to paragraphs (b) and (c) of Section 1 of this rule the claims or grievances shall be barred or allowed as presented * * *."

The Organization did not appeal the Superintendent's decision of June 7, 1954, within 60 days after January 1, 1955, and for this reason that portion of their claim is barred from your Board.

Carrier respectfully requests your honorable Board to deny the claim herein presented in its entirety.

All data in support of the Carrier's position has been submitted to the Organization and made a part of the particular question here in dispute. The right to answer any data not previously submitted to the Carrier by the Organization is reserved by the Carrier.

OPINION OF BOARD: On May 11, 1954, Carrier bulletined a vacancy in the position of Assistant Chief Clerk that was expected to exist in the Superintendent's office at Portland, Oregon, as of June 1, 1954, because of the promotion of the existing Assistant Chief Clerk to the position of Chief Clerk, effective June 1, 1954. Among the four employees bidding for the Assistant's position was Claimant Curtin, who was senior to employe Potter, the man to whom Carrier's Superintendent Monahan, on May 20, 1954, awarded said position.

It appears from the record that before said appointment was made, the applicants were interviewed, and Claimant was told by Assistant Superintendent-

ent Barlow that Claimant was the best qualified applicant but that Barlow had in mind for the position a man of lesser age. Claimant at that time was 61 years old. Age was not listed as a qualification in Carrier's bulletin.

The controlling portion of the Parties' Agreement is Rule 4 (b), which says that, in respect to several listed positions (including that of Assistant Chief Clerk in the office of the Superintendent, Operating Department), promotion thereto is to be based on the following principle: If merit and ability are equal (not just "sufficient") among two or more applicants, the senior applicant is to get the job.

On May 22, 1954, the Organization requested a hearing on the question of Carrier's preference for Potter over Claimant. The hearing was held on May 28, 1954, whereafter Superintendent Monahan affirmed Carrier's original decision.

It appears from the record that at first the Organization did not file a time claim. This was done on June 5, 1954, in the amount of \$2.56 per day, representing alleged daily wage loss suffered by Claimant because he was not awarded the Assistant Chief Clerkship. This was refused by Monahan on June 7, 1954.

The decision following the hearing of May 28, 1954, was appealed to Carrier's General Manager. After a second hearing held on July 2, 1954, the General Manager upheld the original decision.

On December 20, 1955, this Division received from the Employees a notice of intention to file an ex parte submission in support of the claim in its present form. Said submission was received on January 23, 1956.

In substance the Employees assert that Carrier's refusal to promote Claimant instead of Potter was arbitrary, unreasonable, and discriminatory under Rule 4(b) of the Agreement. In support of this contention they cite the records of the two employees and the statement by Assistant Superintendent Barlow that Claimant had the better qualifications.

Carrier defends on three grounds: **First**, claims (2) and (3) are not properly before the Board and must be barred because they were not progressed to a conclusion on the property, as required by Section 3, First (i) of the amended Railway Labor Act; and because they were not handled within the time limits specified in Article V, Section 2, of the Chicago Agreement of August 21, 1954. **Second**, claim (1) must be barred because the Employees did not file their appeal from Carrier's decision to this Board within the time limits specified for such appeals in said Chicago Agreement. The Employees' ex parte submission must have been filed by December 31, 1955. **Third**, as to the merits of the claims, Carrier's decision preferring Potter to Claimant was not arbitrary, unreasonable, or discriminatory. The record contains no evidence of bias or prejudice. Carrier had a right to make suitable age a qualification for the Assistant Chief Clerkship because the incumbent thereof often acts in a supervisory capacity in behalf of the Chief Clerk, in time stands for promotion to the Chief Clerkship, and needs years to prepare himself therefor. Carrier acted well within its rights under Rule 4(b).

As to the first issue raised by Carrier, the Board rules that Claims (2) and (3) are properly here. Said claims not only amend the original protest by the Employees; they are in fact an integral part thereof. From the date they were originally filed (June 5, 1954), the claims were properly to be considered as a whole and as properly progressed under the amended Railway Labor Act and under the relevant provisions of Article V, Section 2, of the Agreement of August 21, 1954.

As to the second issue raised by Carrier, the Board rules that the Employees' appeal to this Division is not barred. It was sufficiently timely under the relevant provisions of Article V, Section 2, of the Agreement of August 21, 1954. The reasons for this finding are the same as those presented in Award No. 8669.

As to the merits of the three claims properly here, the Board rules that they cannot be sustained. The evidence of record does not establish that Carrier's decision under Rule 4(b) was arbitrary, unreasonable, or discriminatory. **First**, Carrier had the right to make suitable age a requirement for this sort of position. The fact that same was not listed among the bulletined specifications for the position is not deemed substantially prejudicial to Carrier's position. **Second**, given this right of Carrier, its judgment as to the relative merits of Claimant and Potter cannot be said to have been biased or prejudicial. It does not seem unreasonable for Carrier to have decided that Claimant was too old or too near retirement age to permit him adequately to work into the many duties of the Assistantship and, ultimately, the Chief Clerkship. As to Barlow's statement to Claimant, it may reasonably be paraphrased as saying, "In most respects except age your qualifications are better than those of the others." In any case, his was not the final decision; his own judgment was subject to modification or reversal by others, such as Monahan. In short, given Carrier's right to stress suitable age as an important requirement for this particular position, its judgment that Claimant's merit and ability were not, on balance, the equal of Potter's cannot be said to have been ill-founded—at least not to the extent that would warrant his Board to substitute its own judgment for that of Carrier. The latter must be said not to have abused its discretion under Rule 4(b).

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 Carrier did not violate the Agreement.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 12th day of March, 1959.