

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

**THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD
COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee that:

(a) The carrier violated the Clerks' Agreement and understanding agreed to June 2nd, 1943, also, the agreed to interpretation and application of the agreements in assigning Carl G. Meyer, Cashier, Statistician, rate \$7.41 per day, Passenger Department, to Stenographer position, rate \$185.00 per month, in Vice-President—Traffic's Office, Cleveland, Ohio.

(b) Claim the carrier be required to correct the agreement violation by assigning an employee who applied for the Stenographer position holding rights on the seniority district where the vacancy occurred.

(c) Claim the employees involved on or affected by the violation be compensated for monetary loss suffered.

EMPLOYEES' STATEMENT OF FACTS: Under date of September 4, 1943, position of Stenographer in Vice President—Traffic's office, rate \$185.00 per month, was advertised. There were two legitimate applications for the position namely; Stenographer Louis J. Kresnye and Stenographer Donald E. Good, both applicants holding rights on the seniority district where the vacancy existed.

Position was assigned to Carl G. Meyer, who is son of Chief Clerk to General Manager, September 14, 1943, an employee holding no rights whatsoever on the district where the vacancy occurred. Conference with the General Chairman as contemplated in the rules was not held. Employees under date of September 15, 1943, protested assignment of this position to Mr. Meyer and on September 20, 1943, six days after position was assigned to Mr. Meyer meeting on protest was held.

Mr. Carl Meyer, who was awarded this position September 14, 1943, as per exhibit "D," did not fill the position until September 28, 1943, fifteen (15) days from the date of the award of the position to him. Rule 11 (a) of the current agreement, effective January 1, 1936, reads:

"Employees awarded bulletined positions shall fill the position within five (5) days from the date of the bulletin awarding the position; otherwise they will forfeit their rights to this position."

This position is covered by the current agreement effective January 1, 1936, Agreement of January 13, 1941, and understanding confirmed in Vice President, Mr. Beale's letter of June 2nd, 1943, to General Chairman Dolard.

Memorandum of Agreement of January 13, 1941, and in which all the applicants were covered by the provisions of the Clerks' agreement but some of them had seniority on the district while others did not.

The purpose of the first paragraph of the understanding of June 2, 1943, was to insure that in such cases the applicants having seniority on the district in which the vacancy occurred would have preference over the applicants who did not have such seniority.

It was not claimed in these negotiations, and there is nothing in any of our clerical agreements to support the claim, that any employe has any right to any position which he is not qualified to fill.

We do not think the awards of this division in past cases, in which it has recognized not only the right but the obligation of management to select qualified employes for positions, would permit it to sustain this contention of the Committee.

Prior to the execution of the January 13, 1941, Memorandum of Agreement, there was a considerable list of excepted positions which had been agreed to in negotiations between the carrier and the employes and which were covered by an exception to Rule 1 (Scope) of the System agreement with the clerks effective January 1, 1936.

In the negotiations leading up to the January 13, 1941 Memorandum of Agreement, the employes endeavored to have the 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 employes agreed that in filling other positions the carrier should have the right of choice, unhampered by the provisions of Rule 8 or 9 (d). (Quoted in statement of facts.)

The list of positions excepted prior to the January 13, 1941 Memorandum of Agreement together with list of positions referred to in that agreement was jointly submitted to the Third Division, National Railroad Adjustment Board on April 19, 1943, by the General Chairman of the Brotherhood and the Vice President of the Company in connection with Docket CL-2245 (Award 2276).

The carrier's arguments above fully support its conclusions that the awarding of the position in question to Mr. Meyer was not a violation of the agreement relating to it.

Premises considered, it is the position of the carrier that the claim should be denied.

OPINION OF BOARD: The contractual rights and obligations of the parties are embraced in the following documents and understandings, all of which may or may not be here pertinent, to-wit: (1) an Agreement bearing the effective date of January 1, 1936; (2) a Memorandum of Agreement dated January 13, 1941; (3) an interpretation placed upon said Memorandum by the organization's circular of February 1, 1941; (4) an understanding of the parties, as revealed by a letter written by the carrier's Vice President—Operation, F. D. Beale, on June 2, 1943; and (5) the results of a conference held on September 20, 1943, as disclosed by the affidavit of said F. D. Beale, bearing date of April 26, 1944, and the organization's record denial of the facts recited in said affidavit. The failure of the parties to agree upon the controlling facts and the applicable contractual provisions requires a more extended opinion than would otherwise have been necessary.

The controversy arose over the filling of the position of Stenographer in the office of Vice President—Traffic, at Cleveland, Ohio, rated at \$185.00 per month. The position was bulletined on September 4, 1943, and a copy furnished the General Chairman of the Organization. Seven applications were received, only three of which came from clerical employes on the seniority

district where the vacancy occurred. One of these applicants failed to send a copy of his application to the General Chairman and another subsequently left the service of the company. The only one of these applications with whom we are here concerned is that of Donald E. Good. His status at the time of bidding was as follows: Age 18, entered service of carrier as a stencil cutter in General Freight Department, April 16, 1943; moved to position of stenographer-clerk, May 27; secretary to Assistant General Freight Agent, August 1; secretary to General Freight Agent, September 1, 1943.

Another applicant was Carl G. Meyer, age 25, who held no seniority rights in the district, but who entered the carrier's service on July 16, 1936, and who was, successively, messenger, clerk and stenographer in the office of Superintendent of Motive Power, and stenographer, file clerk and cashier-statistician in the office of the General Passenger Agent.

On September 14, 1943, the carrier awarded the position in question to Mr. Meyer and, on the following day, the General Chairman protested. Efforts to settle the controversy on the premises having failed, and Mr. Meyer having filled the position on September 28, the organization filed its ex parte submission here.

The petitioner contends that the carrier violated the terms of the controlling agreements, and the binding understandings of the parties in regard thereto, in each of the following respects: (1) by awarding the position to an employe holding no seniority rights in the district where the vacancy occurred; (2) by failing to confer with the General Chairman of the organization before awarding the position; and (3) failing to re-bulletin the position when Mr. Meyer did not fill it within five days from the date it was awarded to him. These propositions will be taken up in the order stated.

The parties appear to agree that the case is governed by the provisions of the Memorandum of January 13, 1941, which says:

"In filling positions listed above in this memorandum of understanding (one of which was, 'Office of Vice President—Traffic, Stenographer,') 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."

As we interpret the agreements, in awarding a position listed in the Memorandum of January 13, 1941, (including the one here involved), the carrier is not required to observe the general seniority rules of the basic Agreement of January 1, 1936, but preference shall be given to applicant employes listed on the seniority roster of the district where the vacancy exists, when qualified; and before determining the matter of qualifications of such applicants for positions requiring special qualifications, the carrier's officer in charge will, under the circumstances to be hereinafter noted, confer with the General Chairman of the organization.

The record before us discloses that the carrier consistently treated the position of Stenographer to its Vice President—Traffic as one calling for special qualifications and the facts would seem to justify that conclusion. Reasonable minds might differ however, upon the question as to whether the applicant Good was qualified for the position in view of his youth and lack of experience. The right to determine whether an applicant possesses requisite fitness and ability for a particular position rests primarily on the employer, however, and this Board will not substitute its opinion for that of the carrier's unless it is made to appear that its action was so capricious, arbitrary and unreasonable as to amount to an abuse of discretion. Awards 2031, 2350 and 2299. No such issue is tendered here and we must conclude that the claimant's contention that he was entitled to the position by reason of seniority is without merit.

We next take up the claim that the carrier violated the Agreement by failing to invite the General Chairman to a conference on the subject of the qualifications of the applicants. Unfortunately, the rule does not definitely place the responsibility for initiating such a conference and the question must, therefore, be resolved in the light of the steps necessary to achieve the objectives of the parties. The provision for such a conference was, manifestly, intended to be in aid of the preferential rights of the employes under the Agreement, since the General Chairman would not be expected to be interested in others. It seems equally clear that it was contemplated that such conferences would be mutually advantageous in cases where the carrier had determined that special qualifications were essential, since otherwise such conferences would serve no good purpose.

Whether a given position is one calling for special qualifications must always be a matter within the peculiar knowledge of the carrier. It alone is advised as to the nature of the particular duties which such employe will be expected to perform, and it likewise has access to the records disclosing the training, experience and efficiency of those applicants whose names appear on the seniority roster. While the General Chairman is furnished with a copy of each application made by a person under the Agreement, these do not disclose the qualifications of the applicant. It is likewise impracticable, if not impossible, for the Chairman to know whether special qualifications will be considered by the carrier in filling the position, unless so advised by it. His only alternative would be to demand a conference in every case where a position under the Memorandum of January 13, 1941, was about to be filled. This would be equally burdensome upon both parties, resulting in many unnecessary conferences. We reject that construction of the rule as being cumbersome and impracticable. It will not be assumed that the parties intended to establish any such practice.

We conclude, therefore, that it is incumbent upon the carrier to invite the General Chairman to a conference whenever it desires to fill a position requiring special qualifications, within the scope of the rule (agreement of January 13, 1941) with a qualified employe, and applications have been received from employes with seniority status. There is nothing in Award 2276 to qualify this conclusion. We cannot, however, sustain any claim for monetary loss for the reason that to do so would amount to a determination on our part that Mr. Good was qualified for and entitled to the position. As heretofore pointed out, the evidence as to the qualifications of the applicants was, in its most favorable light, conflicting, and there was no showing of an abuse of discretion in rejecting Mr. Good's application. Under such circumstances it is not for us to pass upon the matter of qualifications. The claimant would only be entitled to the position and to compensation for monetary loss in the event it should ultimately be determined, after a conference between the carrier's representative and the General Chairman, that he was qualified. Whether that situation will ever arise remains to be seen. We do not pass upon that aspect of the case now; nor do we close the door against its review under a proper and timely submission.

Our conclusion renders it unnecessary for us to consider the petitioner's proposition that Mr. Meyer vacated the assignment by not filling the position within five days from the date it was awarded to him. The position must be rebulletined and that situation may not arise again.

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 agreement by awarding the position without affording the General Chairman of the organization an opportunity for a conference as indicated in the Opinion.

AWARD

Claim sustained as interpretation of the agreement; otherwise denied without prejudice. Cause remanded for disposition in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 29th day of June, 1944.