

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

MISSOURI PACIFIC RAILROAD COMPANY
(Gulf District)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Railroad (Gulf District) that:

1. The Carrier violated the Telegraphers' Agreement dated March 7, 1952, as well as Memorandum of Agreement signed at St. Louis, Mo., December 1, 1959 when, on September 20, 1963, it assigned J. K. Briley to the Star-Agent-Telegrapher position at Opelousas, La., on Circular No. 14 in accordance with Circular 13 of August 19, 1963, which assignment was also ignored in line with the Agreement (see my letter of Sept. 15, 1963 and your reply Sept. 19, 1963), instead of assigning Mr. W. W. Wells to the position.

2. The Carrier shall compensate Mr. Wells beginning September 18, 1963 and continuing thereafter until this violation is corrected for the difference in rate of compensation of the Agent-Telegrapher position of Grayburg, Texas, and that of Star Agent Telegrapher position of Opelousas, Louisiana and resulting necessary expenses for each day held from the Opelousas Agency.

EMPLOYEES' STATEMENT OF FACTS: On August 19, 1963, the position of Star Agent Telegrapher, Opelousas, Louisiana, was advertised on a permanent basis with applications to be received up to 12:01 P.M., August 29, 1963. Star agency positions are under the provisions of Memorandum of Agreement dated December 1, 1959, in lieu of Rule 37 of the Agreement.

The said Memorandum of Agreement specifically requires that such positions are to be bulletined in accordance with Rule 20 (a) of the current Agreement, that is, the successful applicant shall be assigned within five days after the close of the bulletin. In the instant case, the successful applicant should have been named on or before September 4, 1963.

On September 15, 1963, District Chairman Musgrove addressed Superintendent A. K. McKeithan and pointed out the requirements of Rule 20 (a)

OPINION OF BOARD: The issue involved herein is whether or not Carrier violated Rule 23 (e) of the Agreement when it failed to afford Claimant a hearing in regard Carrier's failure to assign him to the Star-Agent-Telegrapher position at Opelousas, Louisiana.

The facts in this dispute are that on August 19, 1963, Carrier bulletined position vacancy of Star-Agent-Telegrapher at Opelousas, Louisiana. Claimant bid for this position on August 26, 1963. On September 20, 1963, employe J. K. Briley was assigned to said position, Claimant being senior in service to Mr. Briley, as well as the other five applicants for said position. On November 5, 1963, the General Chairman of the Organization directed a letter to A. K. McKeithan, Carrier's Superintendent, and requested an investigation, which letter in part stated as follows:

"It is our contention and belief that the Carrier acted capriciously and gave no consideration to Claimant's qualifications; therefore, we demand an investigation as afforded in Rule 23(e) of the Telegraphers' Agreement for 2:30 P.M., Saturday, November 16, 1963, at the Passenger Station at Opelousas, Louisiana. Witnesses to include yourself, J. K. Briley and W. W. Wells. We will, in addition to these witnesses, have two more witnesses present."

The Carrier's Superintendent, A. K. McKeithan, replied to the General Chairman's letter of November 5, 1963, by letter dated November 11, 1963, which letter reads as follows:

"Mr. R. C. Musgrove
District Chairman-ORT
316 W. Cheney Street
Opelousas, Louisiana

Dear Sir:

Your letter of November 5, 1963, File ORT No. 50-63, concerning assignment of Star Agent-Telegrapher Opelousas and filing claim. behalf Mr. W. W. Wells, senior applicant.

Mr. Wells has been agent at Grayburg since I came to the division as superintendent two years ago. I have observed his work, the manner he performed it, and his ability to keep it up. It was readily noted that while the work at the station was less than four hours per day, he permitted the filing of tariffs to get behind and his station was the most unkempt one man station on the division.

The station at Opelousas requires an alert and proficient agent due to competition with competing lines. There is no doubt in my mind that Mr. Wells would be unable to meet the qualifications, and your request is declined.

With reference to your request asking for a hearing under the provision of Rule 23.

This rule deals with discipline such as discharge, suspension, or notation against his record. Such is not the case here, and your request is declined.

Yours very truly,
/s/ A. K. McKeithan"

The General Chairman in return replied to the above letter of Mr. McKeithan on November 13, 1963, and in part, said:

"We also believe that in connection with Rule 23 of the Telegraphers' Agreement, Mr. Wells has been disciplined in by ignoring his application for the agency and in the second paragraph of your letter it is evident that you have made accusations [sic] against his record without an investigation."

Further correspondence shows that Carrier refused to hold an investigation, but offered to hold a conference. However, the Organization insisted on an investigation hearing, rather than a conference. The Organization filed affidavits of various persons stating that they were present on November 16, 1963 at 2:30 P.M. at the office of the Carrier's Opelousas Agency, and that the Claimant and Mr. Briley and the General Chairman were also present for the hearing, but that no Carrier representative showed up for said hearing.

The Organization's position, as clearly stated in oral argument, is that the question of Claimant's qualifications for the position in question is not the issue to be determined in this dispute, but that before the question of "fitness" of Claimant for the position is reached, Carrier should have afforded Claimant a hearing for the purpose of developing facts to show whether or not Carrier acted arbitrarily or capriciously in making the appointment of Mr. Briley rather than Claimant to the position; that Claimant has a contractual right to such a hearing by virtue of Rule 23(e) of the Agreement, which was violated when Carrier refused to comply with its provisions.

"RULE 23. DISCIPLINE

(e) An employe who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as herein provided if written request therefor is made to his immediate supervisor within thirty (30) days of cause for complaint."

The Carrier's position is that inasmuch as the position in question is a star agency, Rule 37(b) applies, and such rule authorizes Carrier to determine the ability and fitness of an applicant and that Carrier did not act arbitrarily or capriciously when it did not appoint Claimant to the position in question; that Carrier's refusal to assign Claimant to the position did not involve "discipline", and, therefore, Carrier was not required to hold an investigation; that a notice for the hearing was not made within 30 days of the cause of complaint as required by Rule 23(e) inasmuch as the assignment of Mr. Briley to the position was made on September 20, 1963, and the Organization did not make a request for hearing until November 5, 1963, more than 30 days from the date of the cause of complaint.

The Organization objects to Carrier raising the defense that Claimant did not request a hearing within the 30 day time limit as set forth in Rule 23(e), and points out that Carrier raised this defense for the first time in its "Rebuttal" to the employes' ex parte submission to this Board.

We agree that Carrier did not raise the contention or charge that Claimant failed to comply with the 30 day time limit provision of Rule 23(e) on the property. This Board has held on numerous occasions that it

is a well established rule of this Board that it will not consider contentions or charges which were not made during the handling on the property. Therefore, the charge that Claimant did not comply with the 30 days' time limit provision of Rule 23(e) cannot be considered by this Board in the determination of this dispute.

In regard to the merits of the dispute, we agree with Carrier that Rule 23(e) is limited to "discipline" matters between Carrier and its employees, and that said rule was not violated in this instance by Carrier. The fact that Mr. McKeithan advised the General Chairman of the reasons for not assigning Claimant to the position does not, in our opinion, bring this dispute under Rule 23 of the Agreement. The Organization argues that the letter of Mr. McKeithan amounts to a "notation made against Claimant's record" for an alleged offense and thus Rule 23 and 23(a) come into play. We cannot infer that such a letter as Mr. McKeithan's amounts to a "notation made against Claimant's record for an alleged offense." Mr. McKeithan was not required to give Carrier's reasons for rejecting Claimant for the position to the General Chairman. Further, the Organization did not meet its burden of proving such allegation when it failed to produce competent evidence to show that a "notation was made against Claimant's record for an alleged offense" and, therefore, this contention must be rejected.

Further, we disagree with the Organization's contention that inasmuch as Claimant considered himself unjustly treated, he was entitled to such a hearing as he requested here in accordance with Rule 23(e) of the Agreement. Unjust treatment in this instance as set forth in Rule 23(e) refers to unjust treatment concerning discipline matters, or to be more specific, when an employee is "discharged or suspended for a definite term or notation is made against his record for an alleged offense." Inasmuch as Claimant was not discharged, suspended, or a notation made against his record for an alleged offense, we must reject this contention of the Organization.

As was said in Award 4858 (Hall):

"The Discipline Rule herein does not extend to or purport to extend to Rule 39(e) or to any investigation of the qualifications of an applicant for employment. See Award 866 (Rudolph)."

Rule 37(b) sets forth the requirements that Carrier must follow in filling the position here in question, and provides in part as follows:

". . . Applications will be considered according to ability, and where qualifications are equal, seniority will prevail. . . ."

Numerous Awards of this Board have held that it is the sole responsibility of Carrier to determine the fitness and ability of an employee, and said decision shall not be interfered with unless Carrier acted in an arbitrary and capricious manner. Awards 11121, 11966, 10459, 9966, 13084, 11780, 14013, and many others.

A careful review of the record in this instance shows that Carrier did not act arbitrarily or capriciously when it refused to assign Claimant to the position in question. The evidence shows that Carrier did not consider Claimant qualified for the position in question, and, therefore, his seniority taken alone did not require Carrier to assign him to said position. As was said in Award 15784 (McGovern):

"Under the rules, seniority alone is not the test to be applied; qualifications, merit and capacity must be established first. The burden of proof in this regard is the Claimant's."

Therefore, it is the opinion of this Board that Rule 37 of the Agreement is controlling in regard to deciding this dispute and inasmuch as Carrier did not abuse its discretion in not assigning Claimant to said position, we must deny the claim.

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

That the parties waived oral hearing;

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 Agreement was not violated by the Carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of May 1968.