



Award Number 17517

Docket Number CL-17957

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

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

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6503) that:

1. The Carrier violated the Clerks' Agreement when it issued Station Clerks' Bulletin No. W-4 dated January 24, 1967, advertising temporary vacancy on Job No. 14, Steno-Clerk, Spokane Freight Office, and then refused to assign senior applicant, Mr. E. Rieger, and instead, assigned junior Clerk, Mrs. P. H. Eagle.
2. The Carrier shall now be required to compensate senior Clerk E. Rieger at the rate of one dollar (\$1.00) per day for each work day on which he was wrongfully withheld from Job No. 14, Steno-Clerk position in Spokane, Washington Freight Office; the dates for which penalty claimed are February 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, March 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 1967.

EMPLOYEES' STATEMENT OF FACTS: Mr. E. Rieger is a Clerk employed by the Union Pacific Railroad Company at Spokane, Washington. Mr. E. Rieger holds Class one (1) seniority date of January 4, 1950 on Consolidated Union Pacific—Spokane International Clerks' Seniority Roster District No. 88-1 (Stations North of Hinkle, Pendleton and Spokane) Roster position No. 30.

Mrs. P. H. Eagle is a Clerk employed by the Union Pacific Railroad Company at Spokane Freight Office, Spokane, Washington. Mrs. P. H. Eagle holds a Class one (1) Clerks' seniority date of July 22, 1964 on consolidated Clerical Seniority Roster District No. 88-1, Roster position No. 73. (Employees' Exhibit "A"—Roster 88-1)

On January 24, 1967, Mr. G. L. Jensen, Assistant Superintendent for the Union Pacific Railroad Company at Spokane, Washington issued Bulletin W-4 to the clerical employees at Union Pacific Railroad Company Stations and Yard Offices, Sixth Subdivision.

"Temporary vacancy on position of Steno-Clerk Job No. 14, Spokane Freight Station, vice E. A. Tanner, has been extended for approximately another 90 days:

CARRIER'S STATEMENT OF FACTS: There is on file with the Board a copy of the current agreement between the Union Pacific Railroad Company and the Brotherhood of Railway, Airline and Steamship Clerks, effective July 15, 1967, and said agreement is hereby made reference to and made a part of this submission.

On January 24, 1967, under the provisions of Rule 12—Temporary Assignments and Short Vacancies—the Carrier placed under bulletin for seniority choice a temporary vacancy of 90 days on Job No. 14, Steno-Clerk, at Spokane, Washington. Bids were received from Clerks E. Rieger and P. H. Eagle, and of the two Rieger is senior.

However, because of the requirement attendant to this job of stenographic ability, and because Clerk Rieger did not possess this particular skill, Clerk Eagle was assigned on February 1, 1967. The Organization subsequently protested this assignment, and after local negotiations, it was mutually agreed that Eagle's assignment would be cancelled and Rieger would be placed on it. This was accomplished on March 8, 1967.

Under Rule 11—Bulletining Positions—there is a provision in Paragraph (e) which states that successful applicants for positions bulletined under that Rule will be relieved to assume the vacancy within ten calendar days and if not so relieved a penalty of one dollar per day will be added to his rate commencing with the tenth day. It is on this basis that the claim is before this Board for a one dollar per day penalty on the dates indicated, all dates prior to Clerk Rieger's assumption of the assignment.

The Carrier and the Union have exhausted all measures of handling on the property, as indicated by the following:

(Exhibits Not Reproduced)

OPINION OF BOARD: On January 24, 1967, Carrier's Assistant Superintendent at Spokane posted a "temporary vacancy on position of Steno-Clerk". The duties were described as

"Expensing waybills, writing up waybill register, and other miscellaneous duties. Must be proficient typist and capable of operating office machines"

The last previous bulletin advertising this position had been issued on August 8, 1946. Therein the duties were described as

"Stenographic work, typing reports and other duties pertaining thereto"

It is undisputed that the rate of pay for the position in January, 1967 was \$516.31 per month, the assigned rate for a Steno-Clerk.

The 1967 temporary vacancy had occurred because the employe permanently assigned to that position was off due to illness. Said incumbent had held the position for twenty years. It is undisputed that at the time of these circumstances she had not been required to perform any stenography work on the job. Carrier explains "over the years the use of stenography soon decreased to none at all." Petitioner states that in all the twenty years that this individual was on the job "she was never required to take shorthand, nor is she able to take shorthand", a statement supported by the employe herself in a signed statement included in the record.

One of the bidders for the vacancy was E. Rieger (Claimant), a clerk with a seniority date of January 4, 1950 on the Clerk's Roster for the seniority district. Rieger, concededly was not able to perform stenography work.

On February 1, 1967, the position was awarded to Phyllis H. Eagle, an employe of lesser seniority than Claimant The Employes' Representative, thereafter addressed an objection to this appointment to Carrier, on behalf of the Claimant.

In response to the protest of Claimant's Organization and at the level at which appeal had been made by appropriate Organization officers to the Superintendent for Carrier's Oregon-Washington Division, these individuals conferred and as a result, on March 7, 1967, the Superintendent wrote to the General Chairman that he had issued instructions to cancel the original Assignment Notice and to assign the Claimant to the position. The letter dated March 3, 1967 follows:

"Mr. R. A. Anderson,
Division Chairman, BofRC
24609-156th Ave., S. E.
Kent, Washington 98031

Dear Sir:

Your letter February 16, file N-27-S, regarding assignment of Clerk Phyllis H. Eagle to Steno-Clerk Job No. 14 in preference to Clerk E. Rieger.

In view of the fact the regular assigned incumbent of Job 14 Mrs. E. A. Tanner has been permitted to hold this position regardless of the fact she is not a qualified stenographer, I am agreeable to cancelling the assignment of Clerk Engle and assign the senior bidder Clerk E. Rieger even though the latter is not a qualified stenographer.

When and if Steno-Clerk Job No. 14 becomes a permanent vacancy for any reason, the position will be bulletined with duties which include ability to take and transcribe dictation and the successful applicant will be required to have stenographic ability.

"Am instructing Assistant Superintendent Jensen to cancel the assignment of Clerk Engle and assign Clerk Rieger with the understanding there will be no claims progressed as result of this change.

Yours truly,

/s/ W. G. JOHNSON
Superintendent

RDM: elt"

Accordingly employee Rieger was assigned to the position on March 8, 1967. (On March 24, 1967, the temporary vacancy was extended for an additional 6 months, with the announcement repeating the duties which had been stated in the previous notice and on March 31, 1967, Mr. Rieger was awarded the extended temporary vacancy.)

After Rieger had been awarded the temporary vacancy in displacement of the first appointment made of the less senior employee, he instituted the claim which is before us. Inasmuch as it is conceded by Claimant that the job he had held prior to appointment to the vacancy was at a higher rate of pay, no claim is made for an alleged loss of pay resulting from denial of appointment. However, Claimant invokes the provision of Rule 11(e) for "a penalty allowance of one dollar per work day up to the thirtieth day, and two dollars per work day commencing with the thirtieth day until placed on his newly assigned position." The one dollar per day claim is made for the 24 days (February 14, 1967 through March 17, 1967) during which the less senior employee held this job in denial thereof to Claimant.

Carrier made two principal contentions:

1. Claimant was not in fact entitled to the appointment inasmuch as the vacancy was for a Steno-Clerk and Claimant admittedly has no knowledge of or ability to perform stenography. The assignment had been correctly given to an employee junior to Claimant who was the senior bidder qualified to do stenographic work. It is conceded that stenography work was not required of the permanent incumbent. However, at the time of the vacancy, management, exercising its discretion to get full performance out of a job title had determined to rearrange job content to include stenographic functions.

2. In spite of the fact that Employees have no valid basis for challenging Carrier's decision to reinstitute stenographic functions in the job and to assign to it the most senior employee capable of performing such work, management decided to effect a voluntary, temporary adjustment of the Organization's initial claim. This permitted Claimant to take the temporary vacancy, pending a reinstatement of the stenography requirement when the job would be permanently bulletined.

Carrier contends however, that this gesture in the direction of "encouraging harmony" was accompanied by an express understanding with and commitment by Claimant's representatives that no claim would be progressed as a result of the change. This understanding and condition was expressed by Carrier in letters of March 3, 1967 to Division Chairman (See above) and March 7, 1967 to General Chairman.

Employees contend:

1. Carrier violated Agreement by initial failure to assign Claimant to job. Carrier conceded that the job in question had no stenographic duties attached to it for twenty years, and the vacancy announcement listed no stenographic requirements. Organization quotes from the record, the following, from Carrier's letter of October 10, 1967 (denying appeal in the instant claim):

"A reivew by the superintendent of your contentions disclosed that the position of the organization was basically correct and that the position did not, as a general situation, require stenographic ability. For this reason, Superintendent Johnson agreed to assign Mr. Rieger to the position on Job No. 14."

2. Employees deny that the later appointment of Claimant to the temporary vacancy was contingent on a waiver by Employees and Claimant of monetary claims in connection with alleged earlier deprivation of appointment.

Our conclusions from the record are:

1. We are unable to resolve, from the record, the conflicting assertions made concerning whether the awarding of temporary vacancy to Claimant was contingent on a consented waiver to restitution for the twenty-four days which had elapsed. The controversy must therefore be decided on the merits of the single question: was Claimant denied appointment in violation of his rights under Rule 8 (promotion proviso and Rule 11 (e) (restitution and penalty provisions in connection with bulletining and awarding position)?

2. On the merits of this basic question we are persuaded that:

(a) It was Carrier's managerial prerogative to mandate the full functions of the title notwithstanding its voluntary relinquishment of its full requirement for a substantial period of time.

(b) However, at the time that the announcement was posted, management did not invoke such right. The record clearly shows that the announcement described the job in the way it had been carried on for many years—with no requirement for stenography work or skills. This identification of the job as the one which had been performed—without stenography—is made all the clearer by comparison of the announcement of January 24, 1967, with the one used 20 years earlier. The earlier one specified "stenographic work", the later one asked for a "proficient typist".

We conclude from the foregoing that in January 1967, management was seeking a replacement for a non-stenographer. Its subsequent choice of a candidate with less seniority than Claimant, because she is a stenographer, cannot be held to have been a management right discovered, invoked and implemented in good faith. If management wishes to exercise such rights in the future, it must serve clear notice of such intention.

We are, however, in agreement with Carrier that the \$1.00 per day penalty provisions of Rule 11 (e) are inapplicable to the circumstances here involved. It is not disputed that the vacancy in issue was a temporary vacancy. Such vacancies come under the governance of Rule 12. Rule 11 begins by declaring as its subject "All new positions or vacancies, except as provided in Rule 12", i.e. except for temporary vacancies. Rule 8 and 12 contain no such penalty clause as the one stipulated in Rule 11; none may be read into them. Where there is no rule to support a claim the Board will not supply one. And the Board will not assess a penalty absent specific agreement provisions to do so. Awards 12824, 15829, 12345.

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 Employee involved in this dispute are respectively Carrier and Employee 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 violated.

A W A R D

Part 1 of the claim is sustained; Part 2 is denied because of absence of Agreement provision therefor.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of October 1969.