

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith Referee

PARTIES TO DISPUTE:

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

UNION PACIFIC RAILROAD COMPANY—Eastern District

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees on the Union Pacific Railroad Company, that the Carrier violated Agreement dated March 23, 1945.

(1) When they declined to give Employee R. C. Armstrong first consideration for position of Assistant Chief Clerk, advertised by Bulletin No. 1 of January 5, 1953, Seniority District 68, and in lieu thereof assigned Employee C. G. Liden, who had no seniority in Seniority District 68,

(2) Carrier now assign R. C. Armstrong to position of Assistant Chief Clerk and compensate him for all monetary loss from time Liden was assigned to vacancy advertised by Bulletin No. 1 until such time as R. C. Armstrong is placed on the position.

EMPLOYEES' STATEMENT OF FACTS: January 5, 1953 Superintendent's Bulletin No. 1 advertised vacancy in position of Assistant Chief Clerk, Seniority District 68. January 7, 1953 R. C. Armstrong made application for assignment to this position. R. C. Armstrong was the senior qualified employee making application. However, his application was not given first consideration in line with agreement dated March 23, 1945.

There was never any question raised by the Superintendent of Wyoming Division or subordinate supervisors concerning R. C. Armstrong's qualifications and in support of this Employees offer Exhibit No. 1 as part of their Statement of Facts.

POSITION OF EMPLOYEES: Copy of the March 23, 1945 Agreement appears on Pages 67 and 68 of Agreement effective February 1, 1952. This February 1, 1952 Agreement has been filed with your Honorable Board and by reference hereto this Agreement is made a part of this Submission.

The March 23, 1945 Agreement provides, in part:

"Employees holding seniority on the roster or district in which the position is located, will be given first consideration, and if in the judgment of the head of the department none of the applicants

The Organization, however, doggedly pursues and clings to a letter written by the Superintendent to Mr. Armstrong on January 23, 1953 wherein he advised Armstrong why he was not assigned to the position. This letter reads as follows:

"Your letter of January 21, 1953 in connection with the assignment of Assistant Chief Clerk in this office.

"The object of having Rule 1(e) positions is to permit the Railroad Company to select the most qualified employee in the opinion of the head of the Department which was done in this instance.

"I do not consider Mr. C. G. Liden to be an employee of another department as he has occupied Rule 1-E positions in this office for nearly ten years."

The Organization, of course, bases its claim on the use of the words "most qualified" in the second paragraph of the above-quoted letter. It will be obvious to this Board that the Employees can find little comfort in this letter. R. C. Armstrong, an employee with many years service, asked the Superintendent why he wasn't assigned to the position of assistant chief clerk. Instead of advising him that he was "not qualified", the Superintendent couched his letter in the language that he did—perhaps less definite than might be expected of an attorney. It is also obvious that the Superintendent was reluctant, for very humane reasons, to come right out and tell Armstrong he was not qualified. The fact remains, however, that Armstrong was not considered qualified and the Employees' General Chairman has been apprised of that fact on three different occasions.

Another question raised by the Organization is in regard to Liden's seniority status on District 68. It is recognized that at the time Liden was selected for this position it was not known that he was entitled to a seniority date on District 68. His right to this date was discovered in the investigation brought about by the Employees' claim. It has been the practice that when such errors become evident, they are immediately rectified. This was done by agreement dated July 29, 1953, Carrier's Exhibit G, according Liden a seniority date of June 23, 1943 on seniority roster 68. Whether or not Liden held seniority on that particular district is of no consequence. If in the judgment of the Superintendent the applicants from District 68 were not qualified, he was free to select an employee from another department.

CONCLUSION

The Carrier, in this submission, has shown that it has complied with the letter and spirit of the applicable rules and agreements. The agreement of March 23, 1945, in addition to outlining the procedure to be followed in filling partially excepted positions, places the right of selection squarely in the hands of the department head, who, in this case, was the Superintendent. His selection of Mr. Liden for the position of assistant chief clerk was neither arbitrary nor capricious. It was based upon a careful consideration and analysis of the qualifications of each applicant. When he found the qualifications of Mr. Armstrong wanting, he selected the only applicant who was qualified, C. G. Liden.

Claim should be denied.

It is hereby affirmed that all information and data herein set forth have been furnished to, discussed with, or are known to the Employees' Organization or the Claimants.

(Exhibits not reproduced.)

OPINION OF BOARD: The Board is here concerned with the propriety of the Respondent's action in elevating C. G. Liden to the position of Assistant Chief Clerk, Cheyenne Division, Seniority District 68.

It is unquestioned that (1) at the time in question the Claimant was the "Senior Employee," District 68, who bid on the vacancy, and that (2) while employee Liden was later granted seniority in the District "without prejudice to the instant claim," he (Liden) had no seniority in District 68 at the time he was awarded the position in controversy.

The Organization, in alleging a violation of the effective Agreement, relies upon Paragraph (e) and Section 1 of Paragraph (f) of Rule 1, Section 2 of the Memorandum of Agreed Upon Interpretations of Rules of Agreement bearing date of March 23, 1945, and the letter to Claimant from C. J. Colombo bearing date of January 23, 1955, each of which reads as follows:

Rule 1.

"(e) The following positions are excepted from promotion, assignment and displacement rules:

* * * * *

Operating Department

* * * * *

Assistant Chief Clerk to Superintendent—Omaha, Cheyenne, Kansas City, Los Angeles, Salt Lake, Pocatello, Albina."

"(f) Employees coming under the provisions of this agreement shall be given preference in filling positions included in Rule 1(e) and excepted positions included in section 3 of Rule 1(d)."

Memorandum of Agreed Upon Interpretations of Rules of Agreement:

"2. Rule 1(e) positions not subject to the promotion, assignment or displacement rules will be bulletined in the department or offices affected, but the selection of the incumbent will be a matter for the determination of the head of the department, subject only to the provisions of the agreement under which preference shall be given to employees in the service.

"Employees holding seniority on the roster or district in which the position is located, will be given first consideration, and if in the judgment of the head of the department none of the applicants from such roster or district are qualified, selection will be made from the qualified employees in other departments."

"Green River—January 23, 1953

Mr. R. C. Armstrong—Cheyenne

Your letter of January 21, 1953, in connection with the assignment of Assistant Chief Clerk in this office.

The object of having Rule 1-E positions is to permit the Railroad Company to select the most qualified employee in the opinion of the head of the department which was done in this instance.

I do not consider Mr. C. G. Liden to be an employee of another department as he has occupied Rule 1-E positions in this office for nearly ten years.

C. J. Colombo

/s/ CJC"

The Organization asserted that the above quoted portion of Paragraph (f) of Rule 1 provided that preference be given employees covered by the Agreement in filling positions included in Paragraph (e) of the said Rule, and further, that under Memorandum of Understanding First consideration had to be given to those employees holding seniority on the roster of the District where the position was located. It was contended that the above quoted letter from the Superintendent clearly indicated that first consideration was not given to the Claimant's abilities as demonstrated by 26 years of service, but rather the position was awarded on the basis of another employee's being "most qualified;" a ground not established by either the effective Agreement or the Memorandum of Agreed Upon Interpretations.

The Respondent took the position that the only restriction or qualification upon their right to fill this position was that first consideration be given to those employees holding seniority in the District where the position was located. It was pointed out by the Respondent that the "judgment of the head of the department" was controlling in filling a position of a semi-excepted nature and that the Board could not substitute its judgment for that of the Superintendent if the action taken here was supported by evidence of a substantial nature, and there was no showing that such action was capricious or arbitrary. It was asserted that first consideration was given the Claimant, but that he was found to lack the necessary qualifications to fill the position.

The position in question, that is Assistant Chief Clerk, is a semi-excepted position, the filling of which is, by the terms of the Memorandum of Agreed Upon Interpretations, a matter for the determination of the head of the department (in this instance C. J. Colombo) subject only to the limitation of the first section of Paragraph (f) of Rule 1 that employees covered by the Agreement be given preference when such positions are filled and the stipulation in the second paragraph of Section 2 of the Memorandum of Agreed Upon Interpretations that employees holding seniority in the District involved will be given first consideration.

The letter of January 23, 1953 from Superintendent Colombo to the Claimant cannot be said to indicate that the Respondent did not give the Claimant first consideration in filling the vacancy of Assistant Chief Clerk, or that he was found (in the opinion of the Respondent) to have qualifications to fill such vacancy.

It is evident from an examination of the quoted Rules and Memorandum that the Respondent is considerably less restricted in filling vacancies in the semi-excepted Assistant Chief Clerk position than they are in filling positions fully covered by the effective Agreement. The only stated restriction on the complete freedom of the Carrier in its selection of such personnel is the requirement that preference be given those covered by the Agreement with first consideration to those having seniority in the District where the vacancy occurs. There is no criteria in the Rule as written which establishes or provides the manner in which the preference or first consideration reserved by and to the employees shall be effectuated.

While the Claimant here apparently has a good record covering a number of years for which he should be commended, these things alone do not necessarily qualify him for the vacancy when the Rule specifically provides "... if in the judgment of the head of the department . . .", and thus, a freedom of action in selecting occupants of semi-excepted positions. Likewise, contrary to the assertion of the Organization, the fact that the occupant of a relief position, who performed the duties of the Assistant Chief Clerk on the rest days of such position, had less overall railroad experience than the Claimant, cannot be controlling since it is not satisfactorily indicative of the qualifications necessary to fill the position on a full time basis.

The Board cannot conclude on the basis of the record as a whole that the action of the Respondent in filling the position in question was either con-

trary to the effective Agreement, the Memorandum of Agreed Upon Interpretations, or was arbitrary, capricious or constituted an abuse of discretion.

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 there has been no violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 2nd day of February, 1956.