

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21055
Docket Number CL-20869

Dana E. Eischen, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7655) that :

(a) Carrier violated the agreement at Atlanta, Georgia, when it refused to assign Mr. J. E. Moore the senior bidder to the position of Chief Clerk in the office of Regional Materials Manager.

(b) Carrier shall be required to compensate Mr. J. E. Moore in the amount of \$2.19 per day five days per week beginning March 12, 1973, at six percent interest, and continuing until he is assigned to the position of Chief Clerk as advertised in Bulletin No. 37, dated March 5, 1973.

OPINION OF BOARD: It is important to note at the outset that the Organization and Carrier herein substantially rewired and renumbered the "old" provisions of the controlling Agreement., effective March 1, 1972. Part of that renegotiation involved Rules at issue herein to wit: A) Rule 1 (Scope) was revised but the parties left inter alia the "exceptions section" in negotiations. Thus, under principle 8 of Railway Labor law, statute quo prevailed in the form of the "old" exceptions. b) "Old" Rule 15 (Promotion, Vacancies or New Positions Not Filled by Seniority) was revised and renumbered as Rule 14, c) "Old" Rule 16 (Filling Vacancies Under Seniority Rules) was retained and renumbered as Rule 15. d) "New" Rule 16 (Grievances) was established in the Agreement.

Thus, at the time the instant claim arose the applicable sections of the Agreement read as follow:

"RULE 1 - Scope (Revised, effective October 1, 1938)

These rules shall govern the hours of service and working conditions of employees described in the following respective groups in general and district offices, and similar employees in offices and operations under jurisdiction of other officers and subordinate officers in the various departments of each of the Carriers named in the caption of this agreement:

GROUP 1. Clerks -

- (a) Clerical Workers, and
- (b) Machine Operators, all as hereinafter defined in Rule 2.

• * *

"Exceptions:

It is understood that this agreement does not apply to the following enumerated employees and positions:

* • •

(c) (Effective September 1, 1926) While positions of Chief Transportation Timekeeper, Chief Clerk to Terminal Superintendent and Chief Clerk to Division Storekeeper are not excepted positions, it is understood that in filling vacancies in these positions the principles of Rule 15 shall govern.

RULE 14 - Promotion, Vacancies or New Positions Not Filled by Seniority (Revised, effective March 1, 1972)

Promotions, vacancies or new positions which are not filled by seniority shall be filled as follows:

Qualifications, merit and capacity being relatively equal, preference shall be given employees in the service, who have made application, in order of their service age.

* * *

RULE 15 - Filling Vacancies Under Seniority Rule

Except as otherwise provided in this agreement, Rules 7, 8, 9, 13, 14, 15 and 17 in particular, vacancies covered by this agreement will be filled in accordance with principles defined in Rule 15 (exclusive of the notes) in the following manner, except that merit, capacity and qualifications being sufficient, seniority shall govern:

• • •

RULE 1.6 - Grievances

An Employee who considers himself unjustly treated, otherwise than covered by these rules, shall have the same right of investigation, hearing, appeal and representation as provided in Rule 40 if written request which sets forth the employee's complaint is made to his immediate superior officer and/or the designated officer with whom claims are filed, within ten (10) days of cause of complaint.

"ROTE: This rule should be used particularly in instances where an employee is adjudged mt to have relatively equal or sufficient qualifications, merit and capacity for a position on which he has submitted an application or bid and a junior employee has been assigned or awarded the position. The employee mat then present evidence at the hearing that he did have relatively equal or sufficient qualifications, merit and capacity and the burden of proof rests with such employee. In the event the employee had previously filled the position for thirty (30) or more workdays during a vacancy or during a vacation period and had mt previously been disqualified therefrom, the burden of proof would then shift to the carrier to prove such employee did mt have relatively equal or sufficient qualifications, merit and capacity.

This rule is mt limited solely to cases of the type cited above, but may be used in any case where an employee feels he has been unjustly treated in some manner mt covered by any specific rule(a) of this agreement."
(Emphasis added)

On March 5, 1973 the position of Chief Clerk in the office of Regional Materials Manager was advertised for bids. During the bid period two applications were received; one from Hr. J. E. Moore, Claimant herein and the other from Mr. W. M. Gude. By Bulletin dated March 12, 1973 Mr. Gude was assigned the job. In this claim under Rule 16 the Organization on behalf of Mr. Moore, argues that Carrier violated the controlling Agreement cited supra when it awarded the position to Gude and mt to Moore.

The position in dispute, Chief Clerk to the Regional Materials Manager, formerly was titled Chief Clerk to Division Storekeeper. Thus, there is m question that said position is subject to "old" exception (c) to Rule 1 quoted supra. i.e. it is understood that in filling such vacancies the principles of Rule 14 ("old" Rule 15) relative to Promotions, Vacancies or New Positions Not Filled by Seniority shall govern. Thus, the dispute before us involves the interpretation and application of Rules 14 and 16 quoted supra.

We think it bears pointing out that Rule 14 does mt obviate entirely the consideration of seniority in filling vacancies thereunder mr does the Rule give Carrier the unqualified right to fill the Chief Clerk position "without regard to seniority" as Carrier seems to contend. Rather, as we read that Rule seniority or "service age" does come into play under Rule 14 and that Rule requires preference be given a senior employee if qualifications, merit and capacity are relatively equal between a junior

and senior **employee**. (Emphasis added). Thus, that Rule may be violated where Carrier **fails or refuses** to give preference to a senior **employee** whose **qualifications**, merit and capacity are **relatively** equal with those of junior bidders. **Rule 16(Grievances)** and **especially** the Rote thereto are important in **considering allegations** of such violations. The clear and **express** language of that Rule **shows** that **Claimant** and the Organization in **his** behalf have the burden of **proving** that **his qualifications** are **relatively equal** to those of Mr. Gude who got the **job**. Absent such a **factual showing** in determination of a Rule 14 violation **is possible** on **this particular** record. **This is so because, contrary to assertions** of the Organization, we **find** not one scintilla of evidence of **bias, prejudice or discrimination** against **Claimant** nor any showing of **scienter** in Carrier's selection of Gude. That leaves the sole question **remaining** whether **Claimant** has proven by a preponderance of the evidence that **his qualifications**, merit and capacity were **relatively equal** to those of the junior **employee** at the time the appointment was made. In our **considered judgment** he has not carried **this** burden of proof.

The **uncontroverted** record **shows** that **Claimant** Moore was working for a little less than a year as Chief Stock Clerk in the Regional Materials Manager's office and Gude had **worked in that office as Invoice Clerk** for over two years. **Claimant** was possessed of a high school education; while Gude held a **Bachelors degree** in **Business Administration** and a technical certificate in data processing. **Claimant** **occasionally** had performed vacation relief of the Chief Clerk in the office of the Diesel Shop Manager; whereas Gude held a regular relief position one day a week as Chief Clerk at Inman Yard. Relative to merit and capacity every managerial supervisor who testified rated Gude superior to **Claimant** on the basis of **work performance**, initiative and quality of **work**. Against this evidence **Claimant** **offered** assertions that he could do the work if given a chance and **contentions** that **his** work performance had **always** been **satisfactory**. We do not contradict these **assertions** nor denigrate **Claimant** when WC holds that such are not relevant or probative evidence on the only salient point **before us, i.e., were his qualifications relatively equal to Gude's**. We are not **persuaded** that they were equal and accordingly we have no alternative but to deny the claim.

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 **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 not violated.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April 1976.