

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bruce Blake, Referee

**PARTIES TO DISPUTE:**

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

**PACIFIC FRUIT EXPRESS COMPANY**

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

(a) The Company violated the rules of the Clerks' current agreement when it assigned Mr. R. W. Nolan to the position of District Agent at Fresno, California, in lieu of assigning Mr. K. Badenhause, an applicant from the seniority district on which the vacancy occurred.

(b) The Company now be required to assign Mr. K. Badenhause to the position and compensate him for net wage loss retroactive to the date Mr. Nolan was placed on the position.

**EMPLOYEES' STATEMENT OF FACTS:** An agreement bearing date of September 15, 1939, as to rules and working conditions, is in effect between the parties to this dispute.

Effective April 19, 1945, Mr. R. W. Nolan, then employed as Agent at Salinas, California, was appointed to the position of District Agent at Fresno, California, an excepted position.

Salinas is located on Seniority District No. 11(a); Fresno is located on Seniority District No. 11.

There were applications made by six employees from Seniority District No. 11 for the position of District Agent at Fresno; all of the applications were rejected and the position assigned to Mr. R. W. Nolan, at that time employed on Seniority District No. 11(a).

One of the six applicants from Seniority District No. 11 was Mr. K. Badenhause, in whose behalf this instant claim is made. Under date of April 21, 1945, Mr. Badenhause wrote Pacific Fruit Express Company Superintendent as follows:

"I desire to protest the appointment of Mr. R. W. Nolan to the position of District Agent at Fresno on the grounds this appointment violates Rules 1, 4, 10, and 46 of BRC Agreement.

In voicing this protest also wish to submit wage claim for difference in pay between my existing wages and the salary paid the District Agent at Fresno. Will this claim be allowed? If not when can a hearing be expected.

The Company in appointing Employee R. W. Nolan considered not only his personal record dating from September 15, 1922, since which time he has worked in all phases of the Company's operations including a period of over three years when he served as a District Agent in a competitive territory, but he was and is known by the Company to possess the precise qualifications needed in all respects for the position of District Agent at Fresno, California.

In considering the essence of the Petitioner's position, namely, that in filling the excepted position of District Agent at Fresno, the Company did not live up to Rule 10(a) which provides that preference in such cases shall be given to the employees in the Seniority District in which the vacancy occurs, it is the Company's position that the agreement provision referred to is not preclusive of a right on the part of the Company to exercise judgment with respect to qualifications of employees in filling excepted positions.

The first sentence of Rule 10(a) requires that "Positions, including excepted positions, will be filled by promotion of qualified employees from the ranks". The first sentence of the rule is fundamental and expresses the primary intent of the rule. It states plainly that only qualified employees will be promoted from the ranks and does not limit the expression "the ranks" to any one seniority district. It is self-evident that the emphasis in the rule lies first upon the word "qualified". The second sentence of the rule supplements the first sentence by requiring that preference shall be given to employees in the seniority district in which the vacancy occurs, but such preference should be shown only in the event that a qualified employee in such district is available. If a qualified employee in such district is not available, it could hardly be reasoned that the Company would be denied the right to select an employee who was qualified from another district instead of an employee who was not qualified from the district in which the vacant excepted position occurred.

In the instant case the Company, in its judgment, decided that no employee in Seniority District No. 11 was qualified for the position of District Agent at Fresno also in Seniority District No. 11 and, therefore, selected Employee R. W. Nolan who it judged to be qualified for the position of District Agent at Fresno, from another seniority district.

It is, therefore, the Company's position that by the very wording of Rule 10(a), latitude is left to the Company in filling a position to select someone who in its judgment possesses the required qualifications, the only restriction placed upon the Company being that if an employee in the Seniority District does possess sufficient qualifications, preference then shall be given to such latter employee.

Petitioner contends that the Company violated Rule 38(d) of the current agreement in denying the six protestants a hearing which had been requested on the grounds that they had been unjustly treated. Rule 38(d) is not applicable in the instant case as there was no unjust treatment to any of the six protestants including Employee K. Badenhausen, in the exercise of its right to select an employee who, in its judgment, was the best and most thoroughly qualified for the position of District Agent at Fresno.

### CONCLUSION

The Company submits that in selecting Employee R. W. Nolan because of his experience and qualifications, it in no way violated Rule 10(a). Furthermore, in denying any and all of the six protestants a hearing or hearings, it did not violate Rule 38(d). Therefore, the Company submits that the claim in this docket is entirely without basis and requests that it be denied.

**OPINION OF BOARD:** The controlling Agreement contains the following provision:

**RULE 10.** " . . . (a) Positions, including excepted positions, will be filled by promotion of qualified employees from the ranks. In filling excepted positions, preference shall be given to employees in the seniority district in which the vacancy or new position occurs." (Emphasis added.)

A vacancy occurred in the position of District Agent at Fresno, an excepted position, which is in Seniority District No. 11, where Claimant holds seniority rights. The Carrier appointed R. W. Nolan to the position, a man who did not hold seniority rights in that district. The main question presented is purely one of fact to be determined from the record in the light of the provisions of the rule. The rule accords the employees merely a preferential right to promotion to vacancies occurring in excepted positions in their seniority districts. It is, however, a right which the Carrier is bound to respect and grant if an employee in the district is adequately qualified to fill it.

From our examination of the record we are satisfied that Claimant, notwithstanding his long and varied experience, was not adequately qualified for the position of District Agent at Fresno. In reaching this conclusion we are not unmindful of the fact that the Carrier in its letter rejecting Claimant's protest based its selection of Nolan "as employee best qualified" for the position. We do not, however, think that this can be translated into a testimonial of Claimant's fitness.

The Carrier does not seem to lay much stress upon a fact disclosed by the record which convinces us that Claimant is temperamentally unqualified for such a position as District Agent. On 1938 Claimant presented a grievance to the Carrier because he was required to work overtime a total of five hours and fifteen minutes from December 8th to 14th. Daily overtime ranged from thirty minutes to an hour and a half. Claimant asserts that the Carrier's action in the instant situation was motivated by prejudice engendered by his presentation of that grievance. We do not think that inference is justified by anything in the record. A clock watcher, in our opinion, is just not qualified for such a position as District Agent.

Claimant asserts that, in any event, the Carrier violated Rule 38(d) which provides:

"An employee who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as hereinabove provided."

The Carrier denied Claimant a hearing on his protest because of its refusal to assign him to the position instead of Nolan. This was a violation of the Agreement but we think, in view of the conclusion we have reached, it was merely technical and did not affect Claimant's substantive rights.

**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 parties waived oral hearing thereon;

That the Carrier and the Employees involved in this dispute are respectively carrier and employees 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 there was no violation of the Agreement affecting Claimant's substantive rights.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 7th day of February, 1947.