

Award No. 14167
Docket No. TE-14125

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Pennsylvania Railroad that Carrier violated and continues to violate provisions of the Telegraphers' Agreement when Carrier assigned Mr. P. O. Tucker, Agent at Franklin, Indiana on July 17, 1961, effective July 14, 1961.

Compensation in the difference of a day's pay and any expense which may occurred shall be allowed Senior Substitute Agent, D. L. Pennington who has suffered a loss in earnings. Regulation 5-A-1 and 1-C-1 (b).

EMPLOYES' STATEMENT OF FACTS: The current Agreement between the parties, which by reference is hereby made a part of this submission, has been effective as to regulations since September 1, 1949. The scope of the Agreement provides in part:

"The provisions set forth in this Agreement shall constitute separate Agreements between The Pennsylvania Railroad Company and its employes, and the Baltimore and Eastern Railroad Company and its employes, of the classifications set forth below, represented by The Order of Railroad Telegraphers, and shall govern the hours of service, working conditions and rates of pay of the respective positions and employes classified herein.

**The Pennsylvania
Railroad Company**

Group 1 — Station Agents and Assistant
Agents Classified herein.

**Baltimore & Eastern
Railroad Company**

Station Agents and
Assistant Agents
Classified herein.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Third Division, Is Required To Give Effect To The Said Agreement, And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act, to give effect to the said Agreement, which constitutes the applicable Agreement between the parties and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employees in this case would require the Board to disregard the Agreement between the parties hereto and impose upon the Carrier conditions of employment and obligation and reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The Carrier has established that there has been no violation of the applicable Agreement, and that the Claimant was not qualified for the position of Agent at Franklin, Indiana.

Therefore, the Carrier respectfully submits that your Honorable Board should deny the claim of the Employees in this matter.

(Exhibits not reproduced.)

OPINION OF BOARD: A vacancy in the Station Agent's position was bulletined on June 28, 1961, as follows:

"To Agents and Assistant Agents:

Bulletin No. 13

Bids for the following position will be accepted by the Officer named below until 9:00 A.M., July 13, 1961:

See Note	Position	Symbol No.	Location	Rate of Pay	Tour Duty	Start of Work Wk.	Rest Days
(a)	Station Agent	F-53	Franklin, Indiana	\$486.28	8a-4p	Monday	Sat-Sun
Primary Duties: All duties incident to the operation of Small Agency Station and work as Operator-Block Station.							

It will be observed that the duties are described as those incident to "the operation of Small Agency Station and work as Operator-Block Station".

There were no bids received for this position and Regulation 1-C-1 (b) of the effective Agreement provides that in the absence of any bids from qualified Group 1 employees or availability of any furloughed Group 1 employees, the position is to be awarded to "the senior qualified substitute Agent appearing on the list created under Regulation 5-A-1."

5-A-1 (a) of Regulation No. 5 provides:

"(a) A list of persons to be known as substitute Agents shall be maintained in each seniority district. The number of persons on such list shall be consistent with the requirements of the service."

5-A-1 (d) of Regulation No. 5 provides:

"(d) For the purpose of applying Regulation 1-C-1 (b) of this Agreement, the persons placed on the substitute Agents' list, in accordance with paragraph (c) of this regulation (5-A-1), shall rank on such list in the order of their length of continuous service with the Company . . ." (Emphasis ours.)

The Award to Bulletin No. 13 was published July 17, 1961 assigning the position to P. O. Tucker. It is contended by Petitioner that Claimant D. L. Pennington was the senior qualified Substitute Agent appearing on the list at the time of the expiration of the bulletin, July 13, 1961, as he had entered the service of the Carrier on June 15, 1960, whereas P. O. Tucker had entered the service of the Carrier on August 7, 1960, that in awarding the position to P. O. Tucker the Carrier had violated the provisions of the Agreement.

The initial denial of the Claim by the Superintendent Stations contains the following: Claim is denied, as the position of Agent—Franklin was awarded senior Sub. Agent", basing his assumption, apparently, on the fact that P. O. Tucker's name appeared earlier on the Substitute Agents list than Claimant's did.

Subsequently, Superintendent-Personnel in a denial letter stated: "P. O. Tucker was the Senior qualified Substitute Agent as contemplated in Regulation 1-C-1 (b), and was properly assigned as Agent at Franklin, Indiana."

The claim was thereupon appealed to the Manager, Labor Relations, and in accordance with the Agreement procedure a Joint Submission was prepared for appeal consideration. For the first time, in the Joint Submission, it was conceded that "in the instant case, there is no argument that Claimant was senior on the list to Mr. Tucker". Carrier, however, then contended that in the opinion of Management Claimant's ability was not sufficient to properly and efficiently perform the work comprehended in the position in question, that whether an employee has sufficient fitness and ability to fill a position is usually a matter of judgment and that the exercise of such judgment is a prerogative of Management.

In a consideration of this case, it is quite significant that the question of the qualification of Claimant as to fitness and ability to fill this position was not raised until the final appeal to Carrier's highest designated officer was made. Up to that time Carrier insisted that Tucker was senior on the list but in the Joint Submission tacitly admitted its error. It may well be wondered whether or not the question of Claimant's qualification was an

afterthought. In any event, Petitioner contends that at the time the position was bulletined the Claimant was qualified.

In Award 6028 — Whiting the following principle is enunciated — “Whether an employe has sufficient fitness and ability to fill a position is usually a matter of judgment. The exercise of such judgment is a prerogative of the management and unless it has been exercised in an arbitrary, capricious or discriminatory manner we should not substitute our judgment for that of management.”

We concur in the conclusion reached in this earlier award and the many awards which have followed and will concede that the judgment of the Carrier should not be set aside lightly. However, from a study of this record, a serious question is presented as to whether or not Carrier acted in an arbitrary and discriminatory manner. There is nothing in the Agreement requiring that the assignment will be made to the person whom management considers to be the better qualified Substitute Agent. **It is sufficient in compliance with the Agreement if Claimant establishes that he was the senior qualified Substitute Agent.**

His seniority has been conceded. One of the designated duties at Franklin was that of a block operator — there is no dispute but that Claimant was an experienced block operator (Tucker had qualified as such just prior to the bulletining of the position). As to Claimant's further qualification to perform the work — his first assignment in the Station Department was at Hervey City, Illinois, for a month straight from June 12 to July 9, 1961, prior to the time that the Franklin position was awarded to Tucker. At the time of the award of the position at Franklin he was working as an Agent at Armington, Illinois, having been assigned to the position on July 10, 1961, and continuing there until August 4, 1961. Except for a few derogatory remarks which were not factually corroborated by Carrier there was nothing in the record to indicate that his work had not been satisfactory and, moreover, it indicated, to the contrary, that he was qualified to fulfill the duties of the position at Franklin, Illinois at the time of the assignment to Tucker.

From a review of the entire record we must conclude that the Carrier's action was discriminatory and arbitrary and that under the facts and circumstances therein disclosed the Board must reach the conclusion that Claimant is entitled to a sustaining award.

There will be no allowance for any reimbursement of any expenses that occurred because there is no proof of the same in the record. Furthermore as Claimant was awarded a permanent position of Agent at Armington, Illinois, on March 8, 1962, any monetary award shall be terminated as of March 7, 1962.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 the Agreement has been violated.

AWARD

Claim allowed in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1966.