

Award No. 1171

Docket No. TE-655

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

I. L. Sharfman, Referee

**PARTIES TO DISPUTE:**

**THE ORDER OF RAILROAD TELEGRAPHERS**

**SOUTHERN PACIFIC COMPANY (PACIFIC LINES)**

**STATEMENT OF CLAIM:** "Claim of the General Committee of The Order of Railroad Telegraphers on Southern Pacific Company (Pacific Lines), that J. E. Hanlon shall be assigned to the fifth telegrapher-teletype clerk position at Oakland Pier as senior applicant on vacancy bulletin No. 457, of December 1, 1935."

**EMPLOYEES' STATEMENT OF FACTS:** "A vacancy as fifth telegrapher-teletype clerk, Oakland Pier, Western Division, was advertised December 1, 1935. J. E. Hanlon, with a seniority date of June 11, 1912, was the senior bidder on the position. He was not assigned to the position."

**CARRIER'S STATEMENT OF FACTS:** "1. Oakland Pier telegraph office is located at Oakland Pier, California, on the Western Division of the Carrier's property. December 1, 1935, Telegraphers' Circular No. 457 was issued (Carrier's Exhibit 'A-1'), advertising vacancy on position of Fifth Telegrapher-Teletype Clerk, Oakland Pier. Applications were received from the following employees, listed in the order of their seniority:

*J. E. Hanlon	June 11, 1912	J. M. McCallum	Aug. 30, 1922
C. A. Cooley	June 27, 1918	C. M. McMillan	Jul. 24, 1923
A. W. Athey	Oct. 9, 1918	L. B. Bobbitt	Aug. 5, 1924
*D. R. Howell	May 16, 1919	G. G. Porter	Jun. 25, 1925
W. F. Mohr	Aug. 4, 1922	E. A. Horn	Jul. 21, 1925

"2. Personal record of the first five employees above listed, namely, Hanlon, Cooley, Athey, Howell and Mohr, indicated that they had no experience in operating sending (transmitting) side of teletype machines, therefore, written notice was sent to Hanlon, Athey, Howell and Mohr, instructing each to report at Superintendent's Office, Oakland Pier, for the purpose of taking test (examination). See Carrier's Photostat Exhibit 'B-1.' Mr. Cooley was on leave of absence, however, upon his return, and when reporting to the Superintendent's Office, he was furnished a copy of Superintendent Gaylord's letter (Exhibit 'B-1').

"3. Mr. Mohr presented himself for the test but failed to qualify. The remaining four men, namely, Hanlon, Cooley, Athey, and Howell, refused to respond and undergo a qualifying test, therefore, position of Fifth Telegrapher-Teletype Clerk, Oakland Pier, was assigned to J. M. McCallum, the senior qualified applicant (being the employee standing sixth in seniority order), who had successfully passed qualifying test.

"4. Rule 19, Paragraphs (a) and (b) of Telegraphers' Current Agreement, read as follows:

'(a) Telegraphers will be regarded as in line of promotion, advancement depending upon faithful discharge of duties and capacity for increased responsibility. Where ability is sufficient, seniority will govern.'

"2. That the Carrier was within its rights in requiring Mr. Hanlon to demonstrate his fitness before assigning him to the position.

"3. That J. E. Hanlon refuses to submit to qualifying test.

"4. To sustain claim of the Petitioner would impair Rule 19, Paragraphs (a) and (b), and change an agreement which has been negotiated by the parties at interest.

"5. The claim is improper for the reason there is pending before the Carrier a similar claim in favor of an employe junior to Mr. Hanlon who likewise is unqualified."

**OPINION OF BOARD:** It is expressly provided in the Agreement that "where ability is sufficient, seniority will govern"; and it is explicitly specified, furthermore, that "the Company, through the proper official, will determine the fitness of telegraphers to fill all positions in this agreement." Under these rules it is obviously not incumbent upon the carrier to make assignments to positions solely on the basis of seniority; and it is clearly within the authority of the carrier, where previous training and experience do not disclose sufficient ability, to require such tests as will enable it to determine whether or not the applicant possesses the necessary fitness. It is conceivable, of course, that these tests, or the requirements for qualification thereunder, may go so far beyond the needs of the situation in any particular case that the carrier may be found to have abused its discretion or to have acted arbitrarily in rejecting the senior employe's application on the basis of the test and its outcome. Such a conclusion can be reached, however, only when the applicant, after taking the test, where the test constitutes the only source of information as to fitness, has made a showing of ability which may reasonably be deemed to satisfy the requirement of the governing rule. Where, however, as in this proceeding, the applicant, without any evidence whatever of sufficient ability to operate the transmitting side of the teletype, declines altogether to subject himself to the proposed test, he cannot be heard to complain that this test is unreasonably severe or otherwise exceeds the requirement of the governing rule. Since, in these circumstances, there is no violation of the Agreement, it is unnecessary to consider the further fact—likewise adverse in its implications to the claim of the employes—that under the rules the position to which the claimant seeks assignment no longer exists, and that the claimant submitted no bid for the new position which replaced it.

**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 employe involved in this dispute are respectively carrier and employe 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 evidence of record does not disclose any violation of the Agreement.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 2nd day of August, 1940.