

Award No. 2997

Docket No. TE-3014

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE DELAWARE AND HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers, on The Delaware and Hudson Railroad Corporation that C. I. Juckett, the senior bidder for the position Agent and Telegraphers, Westport, New York, which was advertised as vacant on August 27, 1940, but whose bid was not accepted and who was denied the assignment, be assigned thereto and be reimbursed for all monetary loss he sustained as the result of the Carrier's refusal to accept his bid and assign him thereon.

EMPLOYES STATEMENT OF FACTS: An agreement bearing effective date of November 1, 1937, as to the rules of working conditions and December 1, 1941, as to rates of pay, is in effect between the parties to this dispute.

The position of Agent and Telegrapher, Westport, N. Y., is covered by said agreement.

C. I. Juckett, the senior employee in service submitting a bid for this position has a seniority date of November 1, 1897, on the telegraphers' seniority roster. Edward Dupee has a seniority date of December 12, 1911, on the same roster. The regular station force at Westport consists of agent-telegrapher, 2nd telegrapher-clerk, 3rd telegrapher-clerk and a baggageman. During the summer months, approximately three months each year, a clerk is added to the station force; also an express agency employee—a helper-driver.

A vacancy on the position of Agent-Telegrapher, Westport, N. Y., was advertised under Rule 10 of the Telegraphers' Agreement, August 27, 1940, to all employees on the Telegraphers' Seniority Roster, embracing the territory on which Westport is located. C. I. Juckett was the senior employee holding seniority on that roster to apply for Westport Agency during the period it was advertised, but was denied the assignment by the Division Superintendent, whose decision was upheld by the Carrier on appeal.

POSITION OF EMPLOYES: The Order of Railroad Telegraphers did not represent the employees on this property for a period of several years prior to November 1, 1937, the effective date of the current agreement.

The Telegraphers' Agreement lists the position of Agent and Telegrapher, Westport, in the wage scale, at the hourly rate of sixty-four (.64) cents, as of August, 1940.

The vacancy on the position of Agent-Telegrapher at Westport was advertised to the employees, under the provisions of Article No. 10 of the Telegraphers' Agreement, by the Divisional Superintendent, under date of August 27, 1940.

it kept one of our Route Agents in almost constant attendance at Westport office during the summer periods during Mr. Juckett's regime at that point.

We certainly feel it would be a serious mistake to reinstate this man as he failed to have any appreciation of his responsibilities or that he was due to protect our interests and we cannot feel that he has improved by way of his subsequent experience. While we never felt that Mr. Juckett was radically dishonest, at the same time he was responsible for the condition that developed at Westport, with which perhaps you are familiar.

I might also remind that we registered several protests with Superintendent Wallace dating back to the forepart of 1932 as to Mr. Juckett being incompetent and not equal to the position. Westport, by way of the large summer business enjoyed, should not be in charge of other than a high-class and competent Joint Agent.

We therefore, trust you will find it possible to disqualify Mr. Juckett for the present vacancy.

Very truly yours,

(Sgd) Charles Benton,
Superintendent."

On September 16, 1940 the Auditor of Station Accounts addressed the following letter to the Superintendent:

"In connection with phone conversation on Sept. 9th, relative to Mr. C. I. Juckett having applied for position of Agent at Westport, N. Y.

Our records covering audits of account at Westport, N. Y., while Mr. Juckett was Agent at that point, show that this employe was not competent for supervising other employes under his jurisdiction.

On account of the Traveling Auditors having had close contact with Mr. Juckett while he was Agent at Westport, and also since his transfer to the agency at Comstock, N. Y., this subject was discussed with them on Sept. 14th and they stated while no difficulty has been experienced with this employe at Comstock, N. Y., they are of the opinion that Mr. Juckett still lacks the experience and ability with respect to instructing other people in the performance of their duties, and this applies to all agencies where the Agent is required to supervise other employes.

After giving this subject very careful consideration, insofar as the Accounting Department is concerned, it is my opinion that Mr. Juckett is not competent for supervising an agency like Westport, N. Y., or any other agency where an agent is required to supervise other employes.

(Sgd) H. A. Ostiguy
Auditor of Station Accounts"

The Agent-Telegrapher at Westport supervises three regular employes and during the Summer, additional employes. During the period 1927 to 1935 Mr. Juckett demonstrated that he was not qualified to handle the job and for that reason he was not awarded the position when it was advertised in August 1940. Mr. Juckett was clearly not entitled to the position of Agent at Westport under restrictions placed on his rights at the time he was reinstated in 1935.

OPINION OF BOARD: This claim brings into review the action of the Carrier in denying the Claimant an assignment to the position of Agent-Telegrapher at Westport, New York, bulletined on August 27, 1940

Rule 10 (a) of the effective Agreement of November 1, 1937, provided, among other things, that:

"Ability and qualifications being sufficient the senior man will be given the job or vacancy."

Under such a rule the determination of the ability and qualifications of an applicant is primarily the responsibility of the Carrier, to be exercised, of course, in good faith and with due regard for both the letter and the spirit of the Agreement. It is only in those instances where the Carrier's conduct is so fraught with bias and prejudice or with manifest intent to circumvent the Agreement as to lead to the conclusion that its action was arbitrary and capricious that this Board will be warranted in intervening. This rule is necessary to the end that the Board shall not fall into the error of substituting its judgment as to the qualifications and fitness of applicants for that of the carrier officials. These principles are so firmly established in numerous well-considered precedents of this agency as no longer to be open to debate. See Awards Nos. 396, 2142, 2440, and 2692.

The Claimant has been in the service of this Carrier, with some interruptions, since November 1, 1897. From March 15, 1927 to April 15, 1935, he occupied the position of Agent-Telegrapher at Westport, which he here again seeks. His service record discloses the following data bearing, more or less, upon his ability and qualifications:

- 6-23-'16, suspended for failing to display train order.
- 1- 5-'18, 20 demerits for failure to keep station in clean condition.
- 1-31-'20, 10 demerits for failure to answer correspondence.
- 11- 5-'29, reprimand for careless handling of papers
- 4-10-'35, dismissed (from Westport position) for falsifying time return.
- 5-23-'35, reinstated with rights restricted to duties not involving supervision of other employees.

The two items last mentioned have reference to an occasion when the Claimant made a charge for two days work for a period during which he was confined to his home on account of illness. He shows, in explanation, that he performed services while at his home and, also, some evidence of the existence of a practice to allow monthly rated employees straight time notwithstanding short absences on account of sickness. The Claimant's conditional reinstatement, referred to above, occurred prior to the negotiation of the Organization's first collective bargaining agreement with the Carrier, however, and we agree with the Petitioner that the Scope Rule of that agreement nullified any and all private understandings between the Carrier and this individual Claimant. See Awards Nos. 383 and 1061.

It is also shown that during the Claimant's prior service at Westport there was a shortage in the office of some \$600. which the Claimant was required to make good under his bond. A subsequent audit revealed, however, that this shortage was due to embezzlement of another employe, who was prosecuted and convicted for that offense. The Carrier does not question the Claimant's honesty but appears to rely upon his lack of ability to supervise subordinates.

Both parties have injected into presentation of this claim many immaterial and irrelevant matters. Charges and countercharges have been made and magnified or minimized. We find nothing in the record, however, to indicate that there is anything in this case beyond honest differences of opinion as to the ability and qualifications of the Claimant to fill the particular position in controversy. Certainly, the record does not disclose such bias and prejudice or such disregard of the terms of the Agreement on the part of the Carrier as to lead to the conclusion that its action in denying the Claimant's application was arbitrary and capricious. The fact that the Carrier has, since 1937, permitted the Claimant to occupy the position of Agent-Telegrapher at another though smaller station, without attempting his removal or reduction, is calculated to rebut any such conclusion. There are many considerations other than seniority and positive guilt that may properly be taken into account in determining an applicant's fitness for a position of trust and responsibility, and it is not for us to weigh and appraise the evidence upon which the Carrier acted. It is enough to say that there are facts and circumstances of record that **might** reasonably justify the action

taken, and that it would be tantamount to the substitution of our judgment for that of the Carrier's responsible officials for us to disturb their decision in this case.

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 established.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary.

Dated at Chicago, Illinois, this 29th day of November, 1945.