

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Herbert B. Rudolph, Referee

PARTIES TO DISPUTE:

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

UNION RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Union Railway Company, Memphis, Tenn. that the carrier violated the Clerks' Agreement:

1. When on May 1st, 1942, according to the understanding of the employes it reduced the rate of pay from \$250.00 per month to \$210.00 per month on the position of Chief Clerk to the President and Superintendent of the Union Railway Company of Memphis, Tenn., and awarded the vacancy thereon to Mr. J. W. Casey, who is not covered by the Clerks' Agreement and who holds no seniority thereunder and failed and refused and continued to refuse to assign Clerk, Mr. Geo. B. Sherman, listed upon the seniority roster as Number 17 with a date of March 10, 1919, who filed application for the position per his letter addressed to President Dozier under date of April 25th, 1942.
2. When on May 1st, 1942, according to the understanding of the employes it reduced the rate of pay of the position of Timekeeper in the Superintendent's Office from \$170.00 per month to \$140.00 per month and awarded the position to Mr. A. J. Gibson, **an extra and relief telegrapher in the service of the Missouri Pacific Railroad**, as stated by the Superintendent in his letter dated May 12th, 1942, addressed to the Terminal Chairman of the Clerks' Organization. Mr. Gibson did not come under the Clerks' Agreement per Rule 14 thereof and held no seniority rights thereunder entitling him to the vacancy on the position of Timekeeper, and failed and refused to award the position to an employe coming under the Clerks' Agreement until July 1st, 1942 when Clerk, W. L. Crittenden, listed on the Clerks' 1942 Seniority Roster as Number 52, with a date of November 11th, 1927, was awarded the position and who occupied it until August 8th, 1942, during which time Mr. Gibson was utilized by the carrier as a vacation relief telegrapher, on which date, i. e., August 8th, 1942, Mr. Gibson was returned to the position and displaced Mr. Crittenden.
3. When on May 1st, 1942, according to the understanding of the employes it reduced the rate of pay of the position of Secretary to the Superintendent from \$170.00 per month to \$140.00 per month, and assigned a Miss Peggy Marable, who the Superin-

tendent in his letter of May 12th, 1942 addressed to the Terminal Chairman, Mr. Severs of the Clerks' Organization said was an employe with sixteen (16) years service **with the Missouri Pacific Railroad**, but who was not an employe of the Union Railway Company coming under the Clerks' Agreement as provided for in Rule 14 thereof, to the vacancy of the position and failed and refused, and continued to refuse to assign an employe coming under the agreement to the position.

- 4-a That the rate of pay of the position of Chief Clerk to the President and the Superintendent be restored to the rate which was in effect thereon prior to May 1st, 1942, and Clerk, Geo. B. Sherman be assigned thereto and shall be compensated for all wage loss suffered retroactive to May 1st, 1942.
- b That the rate of pay of the position of Timekeeper be restored to the rate that was in effect thereon prior to May 1st, 1942, and that the senior qualified employe covered by the Clerks' Agreement entitled to the position be compensated for wage loss suffered retroactive to and including May 1st, 1942 until July 1st, 1942, the date when Mr. Crittenden was awarded the position, and that Clerk Crittenden be compensated the wage loss suffered for each day effective August 8th, 1942, (on which date Mr. Gibson returned to the timekeeper position and displaced Mr. Crittenden) until September 7th, 1942 when Mr. Crittenden was returned to the position of timekeeper.
- c That the rate of pay of the position of Secretary to the Superintendent be restored to the rate that was in effect thereon prior to May 1st, 1942 and that the position shall be awarded to the senior qualified employe coming under the agreement, (per Rule 14) that is entitled to and desires same, and that such employe awarded the position shall be compensated for all wage loss suffered retroactive to May 1st, 1942 just as though such award had been made on May 1st, 1942 and the provisions of Rule 14 were fulfilled.

EMPLOYEES' STATEMENT OF FACTS: On May 1st, 1942, President, Mr. R. M. Dozier of the Union Railway of Memphis, Tenn. issued his bulletin notice, (Exhibit (a)), indicating certain changes in the clerical force of the Union Station Company and also the Union Railway Company as follows:

(UNION RAILWAY COMPANY)

- 1. J. W. Casey to position of Chief Clerk to President and Superintendent.
- 2. A. J. Gibson to position of Timekeeper.
- 3. Miss Peggy Marable to position of Secretary to Superintendent.

On April 25th, 1942, Clerk, Geo. B. Sherman having information that the position of Chief Clerk to the President and Superintendent would soon become vacant wrote to President, Mr. Dozier of the Union Railway Company, (Exhibit (b)), and applied for the position of Chief Clerk, in which communication Mr. Sherman outlined his experience and also his qualifications.

On April 27th, 1942, (Exhibit (c)), Mr. Dozier replied to Mr. Sherman's letter of April 25th, 1942, and in effect declined to award the position to Mr. Sherman.

Such a contention on behalf of the employees is unsupported by any rule of the agreement between the Carrier and the Clerks' Organization dated February 1, 1929. There is no agreement written or otherwise between the Union Railway and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees covering rates of pay of official or excepted positions. The only rule of the February 1, 1929 agreement cited by the Employees is No. 14 that has heretofore been quoted in this submission. There are absolutely no words in this rule by implication or otherwise that would give to the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees any voice in the rates paid by the Carrier to its officials or employees occupying excepted positions.

OPINION OF BOARD: The positions here involved are included in the excepted positions enumerated in Rule 1 of the agreement. This dispute concerns, first, the right of the carrier to increase or decrease rates of pay for these excepted positions, and, second, the method by which such excepted positions were filled.

The only provision of the agreement relating to these excepted positions is Rule 14 which relates to promotion to such positions. There is nothing in this rule which relates to the rate of pay of these excepted positions. The positions being excepted from the agreement, and there being no provision of the agreement relating to the rates of these excepted positions, it follows, that no right is conferred upon the employees under the agreement to question the rate as fixed by the carrier for such positions.

Rule 14 is as follows:

"When vacancies occur in official or excepted positions, which are not covered by agreements with other employees, such position will be open to employees coming under this agreement.

"Employees promoted to official or excepted positions shall retain all their rights and continue to accrue seniority.

"When excepted or official positions are filled by other than employees coming under this agreement, no seniority rights shall be established by such employment."

The parties have agreed upon an interpretation of this rule as evidenced by the letter of October 5, 1941 of Mr. H. E. Roll, Chief Personnel Officer, as follows:

"Our officers at Memphis have agreed,—in the future when there is a vacancy for a clerk on a position not covered by the agreement, to handle the matter with the head of each department for the purpose of selecting a clerical employee from one of the departments to fill the Excepted position, if the employee with the necessary qualifications is available and desires the position referred to. The head of each department will pass this information out to their employees, and the employees will make application to their department head, which will be transmitted to the employing officer who has jurisdiction over the position to be filled."

The record is not entirely clear upon the notice of the vacancies in the excepted positions given by the carrier. The carrier contends that it gave notice as agreed in the Roll letter, and the employees contend that it failed to give such notice. However, assuming that the carrier failed to give the proper notice, nevertheless the claim fails because, with the exception of Mr. Sherman, there is no showing in this record that any employee desired or was available and qualified for the positions in dispute. Promotion to these positions is not governed by seniority (See Rule 4), but is subject to the qualification of the employee and the desire of a qualified employee. Without

It is noted in the Employees' statement of claim filed with the Board they state:

"* * * July 1, 1942 when Clerk, W. L. Crittenden listed on the Clerks' 1942 seniority roster as No. 52, with a date of November 11, 1927, was awarded the position (timekeeper) and occupied it until August 8, 1942."

This is a fact insofar as Mr. Crittenden's employment as the Timekeeper is concerned.

The vacancy that permitted of the promotion of Mr. Crittenden, however, was not caused by the acquiescence of any protest filed by the Clerks' Organization to the non-assignment of Mr. Crittenden to the vacancy created and filled as of May 1, 1942 as intimated in the Employees' statement of claim. The facts are that Mr. Gibson, subsequent to May 1, 1942, had filed application for entry in the Railway Engineering Corps of the Army. To fill such a prospective vacancy that would be caused by Mr. Gibson leaving the service to enter the Army, the employing officers of the Union Railway gave consideration to the following employees in the order named then occupying positions subject to the agreement of February 1, 1929, viz:

Gladys McAdams—Car Record Clerk
W. L. Crittenden—Switching Clerk
W. J. McCall —Yard Clerk
G. J. Kuykendall—Stenographer-Clerk
J. B. Formby —Demurrage Clerk

Each of these employees were given a fair trial on the job and each of them declined to accept promotion, however, at a subsequent date Mr. Crittenden notified the employing officers that he desired to reconsider his declination. As a consequence, when Mr. Gibson was transferred from the Timekeeper's position Mr. Crittenden was assigned to the vacancy. He was permanently assigned on September 7, 1942, on which date Mr. Gibson was transferred to position of telegrapher.

The Complainants' contention in this case is an attempt on their part to read language into Rule 14 that does not appear therein. Their contention is briefly that none other than employees occupying positions covered by the agreement of February 1, 1929 may be employed by the Carrier to fill vacancies in official or excepted positions. The rule does not so read. It was never so applied.

Rule 14 and the mutually agreed interpretation thereon contemplates that the Management shall give consideration in filling excepted and official positions to employees in service occupying positions covered by the agreement with the Clerks, but in the application of this rule and the mutually agreed interpretation thereon it must, of necessity, be controlled by Rule 1 of the agreement that gives to the Management the undeniable right to fill excepted positions that are of a direct and confidential nature as is this position. The rule so reads in plain and unambiguous language, to-wit: that the selection of employees to fill excepted positions must remain in the hands of the employing officer. It does not give to the Organization a voice in any manner whatsoever in the selections.

The Employees further embody in their submission a claim that the Carrier re-establish rates of pay applicable to the three positions in question that were in effect prior to May 1, 1942, viz:

Chief Clerk—Asst. Secy.—Asst. Treas.	\$270.00	per month
Timekeeper	— 165.00	" "
Secretary	— 170.00	" "

some showing that there was a qualified employe who desired the position had he been notified, there is nothing before this Division upon which to base an Award.

It appears from the record that Mr. Sherman was advised of and desired the position of Chief Clerk to the President. He applied for such position, and his application was denied. This raises the question of the authority of the carrier to refuse to place on an excepted position an employe covered by the agreement, who desires the position. As pointed out above, under the interpretation of Rule 14, contained in Mr. Roll's letter and agreed to by the employes two things must concur to give an employe covered by the agreement any right to an excepted position, first, the employe must desire the position, and second, the employe must be available and qualified. The determination of whether an employe is qualified must, we believe, be left in the first instance to the carrier, and this Division will review the action of the carrier in this regard only for the purpose of determining whether the action of the Carrier was arbitrary or unreasonable. We are unable under this record to determine that the carrier acted arbitrarily or unreasonably in denying the position to Mr. Sherman. His application was given consideration, his experience was known to the carrier and it was decided that such experience would not qualify him for the position. As recognized in Rule 1 under "Exceptions" these excepted positions are "of a direct and confidential nature." Qualifications for such a position are obviously different from the qualifications for the ordinary position covered by the agreement.

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 no violation of the agreement has been shown.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 24th day of September, 1943.