

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION EMPLOYES
ERIE RAILROAD COMPANY**

DISPUTE.—

"Claim of employes that vacancy on position of Car Clerk caused by Promotion of F. P. Reagan be bulletined and assigned in accordance with rules of agreement dated December 1, 1928, and that any other vacancies caused by bulletins and assignments in connection therewith in the Office of the Operating Vice President be likewise handled under the seniority rules of the aforementioned agreement and that employes suffering wage losses be reimbursed retroactive to April 1, 1936."

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

The carrier and the employes involved in this dispute are, respectively, carrier and employes 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.

Position of Car Clerk in Office of Operating Vice President was not bulletined, but was filled by appointing and assigning Byron Pierce thereto, April 1, 1936. The carrier then filled the position vacated by Mr. Pierce by appointing J. F. Hazzard, seniority date September 16, 1929, thereto. The petitioner protested carrier filling vacancy by appointment, and contended the seniority rights of Francis Schafer, seniority date February 4, 1929, were violated.

There is in evidence an agreement between the parties bearing effective date of December 1, 1928, and the following articles thereof have been cited:

"ARTICLE 1—SCOPE

"(a) These rules shall govern the hours of service and working conditions of Clerks (except as otherwise specified herein) in all General Offices under the jurisdiction of the Operating Vice President and all Departments reporting to the Comptroller.

"(b) They shall not apply to the heads of offices or their assistants, including Chief Clerks, Ass't Chief Clerks, Office Managers, Ass't Office Managers and Confidential Secretaries.

"(c) They shall not apply to the personal office forces of the:

"Comptroller.

"Auditor of Disbursements.

"Auditor of Freight Accounts.

"Auditor of Passenger Accounts.

"District Accountants.

"Managers of Accounting Bureaus.

"(d) Personal office forces shall consist of:

"General Bookkeepers.

"Payroll Clerks Accounting Department.

"File Clerks.

"General Accountants.

"Traveling Auditors.

"Traveling Accountants.

"Traveling Rate Clerks.

"Demurrage Inspectors.

"Special Traveling Representatives.

"ARTICLE 8—SENIORITY

- "(a) Seniority begins at the time employe's pay starts.
 "(b) Seniority districts are established, by mutual agreement, in the various offices as follows:

"GENERAL OFFICE GROUP

- "1. Operating Vice President, including Superintendent of Motive, Chief Engineer Maintenance of Way and Assistant Vice President and Chief Engineer.
- "2. Dining Car Department, Jersey City, N. J.
- "3. Mail Room, New York, N. Y.
- "4. General Freight Claim Department.
- "5. Stationer and Manager of Purchases.
- "6. Superintendent of Transportation and Car Records.
- "7. Superintendent Car Department, Hornell, N. Y.
- "8. Manager of Stores, Hornell, N. Y.
- "9. Superintendent of Telegraph.
- "10. Employment Bureau.

"ARTICLE 12—NEW POSITIONS AND VACANCIES

"(a) New positions or vacancies will be promptly bulletined in places accessible to all clerks affected, for a period as mutually agreed, but not to exceed five (5) days in the district where they occur, bulletin to show location, title, hours of service and rate of pay. Clerks desiring such positions will file written applications within that time and an assignment will be made within five (5) days thereafter.

"(b) The name of the clerk assigned to the position will, immediately thereafter, be posted for a period of five (5) days where the position was bulletined.

"(c) When a clerk bids for and is assigned to a permanent position, the former position will be declared vacant and bulletined; such clerk cannot make application for a position just vacated, but if the position is vacated by the clerk who was assigned to it, the clerk may then make application which will be considered.

"(d) Bulletined positions may be filled temporarily pending an assignment.

"(e) Clerks absent on account of sickness, disability, committee work, or company business may return to former position and within three (3) days after return to duty may exercise seniority rights to any position bulletined during such absence. Clerks displaced by their return may exercise seniority in the same manner.

"(f) Bulletined positions for which no applications are received shall be permanently filled without regard to these rules.

"(g) Positions or vacancies of ninety (90) days or less duration will be considered temporary, and will be filled without bulletining.

"(h) Clerks assigned to temporary positions for special work will be permitted, upon abolishment of these positions, to return to the position formerly held or exercise their seniority in accordance with paragraph (e).

"(i) Positions or vacancies of indefinite duration need not be bulletined until the expiration of ninety (90) days from date vacancy occurs or new position is established.

"(j) Positions or vacancies known to be of more than ninety (90) days duration shall be bulletined and filled in accordance with these regulations."

Petitioner contends that the agreement cited was not modified or changed even though the class of employes covered thereby did change their representative, under the provisions of the Railway Labor Act, and so certified by the National Mediation Board under date of March 6, 1935; that the rules of the agreement were in full force and effect April 1, 1936, and that the positions in question were embraced therein.

Carrier contends that employes involved in this dispute did not vote in the representation election which resulted in the certification of the National Mediation Board, and as a result thereof they were thereby removed from the agreement of December 1, 1928; that on April 8, 1935, at conferences between repre-

representatives of the management and representatives of the employees the carrier explained that the then existing agreements, including the agreement herein mentioned, would be assumed by the petitioner in this dispute, except that offices and designated employees, which were by agreement or by action of the Mediator placed in the category of excepted positions, would not be included; that after some general discussion a verbal understanding was reached to the effect that the organization would not represent employees not voting; that the position of Car Clerk, then held by F. P. Reagan, came within the group of employees not voting; and that this position was for that reason not bulletined when it became vacant, but was filled by a qualified employee within the office of Superintendent of Car Department by appointment of B. W. Pierce.

The carrier further contends that Francis Schafer was not assigned to position to which Clerk Hazzard was appointed, for the reason that the former was not qualified.

The Third Division finds that the action of the employees in changing their representative under the provisions of the Railway Labor Act in no manner modified or changed the agreements then in effect between the carrier and the employees.

The employees in question, however, were, by agreement between the parties, not permitted to vote in the representation election. Evidence indicates that it was the understanding of the carrier by the employees not voting and also through discussions at a conference between the parties held immediately subsequent to the election that positions occupied by employees who did not vote would be treated as excepted positions. This understanding of the carrier is supported by the fact that in the agreement subsequently negotiated, and which is now in effect, employees who did not vote are excepted therefrom, and all of the positions involved in this dispute are in that excepted group. The preponderance of evidence supports the contention of the carrier.

In view of the above findings it is unnecessary to pass on the fitness and ability of Clerk Schafer.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this Sixth day of November, 1936.