

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

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

**NEW YORK, CHICAGO & ST. LOUIS RAILROAD
COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) The carrier violated the Clerks' agreement by assigning Mr. E. J. Crawford, Clerk-typist, General Passenger Department, to Stenographer position in the Vice President-Traffic's Office, Cleveland, Ohio.

(b) Claim the carrier be required to correct the agreement violation by assigning Mr. Joseph R. Haynosch, Clerk Stenographer, Freight Traffic Manager's Office to Stenographer position in Vice President-Traffic's Office, rate \$185.00 per month, and Mr. Haynosch be reimbursed for all monetary loss sustained.

(c) Claim that all employees involved in or affected by the violation be compensated for all monetary loss sustained.

EMPLOYEES' STATEMENT OF FACTS: Under date of September 18, 1942, position of Stenographer at Cleveland, Ohio, in Vice President-Traffic's Office rate \$185.00 per month was advertised. Last Paragraph of the bulletin read: "A copy of the application for the above position should be sent to General Chairman."

There were three applicants for the position namely; Mr. Clyde Ware, who was the only employee holding rights in the seniority district where the vacancy existed. However, Mr. Ware under date of September 28, 1942, withdrew his application. Mr. J. R. Haynosch, Stenographer-Clerk, Freight Traffic Manager's Office, seniority date, January 5, 1940, and Mr. E. J. Crawford, Clerk-typist, General Passenger Agent's roster, employment date October 30, 1941 as Mail Clerk and seniority date on General Passenger Agent's roster, May 6, 1942, were the other two applicants.

Mr. Clyde Ware who withdrew his application and Mr. J. R. Haynosch complied with the provisions of the January 13, 1941 agreement by furnishing the General Chairman copy of their application. Mr. E. J. Crawford, who was assigned the position did not furnish copy of his application to the General Chairman in accordance with January 13, 1941 agreement, which reads in part: "Applicants for positions listed herein shall send copy of application to the General Chairman."

"Positions covered by separate agreements between the parties hereto listing excepted positions, which are on file with the Management and General Chairman, are excepted and not subject to the rules of this agreement except Rule 6 (f)."

Rule 6 (f) reads:

"(f) Employees now filling or promoted to Excepted or Official positions with the railroad or their organization, shall retain all their seniority rights and continue to accumulate seniority in the seniority district from which promoted. When excepted or official positions are filled by other than employees covered by these rules, no seniority rights shall be established by such employment."

The employees endeavored to have this list of excepted positions completely eliminated, such positions to become subject to all of the rules of the clerks' schedule. The carrier was unwilling to agree to this but did agree that some of those positions should fall more or less completely under the clerks' schedule, while the employees agreed that in filling other positions the carrier should have the right of choice, unhampered by the provisions of Rule 8 or 9 (d); such positions are specifically designated in the memorandum of agreement and include the position in question.

There is nothing vague or uncertain about the paragraphs of the January 13, 1941, memorandum of agreement which definitely releases the carrier from any obligations under promotion Rule 8 or Rule 9 (d) when filling the designated positions and there are no other rules in the schedule which prescribe the method of awarding bulletined positions.

The carrier selected Mr. Crawford because in its opinion, taking all things into consideration, he was the proper man for the position. This opinion is supported by the fact that he is filling the position with entire satisfaction.

It is the opinion of the carrier that the prosecution of this case is an attempt on the part of the employees' representatives to get a decision from the Third Division of the National Railroad Adjustment Board which will restrain the carrier from exercising the privilege which is plainly and clearly given to it in the memorandum of agreement of January 13, 1941. Such action on the part of the Division would in effect abrogate an agreement negotiated and in effect between the carrier and the duly authorized representative of the employees involved.

It is respectfully submitted that the claim in question is not supported by the rules and agreements in effect between the carrier and the employees involved and that it should therefore be denied.

OPINION OF BOARD: On September 18, 1942, a position of stenographer in the office of Vice President-Traffic, at Cleveland, Ohio, carrying a rate of pay of \$185.00 per month, became vacant. On the same day the following bulletin was issued and posted:

"TO CLERICAL EMPLOYEES:

Applications will be received up to September 23, 1942, for the position stenographer at Cleveland, Ohio, Rate \$185.00 per month. Address applications to Mr. J. H. Day. A copy of application for above position should be sent to General Chairman.

J. H. Day, Vice President."

A copy of this bulletin was sent to the General Chairman of the Clerks' Brotherhood.

Three applications for the position were filed. One by Clyde Ware, the only employe applying who held seniority rights in the district where the vacancy occurred; another, J. R. Haynosch, a stenographer-clerk in the

Freight Traffic Manager's Office, with seniority dating from January 5, 1940; and the third, E. J. Crawford, a clerk-typist on the General Passenger Agent's roster, with seniority from October 30, 1941, as a mail clerk, and on the Passenger Agent's roster from May 6, 1942. On September 28, 1942, Ware withdrew his application, and on the same day the position was awarded to Crawford. Haynosch, on September 30, 1942, protested this action, claiming that Crawford was not a qualified bidder for the position, and that the same should have been awarded to him, Haynosch, as the only person who had, under the rules, bid therefor, after the withdrawal of Ware's application. A hearing was held on this protest on October 7, 1942, participated in by the appropriate Carrier officials, the General Chairman and his assistant, and Haynosch, with the result that the protest was overruled, and this claim was filed on February 4, 1943.

For a full understanding of this dispute reference to and quotation of certain rules of the current agreement effective January 1, 1936, and a supplementary agreement dated January 13, 1941, seem necessary. Rule 8 of the current agreement reads:

"Promotions or the awarding of other bulletined positions coming within the scope of these rules, shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.

"NOTE: The word 'sufficient' is intended to more clearly establish the right of the senior clerk or employe to bid in a new position or vacancy where two or more employes have adequate fitness and ability."

The pertinent provisions of the supplemental agreement of January 13, 1941, signed by the Carrier's General Manager and the General Chairman of the Clerks' Brotherhood are:

"It is agreed that the following positions are excepted from promotion rule 8 of the clerks' agreement and occupants of these positions are not subject to displacement, and it is further agreed that such positions will be paid a monthly rate which will compensate them for their services.

* * * * *

"OFFICE OF VICE PRESIDENT—TRAFFIC

Assistant to Vice President
Clerk
Secretary
Stenographer

* * * * *

"Occupants now filling excepted positions who had not previously filled positions covered by the clerks' schedule will be assigned a seniority date as of the date that they first filled such excepted positions.

"In filling positions listed above in this memorandum of understanding, preference shall be given to employes covered by the provisions of the clerks' agreement.

"Note: General Chairman will confer with officer in charge as to certain positions which will require special qualifications.

"When positions in the foregoing list are bulletined bulletin shall be worded as follows:

'Applications will be received up to for the position at Rate per month. Address applications to

"It is further agreed that the time limit provided in rule 7 (a) for filling positions listed herein shall not apply, provided in any event the position shall be filled within 30 days, unless otherwise agreed with the general chairman.

* * * * *

"Applicants for positions listed herein shall send copy of application to general chairman.

"This agreement shall become a part of the clerks' agreement between the parties hereto effective January 1, 1936, and shall supersede any rules that are in conflict therewith.

"This agreement shall be effective on the dates listed below for the respective departments:

* * * * *

It will be noted, that while the agreement quoted above does not require the bulletin to contain any direction that a copy of any application filed should be sent to the General Chairman, such a direction was added to the bulletin. The agreement, however, does provide that "Applicants for positions listed herein shall send copy of application to General Chairman," and it is contended by the petitioner that this provision is a mandatory one; and that an applicant who fails to conform thereto, forfeits the right to have his application considered. This brings us to one, if not the most important, of the questions presented to us for decision.

Crawford filed his application for the position in question on September 16, 1942, two days before the date of the bulletin aforesaid. It is explained that he learned from the former occupant of the position that the vacancy would occur, and then before the bulletin was posted he filed his application. It is claimed that he did not, at any time, see the bulletin, and, therefore knew nothing of the requirement that a copy of his application be sent to the General Chairman. At any rate, no such copy was sent. Petitioner contends that the filing of the application on September 16, 1942, was a violation of the rules such as invalidates the bid; but relies more strongly on its contention that the failure of Crawford to send a copy of his application to the General Chairman, made that application of no effect whatever, and that Haynosch, the only qualified and remaining applicant, became and was entitled to the position in question.

On the first contention, we hold that the mere filing of the application two days before the bulletin date did not invalidate the bid. Such filing could not have resulted in any possible prejudice to anyone, and, had a copy thereof been sent to the General Chairman, should have been considered along with other applications filed on or after September 18, and up to September 23. To hold otherwise would be to attach too much importance to technical details which have no substantial bearing on the rights of any party concerned in this dispute.

But we think the failure of Crawford to send a copy of his application to the General Chairman was a plain violation of the Agreement, and, had it been known by the Carrier, would have required that no consideration be given to his application. To give full effect to the rule so violated, it must be held that the selection of Crawford, in the circumstances, was, as to him, non-effective; and the true situation being developed, the Carrier should have assigned the position to Haynosch. The Carrier should not, in our opinion, be criticized for the selection of Crawford in the first instance, for it is not shown that it knew of Crawford's failure to send a copy of his application to the General Chairman; but when it learned of that fact, it should have been the first to suggest that the position should be awarded to the person, who,

under the rules, was entitled thereto. It should not be allowed to escape the penalty which its failure to properly act in the premises may bring upon it. The offer it made on October 7, to void the assignment and re-bulletin the position, cannot be considered. The game should have been played according to the rules, and a party participating therein who had, by a violation of such rules, forfeited his right to win, should not have been permitted to play the game over, and in that way correct his error. The party who observed the rules, and thereby became entitled to be declared the winner, had rights which should have been accorded him at the time the true situation was brought to light.

The observance of the rule in question is of the utmost importance for two reasons: First, it is a rule agreed on by the parties, and made to be observed in letter and spirit; and Second, it has a bearing upon the rule which contemplates that the General Chairman shall be permitted to confer with Carrier officials as to certain positions. How can the General Chairman know whether he desires such conference unless he has knowledge of the applications filed? As between two or more applications of which he has notice, he may not wish to confer, and to keep within the time intent and spirit of the rule, he is entitled to a copy of all applications on file. According to petitioner's Rebuttal Brief, when the Agreement of January 13, 1941, was being negotiated, the Carrier offered to assume the responsibility of furnishing copies of all applications filed to the General Chairman, but for some reason the Brotherhood preferred to place that responsibility on the applicant employe, thus waiving the right to charge the Carrier with a violation of the rule, until the violation thereof by the employe is brought home to it.

Solely on the ground that when proof of the violation of the rule by the employe, Crawford, was brought home to the Carrier, it failed to properly act, and award the position to Haynosch, we sustain 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 Employes involved in this dispute are respectively carrier and employes 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 Carrier violated the rules in not awarding the position in question to Haynosch, when notice of Crawford's violation of such rules was brought home to it; and that Haynosch, at his election, is entitled to the position awarded Crawford, and to be compensated for all wage loss suffered.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 13th day of August, 1943.