

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

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

**THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC
RAILWAY COMPANY**

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

(a) The Carrier violated the Agreement, when, effective December 5, 1952, it assigned one C. E. Early to the position of Depotmaster, Gest Street Depot, Cincinnati, Ohio, thereby failing and refusing to assign the senior qualified bidder, Mr. H. C. Kolhoven, to the aforesaid position.

(b) The Carrier shall now assign Claimant, Mr. H. C. Kolhoven, the senior qualified applicant, to the position of Depotmaster and compensate him for loss of earnings he has suffered because of the Carrier's violation of the Agreement, namely, \$2.40 per day, since December 5, 1952.

EMPLOYEES' STATEMENT OF FACTS: On November 7, 1952, the Carrier's Agent, Mr. E. W. Rothring, issued Vacancy Bulletin No. 30, advertising vacancy in the position of Depotmaster on account of the retirement of Mr. R. J. Fischer, Depotmaster. On the same date, Mr. R. C. Flanigan, Local Chairman, in a letter to Agent Rothring, made protest in regard to certain language appearing in the description of "preponderating duties" in Bulletin No. 30, and requesting a corrected bulletin be issued. Agent Rothring replied, under date of November 10, 1952, declining Mr. Flanigan's request. On November 12, 1952, Local Chairman, Mr. Flanigan, again wrote Agent Rothring, renewing the protest and again objecting to the phrase "and have previous experience in warehouse supervision."

On November 15, 1952, Agent Rothring issued Bulletin No. 30-A, cancelling Bulletin No. 30 of November 7, 1952, and calling attention to Bulletin No. 31 of November 15, 1952. Bulletin No. 31 differed from Bulletin No. 30 in that the Agent had eliminated the requirement "also uniform freight classification" as well as the phrase, "have previous experience in warehouse supervision" to which Local Chairman, Mr. Flanigan, had objected.

ability of an employe have been found by the Carrier to be lacking, the burden rests upon the Claimant to overcome that decision by substantial and competent proof', citing awards 1147, 2031, 2491, 3273, 3469, 4040 and 5147 of this Division in support thereof."

In the instant case the effective agreement provides in clear and unambiguous language that the appointing officer shall be the judge of an employe's merit, capacity and qualifications, subject to appeal to the highest officer designated by the Carrier to whom appeals may be made **whose decision shall be final**. The employing officer determined that Claimant Kolhoven's merit, capacity and qualifications were **not** sufficient to enable him to fill the position of depotmaster. This determination was **not** unreasonable, arbitrary or capricious. As Claimant Kolhoven questioned Carrier's decision in the matter, he had the burden of overcoming it by substantial and competent proof. That he did **not** do. In these circumstances, and on the basis of prior Board awards, he cannot prevail.

CONCLUSION

Carrier respectfully submits that:

(a) Rule 16 of the effective clerical agreement provides that **merit, capacity and qualifications being sufficient, seniority shall govern, the appointing officer to be the judge, subject to appeal to the highest officer designated by the carrier to whom appeals may be made, whose decisions shall be final**.

(b) Merit, capacity and qualifications of Rate Clerk Kolhoven, here claimant, were **not** sufficient to fill the assignment of depotmaster at Gest Street Station in Cincinnati, therefore, his seniority did **not** govern in the filling of such assignment.

(c) Under Rule 16 of the effective clerical agreement, the appointing officer (the Agent at Cincinnati) was the judge of Rate Clerk Kolhoven's merit, capacity and qualifications. In judging and making his decision he determined that Claimant Kolhoven's merit, capacity and qualifications (training) were **not** sufficient to enable him to fill the assignment of depotmaster at Gest Street Station, Cincinnati. This decision was appealed to the highest officer designated by the Carrier to whom appeals may be made, who agreed with the decision of the Agent. **Under Rule 16, his decision was final**. In this situation, the Board does **not** have authority to make a decision different from that made by the Agent and concurred in by the highest officer designated by the Carrier to whom appeals may be made.

(d) There was no violation of the effective clerical agreement when Rate Clerk Kolhoven was not awarded the assignment of depotmaster. Carrier has **not** failed or refused to assign the senior qualified applicant for the assignment. To the contrary, "the senior qualified employe" (the senior employe possessing merit, capacity and qualifications sufficient to fill the assignment) was assigned to the position of depotmaster as provided in Rule 16 (a) of the effective agreement. Such employe had had the required training and possessed the necessary skill and ability to do so. This was **not** true of Claimant Kolhoven.

(e) Claim being wholly without merit and unsupported by the effective clerical agreement, and principles of prior awards, should be denied. Carrier urges the Board to so hold.

All evidence in Carrier's submission has heretofore been made known to employe representatives.

(Exhibits not reproduced).

OPINION OF BOARD: The important facts in this claim are not in dispute. A vacancy occurred in the position of Depotmaster at Gest Street

Depot, Cincinnati, Ohio, which was first bulletined on November 7, 1952. There were objections by the Organization to the descriptions contained therein and the bulletin was cancelled and a new one issued on November 15, 1952. This complete bulletin appears in the record with description of preponderating duties.

Four persons bid on the position which was awarded to C. E. Early, whose seniority date is November 19, 1920. Claimant, a rate clerk, has a seniority date of November 11, 1917, and the claim is based on Carrier's failure to award him the position as the senior qualified bidder and for loss of earnings suffered by reason thereof.

It is contended, in brief, in behalf of claimant that rules of the Agreement, Rules 4, 16, 19, 40, 41, 42, 43 and 44, as well as "Procedure of Determining Employees' Qualifications—Mediation Agreement dated April 21, 1932," Rule 16—Filling Vacancies Under Seniority Rules is particularly applicable as showing the senior qualified employee shall be assigned to the position, and note No. 1 thereto:

"The word 'sufficient' as used above is intended to establish the right of the senior qualified employees to be assigned to new positions or vacancies covered by section (a) of this Rule 16 over junior qualified employees."

Carrier's Agent in letter to Claimant states:

"In view of the fact that you have had practically no experience in freight house operation your claim is hereby respectfully declined."

On behalf of Claimant the historical background and intended application of the seniority rules in question is outlined starting with Supplement No. 7 to G. O. 27 written by representatives of the Federal Government during World War I, and later in a reissuance of rules by the U. S. Labor Board in Decision 630, applying on a national basis to all railroads, and contending that this Board later, in interpreting rules, equivalent to Rule 16, issued Decisions Nos. 44, 475, 2680, 2639, 2652, 2985 and others, which it is stated to be interpreting such rules and citing numerous awards which have dealt with like situations.

In brief, it is the contention that Carrier tailored the position, as to duties, to fit an employee previously determined upon for the position and that "experience" was the yardstick used in respect to certain duties in filling the position and that such action has no place here, as sufficient merit, capacity and qualification under Rule 16 are the proper requirements to be considered. Also that Claimant was given no opportunity to qualify, if it were true that such qualification was necessary, citing Awards 2534, 2638,

4730 and 5265.

On behalf of Carrier's position Rules 15 and 16, Note No. 1 thereto of the Mediation Agreement dated April 21, 1932 are cited, stating that Rule 16 is specific, clear and unambiguous and that the same is applicable to the instant claim, as in *Collins v. Atlantic Coast Line*, 190 S. E., 817. Also citing Award 5966 on the proposition that the Mediation Agreement, *supra*, does not supersede the regular scheduled Agreement, as it does not provide for the automatic assignment of any employee to a position. That the determination here made—that claimant was not qualified to fill the position—is a prerogative of Carrier and the burden is on Petitioners to show by convincing proof that the act complained of was prejudicial in its nature as being arbitrary, capricious or unreasonable.

Carrier also urges that Rules 15 and 16 are controlling and cites pertinent parts of the same to support the position taken, as follows:

"Rule 15—Promotion, Vacancies or New Positions Not Filled by Seniority (Revised, effective October 1, 1938).

Promotions, vacancies or new positions (either excepted or schedule) which are not filled by seniority shall be filled as follows:

Qualifications, merit and capacity being equal, preference shall be given employees in the service in order of their service age, the appointing officer to be the judge, subject to appeal to the highest officer designated by the carrier to whom appeals may be made, whose decision shall be final."

"Rule 16—Filling Vacancies Under Seniority Rules.

"(a) (Revised, effective October 1, 1938) Except as otherwise provided in this agreement, Rules 7, 8, 9, 13, 14, 15 and 17 in particular, vacancies covered by this agreement will be filled in accordance with principles defined in Rule 15 (exclusive of the notes) in the following manner, except that merit, capacity and qualifications being sufficient, seniority shall govern:

"* * *"

It appears in the rules above cited that provision is made to meet varying situations and the prerogative is given management to make determinations in such situations. Here, we cannot say under this record, that this prerogative has been used in a prejudicial manner. There was justification for the action taken in view of the service in certain essential duties.

It is alleged by Petitioners that the duties outlined were "tailor made" to give the position to an employee previously decided upon.

We do not deem this view point to control, but rather consider the question to be determined is: Are the duties outlined necessary and essential to the position? If so, and we find nothing to indicate otherwise, then it must appear that Carrier exercised the prerogative given under the Agreement, in a manner which is not arbitrary, capricious and unreasonable. While it may well be that honest minds may differ on the proper use of the appointive power in any given situation, yet, in the absence of abuse of that right, the appointive power cannot be said to have been used in bad faith.

Seniority is a valuable asset and should be carefully guarded, however, the rules under consideration do set out methods by which certain standards are to be given consideration in filling vacancies. The power to fill is given Carrier. Its use of the same is limited by these rules and in the absence of a strong showing that the right has been misused we should not substitute our judgment for that of Carrier. We do not believe the showing made is sufficient and on that basis we deny the claim.

(Page references relate to original document.)

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 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

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The contract provisions were not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 28th day of January, 1955.