

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION EMPLOYEES
THE NEW YORK CENTRAL RAILROAD—BUFFALO & EAST**

DISPUTE.—

"Claim that Robert Wilson, trucker, be paid for twenty-seven (27) days at the rate of pay for position of messenger at Carroll Street Warehouse, Buffalo, N. Y."

FINDINGS.—The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:
The carrier and the employe involved in this dispute are respectively carrier and employe 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.

As a result of a deadlock, Lloyd K. Garrison was called in as Referee to sit with the Division as a member thereof.

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

"On July 23, 1934, Robert Wilson, trucker with Class 2 seniority dating of April 8, 1925, on the Carroll Street Warehouse (Buffalo, N. Y.) roster, requested the opportunity of working a temporary vacancy in a position of warehouse messenger, a Class 2 position on the same roster. His request was denied by the Agent on the basis that messengers' positions should not be filled by truckers.

"On the same day (July 23, 1934) the employees filed written protest with the Agent on account of this action. This protest included a claim that Wilson be reimbursed for pay loss sustained on July 23, 1934, and on any subsequent days his right to cover the vacancy was similarly denied.

"Vacancy in question was caused by regular messenger being off duty with permission, from July 23, 1934, to July 31, 1934. This regular messenger worked August 1st and 2nd, and commencing August 3rd, was again off duty on a 30 days leave of absence account of ill health of his brother-in-law.

"An extra messenger, without seniority rights on the Carroll Street Warehouse roster, was used to fill the vacancy from July 23 to July 31, 1934, inclusive, and a furloughed messenger with seniority on this roster, but junior to Wilson, filled the vacancy from August 3 to August 24, 1934, inclusive.

"On August 27, 1934, the Superintendent for the carrier advised the employees he had instructed the Agent that in future, qualified truckers are to be given the opportunity to work the messenger's position when a vacancy is created—this in the order of their seniority."

There is in evidence an agreement effective September 1, 1922. Rule 9 thereof provides:

"New positions or vacancies in Class 2 will be filled by the senior qualified employee if he desires the position."

The rule is clear and unambiguous on its face, and it contains no exceptions. Wilson was admittedly qualified for the position and was admittedly the senior applicant. Thus the petitioner makes out a complete prima facie case, and the claim must be sustained unless successfully rebutted by the carrier. In such rebuttal, the burden is upon the carrier to sustain its defense. The petitioner has shown a clear rule and a clear violation, and the carrier must show, if it can, why no award should be made.

The carrier's defense is that over a long series of years, there was an established practice, acceded to by the employees and amounting to an agreed upon interpretation of the rule, that where messenger positions were vacant they would be filled by extra messengers, and that where trucker positions were vacant they would be filled by extra truckers. But this contention, which is denied by the employees, is supported by no evidence, and at the oral hearing before the Board the employees stated that the messenger in question (Wetzel) who went off duty had acquired his messenger job by virtue of his having been a trucker, and also that Wilson had been allowed to work as a messenger a short time before his claim arose in this case. With respect to the latter statement the carrier said that at the time Wilson was so employed there were no available extra messengers; and it may be that Wetzel, the former trucker, had acquired his messenger job in some such manner. But, however these facts may be viewed, we think it is incumbent upon the carrier, when a clear prima facie case has been made out by the employees, to submit some evidence in support of its defense other than the bare statement that there has been a practice or understanding which would defeat the claim.

The carrier points to the fact that in December 1933 the employees' representative requested the agent to allow messenger vacancies to be filled by qualified truckers; that this request was denied and nothing more said or done until the present claim arose in the following July; that the mere making of the request was evidence that up to that time the practice and understanding had been the other way; and that the failure to act when the request was denied indicated a further acquiescence by the employees in the previously established interpretation. But all of these conclusions rest upon inferences, and contrary inferences are drawn by the employees. Thus, it is argued that until the acute period of the depression, truckers may very likely never have applied for the privilege of filling messenger vacancies under Rule 9 for the simple reason that the rate of pay of the truckers is more than twice that of the messengers; that, furthermore, apart from this natural disinclination to take a messenger job, few truckers might be qualified for messenger positions; and that the request in 1933 may have been occasioned by indications, arising for the first time, that qualified truckers might desire to fill messenger vacancies. These inferences from the bare facts of the record seem to be as plausible as the inferences drawn by the carrier. Why no formal claim arose as a result of the denial of the December 1933 request, we do not know, but it may be that no formal application had been made by any trucker to the management in that instance. Six months later, a formal claim was made—the claim in this case—and for all that appears, there may have been during the interval no instance of a messenger vacancy coinciding with the desire of a qualified senior trucker to fill the position.

There being no evidence of any restrictive agreed upon interpretation of Rule 9, except the mere assertion of the fact by the carrier, which is denied by the petitioner, and except for certain inferences drawn from the record, which permits of contrary inferences quite as persuasive, it follows that the claim must be sustained.

AWARD

Claim sustained.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary*.

Dated at Chicago, Illinois, this 9th day of April 1936.