

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20963
Docket Number CL-20724

Dan E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station Employees
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7599) that:

1. Carrier violated the Clerks' Rule 6 Agreement which became effective March 1, 1973, and in particular the parties' Letter of Agreement dated October 4, 1972, when it arbitrarily failed and refused to assign Mrs. Vicky Ball to the position of Secretary to the Assistant Superintendent, Memphis, Tennessee (Carrier's File 205-4770).

2. Carrier shall now be required to compensate Mrs. Vicky Ball eight hours' pay at the rate of \$40.78 per day, April 19 and 20, 1973, and continuing Monday through Friday of each work week until violation is corrected by assigning Mrs. Ball to the position of Secretary to the Assistant Superintendent.

OPINION OF BOARD: There is an Agreement between the parties hereto, with effective date of September 1, 1952, as revised and reprinted September 1, 1964 and subsequently on March 1, 1973. Rule 1, the Scope Rule of that Agreement, has an Exception No. 2 relative to "restricted positions" which are listed specifically therein. The Agreement, provides that the list of restricted positions as tabulated shall not be changed except by mutual agreement.

In the Fall of 1972 the parties had discussions relative to a change in status of restricted positions at Memphis, Tennessee. Subsequent to those conversations the parties entered into a Letter Agreement dated October 4, 1972 which reads in pertinent part as follows:

* * * * *

This will confirm our understanding that Exception 2 to Rule 1 of the Agreement is amended to eliminate restricted status from Job 001 Chief Clerk and to place restricted status on Job 107 Secretary to the Assistant Superintendent.

It is understood this restricted position will be filled by appointment of employee holding seniority on the Memphis Station and Yard Seniority District.

"Please indicate your concurrence by **affixing** your **signature in** the space provided below.

Yours truly,

O. B. SAYERS /s/

IT IS AGREED:

OTIS J. HAWTHORNE /s/
General Chairman "

The **record** show6 that the **parties** renegotiated the controlling Agreement effective **March 1, 1973** and that the **understanding** contained **in** the October **4, 1972** Letter Agreement was reaffirmed and Incorporated **specifically into** Exception 2 (b) to Rule 1.

On **or** about **March 15, 1973** the Incumbent of the job of **Secretary** to the **Assistant** Superintendent, Operating Department, tendered her **resig-** nation effective **April 1, 1973**. By letter dated March 26, 1973 one Evelyn Oslics, who occupied on that date a **position** of Stem Clerk in the Traffic Department, confirmed that she **was** transferred effective April 1, **1973** to the **job** of Secretary to the **Assistant** Superintendent, Operating Department. On **March 27, 1973** the **Organization's General** Chairman **protested** to Carrier that **filling** the **position from the Traffic Department** was violative of the **requirement** of the October 4, 1972 Letter Agreement and of Exception No. 2 that the **position "will be filled** by appointment of **employee holding seniority** on the Memphis Station and Yard Seniority **District."** Thereafter, on April 2, 1973 the **Assistant Superintendent** posted a bulletin **soliciting the names of employees** in the Operating Department **who** wished to be considered for the **position**. Claimant and two other **employees** applied and apparently were tested on **secretarial skills** by the **Assistant Superintendent**. **Miss Oslica from** the **Traffic Department** also **was** tested by the **Assistant Superintendent**. The **Assistant Superintendent** stated that none of the **employees** from the Memphis Station and Yards Roster, including Claimant, were qualified for the position.

It **is** worth **noting** that effective April **18, 1973** Carrier placed **Oslica in** the **Memphis Station and Yard Seniority District** and gave he6 the restricted Job on **April 26, 1973**.

A6 **we** read this record it **is** obvious that **Carrier** officer6 had arranged at least a6 **early** as March 26, 1973 for **Miss Oslica**, ah **employee** outside the **Memphis Station and Yard Seniority District**, to step into the restricted position which was vacated April 1, 1973. Before **she** could take over the position the Organization notified **Carrier** that that **was** an anticipatory violation of the October **4, 1972** Letter Agreement and Carrier promptly backtracked to solicit applicants **from** the Station and Yard Seniority

District. The Carrier Officer who had sought Miss Oslica for the position then "tested" each of the applicants in the contractually mandated seniority district, found each one wanting and then turned to his first-ordained choice, Miss Oslica, who had in the interim been placed on the Memphis Terminal clerical Extra Board, thereby becoming effective April 19, 1973 within the seniority district mandated by the Letter Agreement of October 4, 1972.

The requirement of the Letter Agreement and of its derivative Exception 2 (b) to Rule 1 of the March 1, 1973 Agreement is clear and unambiguous. It states that Carrier will fill the position at issue from the Memphis Station and Yard Seniority District. Among the many Awards cited by each party in this case we think the words of Award 11959 are particularly appropriate herein:

"The rule involved is clear. It is not ambiguous. By its own terms it is obligatory on Carrier. The burden was on Carrier to either comply with the plain mandate of the rule or, in the alternative, to show an affirmative good faith effort to meet the obligation of the rule, using such reasonable procedure as might be designed by the exercise of its sound discretion to implement the rule instead of ignore it."

There are a goodly number of red herrings and much extraneous argumentation on this record relative to fitness and ability in the exercise of seniority rights. As we read this record those arguments and that issue are tangential to the central inquiry raised by the particular facts and circumstances of this case. In our considered judgment Carrier violated the express mandate of the Letter Agreement when it arranged for Oslica to fill the vacated restricted position without even considering the qualification of employees in the Memphis Station and Yard Seniority District. By a series of highly suspicious maneuvers culminating in Oslica's placement in the Memphis Station and Yard Seniority District immediately before her "official" placement in the job, Carrier managed to extricate itself from the violation. We have doubt about the testing and interviewing of Claimant in these circumstances in that her disqualification by the Assistant superintendent smacks of self-fulfilling prophecy. We do not have sufficient solid evidence to sustain a finding that Carrier acted in bad faith herein and mere suspicion of sharp practice will not support the claim that the Letter Agreement was violated by indirection after April 19, 1973. At least on and after that date Carrier was in technical literal compliance with the letter, if not the spirit, of that Agreement. We are sufficiently convinced, however, that the Letter Agreement was ignored and violated by Carrier until April 19, 1973 when it filled the position "by appointment of employee holding seniority on the Memphis Station and Yard Seniority District." Accordingly we sustain that part of the claim which alleges a violation of the Letter Agreement but necessarily must limit the time of violation to the period

between April 1, 1973 and April 19, 1973. Finally, with respect to damages, we shall award Claimant the difference, if any, between the compensation for the job of Secretary to the Assistant Superintendent, Memphis, and her taming6 a6 an employe of Carrier from April 1 to April 19, 1973.

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 violated.

A W A R D

Part 1 of the claim is sustained as indicated in the Opinion.

Part 2 of the claim is sustained in modified form to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1976.