Award Number 98
Docket Number CL–125

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Paul Samuell, Referee

PARTIES TO DISPUTE:

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

NORTHERN PACIFIC RAILWAY COMPANY

DISPUTE.—"Claim of D. J. Speier dated December 27, 1932, that he should have been assigned to position of Chief Clerk to the Assistant Superintendent at Pasco and that he be paid the difference in rate as between position he is occupying and position denied him from date of claim."

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

The carrier and the employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

This dispute being deadlocked, Paul Samuell was called in as Referee to sit with this Division.

The following statement of facts is jointly certified by the parties, and the Third Division so finds:

"The Pasco Division was abolished effective December 18, 1932. The division offices formerly located at that place were discontinued. An assistant superintendent was assigned at Pasco. Position of Chief Clerk to the Assistant Superintendent, basic rate of $6.60 per day, was created and this position was bulletined to employees on the Operating Division. Mr. S. D. Douglas, who prior to December 18, 1932, was Chief Clerk to the Superintendent, and Mr. D. J. Speier, who prior to December 18, 1932, was Clerk to Trainmaster at Pasco, made application for the position of Chief Clerk to the Assistant Superintendent. Mr. Speier was senior to Mr. Douglas. Mr. Douglas was awarded the position. The position of Chief Clerk to Assistant Superintendent is covered by Rule 5 (b) reading as follows:

"'RULE 5 (b). The positions of Chief Clerk to Master Mechanic, Chief Clerk to Assistant Superintendent, Chief Clerk to Trainmaster, Chief Clerk and Cashier in the following freight offices: Duluth, St. Paul, Minneapolis, Tacoma, and Seattle; cashier in freight office at Billings, Butte, and Spokane, shall be subject to all the rules of this agreement except that promotion to these positions shall be: Merit and ability being equal the senior applicant will be awarded the position, the appointing officer to be the judge (subject to appeal).'"

An agreement bearing effective date of August 15, 1922, exists between the parties, and employees rely upon the following rules thereof to sustain their claim:

"RULE 3. *Seniority datum.*—Seniority begins at the time employe's pay starts on the seniority district and in the class to which assigned.

Where two or more employes enter upon their duties at the same hour on the same day, employing officer shall at that time designate respective rank of such employes and advise the employes affected."

"RULE 4. *Clerical dating.*—Employes will rank as clerks from date assigned to clerical positions."

"RULE 5. (b) The positions of Chief Clerk to Master Mechanic, Chief Clerk to Assistant Superintendent, Chief Clerk to Trainmaster, Chief Clerk and Cashier in the following freight offices: Duluth, St. Paul, Minneapolis,

Tacoma, and Seattle; cashier in freight office at Billings, Butte, and Spokane shall be subject to all the rules of this agreement except that promotion to these positions shall be: Merit and ability being equal the senior applicant will be awarded the position, the appointing officer to be the judge (subject to appeal)."

"RULE 7. *New positions and vacancies.*—Seniority rights of employees to vacancies or new positions will be governed by these rules."

"RULE 11. *Bulletin.*—New positions or vacancies will be promptly bulletined in agreed-upon places accessible to all employes affected, for a period of five (5) days in the districts where they occur; bulletin to show location, title, hours of service, and rate of pay. Employes desiring such positions will file their applications with the designated official within that time, and an assignment will be made within five (5) days thereafter; except that in the general offices at Saint Paul and Seattle positions will be bulletined for a period of three (3) days and an assignment will be made within three (3) days thereafter. The name of the successful applicant will immediately thereafter be posted for a period of five (5) days where the position was bulletined.

"The provisions of this rule shall apply to all positions or vacancies except that of truckers and similarly rated or lower positions, provided, however, the senior employe in this class of service will be given an opportunity to exercise his seniority rights to preferable shifts when a new position or vacancy occurs."

Complainant Employee Speier was assigned to position of Chief Clerk to the Assistant Superintendent at Pasco on December 18, 1934, vice employee Douglas promoted, thereby terminating claim made subject of dispute as of December 18, 1934.

The disputants agree that the question for this Board to determine in this dispute is, "Did Mr. D. J. Speier, on December 18, 1932 (date assignment was made), have equal merit with Mr. S. D. Douglas for the position of Chief Clerk to the Assistant Superintendent at Pasco?"

Rule 5 (b) places the responsibility upon the carrier to determine the issue of merit where more than one employee seeks a position. In other words, the agreement reserves unto the appointing officer the right to be the judge subject to appeal. We stated in the previous case, CL–124, "This Division should be reluctant to interfere with the decision so made by the carrier so long as it acts in good faith, is without bias or prejudice, and indicates no disposition to purposely or carelessly evade or disrespect the rules as well as the spirit and intention thereof", and we are of the opinion that the language applies in this dispute.

The question of merit of the two applicants is largely discretionary with the appointing officer. In this dispute we concede that such officer might have properly decided that petitioner Speier be selected, while on the other hand, we cannot say that the officer abused any right in deciding that Douglas had more merit than Speier.

This dispute is not one of principle but one of fact, and we are not disposed to substitute our opinion for that of the appointing officer with the present record before us.

AWARD

Claim denied.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary.*

Dated at Chicago, Illinois, this 25th day of September 1935.