

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Wm. H. Spencer, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION EMPLOYEES
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY**

DISPUTE.—

“(a) That it was improper under the clerks agreement for LeRoy Myers and Frank J. Westerman to displace employes from their regularly assigned positions in roster #3, Store Department at Kansas City, Missouri.

“(b) That the roster #3 employes so displaced be restored to their positions with pay for all wage and time loss, as hereinafter set forth.”

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

As a result of a deadlock, Wm. H. Spencer was called in as Referee to sit with the Division as a member thereof.

FURTHER FINDINGS.—Frank J. Westerman entered the service of the carrier as a trucker in the Store Department, Kansas City, on August 17, 1903. In 1905 he was promoted to a clerical position.

LeRoy Myers entered the service of the carrier as a trucker in the Store Department, Kansas City, on August 16, 1911, and was promoted to a clerical position in 1919.

In 1923 the system of seniority rosters which now prevails under the Clerks' Agreement on the Frisco lines was adopted. This system established three seniority rosters, only two of which are involved in this dispute. Roster No. 1 covers clerical positions; roster No. 3 covers a wide range of positions, including the position of trucker. There is no roster No. 2 at the Store Department in Kansas City as there are no positions at this point covered by such roster.

With the establishment of the new system of seniority rosters, the name of each of the claimants herein, dating from his original entry into the service of the carrier, was placed upon seniority roster No. 1. Their names, however, were not placed on the Store Department roster No. 3.

On or about August 1, 1931, the carrier discontinued the positions held by Messrs. Myers and Westerman and permitted them to displace employees from positions covered by Roster No. 3. Following a protest of a representative of the Brotherhood of Clerks, a local representative of the carrier restored the displaced employees to their positions. On or about November 10, 1931, the carrier again permitted Messrs. Myers and Westerman to displace employees on roster No. 3.

Rule 27 of the Agreement between the parties provides:

“Employes whose positions are abolished shall be allowed to exercise their seniority rights over junior employes. Employes so displaced shall be allowed to exercise their seniority rights over junior employes in similar

manner. Employees must exercise their seniority rights under this rule in general offices within forty-eight (48) hours, at terminals within seventy-two (72) hours, and on divisions within seven (7) days (Sundays and holidays not to be counted).

"Roster No. 1 employees displaced must exercise rights as above outlined, but if there is no position on Roster No. 1 to which seniority rights may be exercised, may, within above time limit—

"(1) File address under General Rule 24; or

"(2) Displace junior employee on Roster No. 2, in which case seniority shall continue to accumulate on Roster No. 1."

It was jointly agreed by the parties, however, that this rule was modified by an agreement between the carrier and the Brotherhood in February 1922 establishing "the right of any employee who had been promoted to roster #1 from roster #3 and whose seniority had continued to accumulate in roster #3 while working in roster #1 position, to return to roster #3 with seniority date in roster #3 from date of his entering the service on that roster, provided he could no longer hold a position on roster #1.

Rule 25 provides in part:

"Rosters shall be revised and posted in January and July of each year and shall be open to protest for a period of thirty (30) days from the date of each posting. Upon presentation of proof of error by an employee or his representative, such error shall be corrected. The duly accredited representatives of the employees shall be furnished with a copy of the roster upon request."

Because of a great deal of confusion caused by old seniority claims, the carrier and the Brotherhood on September 22, 1926, agreed that this footnote should be appended to the seniority rosters to be posted in January 1927:

"This seniority roster is revised and posted in accordance with Rule 25 of Clerks' Agreement. It shall be open to protest for a period of 30 days from the date posted.

"Unless protest is made within 30 days after the posting it shall be final and the seniority dates shown thereon shall stand as correct regardless of future developments. In other words, if the errors are not protested within 30 days they may never be protested in future either by employee, his representative, or management."

The names of Messrs. Myers and Westerman were correctly included on roster No. 1, but not on roster No. 3. The employees in question, through error, oversight, or otherwise, made no protest because of the omission of their names from the third roster.

This dispute originated about November 10, 1931. The parties being unable to reach a settlement, submitted the controversy to the Frisco Clerical Forces Adjustment Board on March 2, 1932, and again in February 1933. In each instance, the System Board was unable to reach a decision. On October 29, 1934, the employees again presented the claim to the carrier. On December 16, 1934, the carrier again declined to recognize the claim. On April 9, 1935, the petitioner filed notice with this Division of the Adjustment Board of its intention to make an ex parte submission of the dispute. The petitioner did not, however, following its unsuccessful appeals to the System Board of Adjustment, make any appeal to the United States Board of Mediation, as it was entitled to do under the provisions of the Railway Labor Act of 1926.

RESPECTIVE POSITIONS OF THE PARTIES.—The petitioner contended that Messrs. Myers and Westerman had no seniority rights with respect to positions listed on roster No. 3, and that their displacement of employees occupying the positions in question was in violation of the agreement between the parties to this dispute.

The carrier contended that this Division has no jurisdiction over the present dispute. It asserted that the Frisco Clerical Forces Adjustment Board is still in existence, and that the present dispute should have been referred to that Board. This contention has been disposed of in Award No. 197 of this Division and will not be discussed further here.

The carrier also contended that in any event this dispute was not a pending and unadjusted case within the meaning of the Railway Labor Act of June 21,

1934, on the date of its enactment. The carrier based this contention on the fact that the petitioner, following the two unsuccessful attempts of the Frisco Clerical Forces Adjustment Board to reach a decision, did not avail itself of its right under the Railway Labor Act of 1926 to submit the controversy to the United States Board of Mediation.

As to the merits of the dispute, the carrier contended that it was the purpose of the footnote to the roster of January 1927 to foreclose discussion of errors appearing on the roster, but not to preclude the restoration of names inadvertently omitted.

CONCLUSIONS OF THE DIVISION.—(1) The Referee is of the opinion that the dispute was pending and unadjusted within the meaning of the Railway Labor Act of 1934 on the date of its enactment. It is not denied that there was a dispute when the claims were first presented to the management in 1931. The two unsuccessful attempts of the Frisco System Board of Adjustment to settle this controversy did not alter its character as a pending and unadjusted case. Nothing has happened since to alter its character. There is nothing in the Railway Labor Act of June 21, 1934 which provides that employees shall have exhausted their remedies under the Railway Labor Act of 1926 as a condition precedent to the submission of their grievances to the National Railroad Adjustment Board.

(2) The omission of an employee's name from a seniority roster is as much an error, as that term is ordinarily defined, as an inaccurate statement of the date of the employee's entry into service. It is also to be noted that, although the carrier on several occasions protested, the application of the provisions of the footnote to the seniority roster of January 1927, has, with one or two exceptions, been that for which the petitioner here contends. It follows, therefore, that the award of the Division, if rested solely on a definition of *error* and what little practice there has been, would have to be in favor of the petitioner.

The Referee, however, is of the opinion that the parties in drafting the footnote in question were concerned with the problem of eliminating errors and inaccuracies which appeared on seniority lists rather than with the problem of determining what names should appear thereon. In the opinion of the Referee, the controlling sentence in the footnote is this:

"Unless protest is made within 30 days after the posting it shall be final and the seniority dates shown thereon shall stand as correct regardless of future developments."

Upon the record and the evidence the Division concludes that the purpose of the footnote to the roster of January 1927 was to foreclose further controversy with respect to errors appearing in the roster as published, but not to preclude the restoration of names inadvertently omitted.

AWARD

The claim is denied in its entirety.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary*.

Dated at Chicago, Illinois, this 18th day of February 1936.