Award Number 250
Docket Number CL–222

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

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

WABASH RAILWAY COMPANY

DISPUTE.—

"Violation of the seniority provisions of the Schedule Agreement for Clerks, effective August 1, 1929, by permitting Mr. F. E. Pfeiffer to displace on a clerical position in Superintendent's office, Decatur, Illinois, due to abolishment of excepted position held by Mr. Pfeiffer in office of Vice President and Chief Operating Officer. Claim is that Mr. Pfeiffer held no clerical rights on Decatur Division. Request is made that position of claim clerk, paying rate of $6.41 per day, now held by Mr. Pfeiffer in the Superintendent's office at Decatur, be bulletined, and employes affected through the displacement, be reimbursed for monetary loss sustained account of such displacement, retroactive to the effective date of displacement."

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

The carrier and the employee involved in this dispute are respectively carrier and employee 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, Lloyd K. Garrison was called in as Referee to sit with the Division as a member thereof.

There is in evidence an agreement between the parties bearing effective date of August 1, 1929, Rule 11, paragraph (h) thereof, reading as follows:

"(h) A seniority roster of all employes in each seniority district, showing name, position, location, rate of pay and proper dating, will be posted in agreed upon places accessible to all employes affected. The roster will be revised and posted in January and July of each year, and will be open to protest for a period of thirty (30) days from date of posting. Upon presentation of proof of error by an employe or his representative, such error will be corrected. The duly accredited representative and the General Chairman of the employes shall be furnished with a copy of the roster.

"NOTE.—In the application of this paragraph it is understood that protests which can be made within a thirty day period as provided for in the rule are not to be considered in cases of an employe whose name appears on previous rosters, except where it can be shown that a clerical error has been made."

Rule 11, paragraph (s), reads:

"(s) Employes now filling or promoted to excepted or official positions shall retain all their rights and continue to accumulate seniority in the district from which promoted.

"When excepted or official positions are filled by other than employes covered by these rules, no senority rights shall be established by such employment."

A Memorandum of Agreement between the parties dated March 28, 1927, (hereinafter referred to as the Memorandum Agreement), provided that:

"The seniority rosters for clerks and freight handlers as of July 1926 shall be considered as correct."

This Memorandum Agreement also contained the provision now carried as a Note to Rule 11 (h) set forth above.

Mr. Pfeiffer entered the service of the Carrier as a clerk on the Decatur Division on October 6, 1906. On February 1, 1916, he was transferred to the position of Secretary in the Engineering Department in the General Offices at St. Louis. On October 31, 1917, he was granted a leave of several weeks to take a trip to Florida. By the time of his return, new construction work had been begun at Granite City and he was sent there temporarily with one or two others from the Engineering Office, being still considered according to the Carrier, as a part of the secretarial force of the Chief Engineer. As a result of his vacation trip to Florida he worked for only five days in November at Granite City, but worked thereafter the full thirty days in December and the first eight days in January 1918, whereupon he was assigned to the position of Secretary to the Superintendent of the Detroit Division at Montpelier. On June 1, 1919, he became Secretary to the General Superintendent at St. Louis and held two other similar positions in the General Office until September 30, 1932, when the position he held was abolished and he was permitted to displace on the Decatur Division, this displacement being the cause of the claim in this case.

The employes have based their claim, both in their original submission and in their reply to the Carrier's submission, on the proposition that Pfeiffer left the service of the Carrier in November 1917 and thereafter re-entered the service in excepted positions, which would give him no seniority rights on the Decatur Division. The employes apparently came to this conclusion as a result of examining Pfeiffer's service record, which as stated above listed only five days of work in November 1917. They apparently assumed that the gap was occasioned by his having left the service. But the facts and documents submitted by the Carrier seem clearly to establish that the gap was due to a vacation as described above and that Pfeiffer never left the Carrier's employ but was in continuous service from October 6, 1906. Both in their submission and in their reply to the Carrier's submission the employes took the position that if Pfeiffer had in fact been in continuous service from October 6, 1906, his seniority status on the Decatur Division and his right of displacement would not be questioned. We think the facts show continuous service on Pfeiffer's part, which disposes of the contention relied upon by the employes in their presentation of the case to this Board.

But rights should not be foreclosed by errors in pleading. We are not a Court of Law and are not bound by technicalities. If a violation of an Agreement is clearly established by the record we ought not to deny the claim merely because it was presented upon an erroneous theory, provided always that the Carrier has not been prejudiced by the manner of presentation and has had an opportunity to meet the issues which are really controlling. In the present case, although the principle issue and the one upon which the employes based the theory of their claim was whether or not Pfeiffer had been in continuous service, two other questions were touched upon by the petitioners which had a distinct bearing on the claim and which were sufficiently noticed and discussed by the Carrier to justify our considering them.

The first of these questions was whether or not Pfeiffer brought himself under Rule 11 (s) above. That rule was written into the Agreement on April 16, 1920, and it provided that employes "now filling" excepted positions would retain their seniority rights in the district from which promoted. Apparently, the positions which Pfeiffer held after leaving the Decatur Division on February 1, 1916, and until the adoption of this rule in 1920 were not excepted positions. But by other changes in the Agreement which were effected at the same time that Rule 11 (s) was adopted, the position which Pfeiffer held at that time was established as an excepted position and it was similar to the positions which he had held before and subsequently. When Pfeiffer entered the service

in 1906 in a clerical position the Clerks' Agreement had not then been negotiated and did not become effective until some years later. We have then this situation. A man enters the service of the Carrier as a clerk at a time when the Clerks' Agreement is not in force. Later the Agreement covers the kind of position which he filled. He then transfers to another position in a General Office, which is not at that time covered and excepted, but which a little later by a change in the Agreement is covered and excepted, and at the time of this change the Agreement is also made to provide that employes "now filling" excepted positions shall retain their seniority rights. Under these circumstances did Pfeiffer retain his seniority rights? In view of the somewhat obscure meaning of the rule and in the absence of the submission of any precedent to guide us, we think the position of the parties in this particular case should be controlling, with the understanding that it will not be a controlling precedent in any subsequent cases in which the issue may be more fully presented. In this case the employes stated in their submission that: "Secretaries to Division Superintendents were placed under the individual exceptions to the Schedule rules in the Agreement for Clerks effective April 16, 1920," and that under Rule 11 (s), "had Mr. Pfeiffer been in continuous service his rights under the Agreement would have remained on the Decatur Division." For want of better evidence, we are constrained to accept the position thus taken by the employes.

The second question to be considered is whether since Pfeiffer's name was not on the seniority roster of the Decatur Division in July 1926, he was barred under the terms of the Memorandum Agreement from any right thereafter to be included in the roster. Here again the meaning of the rule is not altogether clear. The Memorandum Agreement states that the roster of July 1926 "shall be considered as correct." This might mean that an employe who did not appear on the roster could not thereafter appear on it or it might mean that if an employe's name did appear on the roster his seniority date there shown would be taken as correct. The latter seems to have been the intention, because the Memorandum Agreement went on to provide in a clause now appearing as the "Note" to Rule 11 (h), that employes' protests within the thirty day period after the positing of a particular roster "are not to be considered in cases of an employe whose name and seniority date appears on previous rosters except where it can be shown that a clerical error has been made." The implication of this clause is that protests would be proper if the employe's name did not appear at all. The object of the Memorandum Agreement seems, therefore, to have been, in the language of the Carrier's reply, "to eliminate complaints from employes with respect to their proper seniority date as published on the roster," and that the Memorandum Agreement "does not in any way restrict the right of employes whose names and seniority dates have not appeared on a previous roster to return to the division or roster from which promoted and exercise their seniority rights, and has never been so understood by either party." There is no denial of this statement in the record and in the absence of any other evidence we take it to be a correct statement of what was intended.

The record contains numerous instances of employes whose names were added after the Memorandum Agreement to the rosters under circumstances similar to those in the case before us. Save in a few instances these additions were all effected after an exchange of letters between the General Chairman and the Management. Sometimes the additions were initiated or suggested by the Management and sometimes by the General Chairman. The tenor of the correspondence is uniform. The initiating party says to the other, "here is a man who ought to be included because his service record is such and such, and we assume you will have no objection." The other party then verifies the facts and acquiesces in the addition to the roster.

Two interpretations can be placed on this correspondence. It can be said to express an understanding that no addition to the roster could be made except by mutual agreement, and that either party for any reason, whether arbitrarily or not, could block the addition by merely invoking the Memorandum Agreement. This interpretation was urged on behalf of the employes at the hearing before the Referee. On the other hand, the explanation of the correspondence might be this, that both sides recognized the right of an employe to go on the roster when he brought himself under Rule 11 (s); that the purpose of the correspondence was simply to make certain that the facts were correct; and that neither party understood the purpose of the Memoran-

dum Agreement to be the giving of an absolute veto to either party where the employe was in fact covered by Rule 11 (s). This seems to have been the understanding of the employes in this case, for in their reply to the Carrier's submission they state that:

> "The question of Mr. Pfeiffer not being entitled to the date of October 6, 1906, because his name had never appeared on the Decatur Division roster is not involved in the dispute as submitted by the employes. Our claim is not based upon that fact."

The sole question which they present is whether Pfeiffer's service was continuous. If it was, his right to appear on the roster would have been clear and, so far as we can ascertain the understanding of the parties in this case, and without foreclosing further consideration in some other case, it seems to have been established that neither party would deny the right where the facts brought the employe under Rule 11 (s), which contains no qualifications or exceptions.

This conclusion is strengthened by the last sentence of Rule 11 (h), which provides that upon presentation of proof of error by an employe or his representative within thirty days after the posting of the roster "such error will be corrected." This seems to imply a right on the part of the employes which cannot arbitrarily be denied merely by the withholding of consent, subject, however, to the restriction that the protest must be made within the thirty day period. If it is not made then, it may be made within thirty days after the posting of the next roster.

This brings us to a final consideration. Pfeiffer sought to exercise his seniority on the Decatur Division in October 1932. Correspondence ensued between the General Chairman and the Carrier, the gist of which was that the General Chairman wanted a statement of Pfeiffer's complete service record in order to "verify" his claim, but the Carrier contented itself by merely stating that Pfeiffer had been continuously employed since October 6, 1906. During the course of this correspondence, and in November 1932, before the Carrier had submitted Pfeiffer's service record to the General Chairman, Pfeiffer was permitted to exercise his seniority right and to displace a junior employe. Some time in December 1932, or perhaps a little later (the exact date does not appear in the record), the General Chairman died and was succeeded by General Chairman Rogers, who took up the case again in the spring of 1934, developed the contention that Pfeiffer's service was not continuous, and ultimately presented the case to this Board. The record indicates that shortly before the previous General Chairman died Pfeiffer's service record had been submitted by the Carrier.

The July 1932 roster did not contain Pfeiffer's name. The thirty day period for protests under Rule 11 (h) had expired. It is not clear from the record whether this thirty day restriction was applicable only to employes whose names appeared on the roster and who wished to make a correction in the seniority date, or whether it was meant to apply also to employes whose names did not appear at all but who wished to be included. But so far as the practice can be ascertained from the record, the restriction seems to have been applied to both types of employees alike. Thus, in the case of one employee (Buchanan) the General Chairman wrote the Superintendent on November 18, 1927, that through an oversight his name had never appeared on any roster and, "therefore, would suggest his name be placed on the next roster issued." In in case of another employe (Michel) whose name had not appeared on any roster, the General Chairman asked that the name be included and the Carrier, after satisfying itself as to the facts, instructed the Superintendent on February 22, 1934, to make the inclusion "when issuing the next seniority roster." This practice was in accord with what seems to have been the purpose of the thirty day restriction. The purpose, as we understand it, was to create a deadline, after which the roster would stand without change until the next semi-annual roster appeared, thus giving the employes on the Division an authoritative statement of their rights for the time being upon which they could rely and make their plans. The addition of a new name after the deadline would have just the same effect upon the other employes as the alteration of the seniority date of an employe already on the roster.

Upon this view of the case, and in the absence of any other evidence, we think the Carrier's action in arbitrarily adding Pfeiffer's name to the roster

between periods and permitting him to displace, was improper. Pfeiffer's application was made some time in October 1932. The facts as we have found them, in the light of the practices of the parties and their apparent understanding of the rules including the Memorandum Agreement, established Pfeiffer's right to a seniority status on the Decatur Division as of October 6, 1906. But that being so, he should have been added to the January 1933 roster and have been permitted to displace thereafter instead of in the middle of the period preceding the posting of the January roster. Under Rule 11 (h) Pfeiffer would have had the right to appear on the January roster, his request having been made prior to its posting, but he had no right to displace before his name was duly and properly added to the roster.

The question then remains as to the damage done to the rights of the employes by permitting Pfeiffer to displace in November instead of in January. At this point the record becomes complicated. The Carrier asserted in its reply to the petitioner's supplemental statement that Pfeiffer did not displace Sencenbaugh as stated in the employes' submission, but displaced Sheehan, a clerk, on November 23, 1932. Sheehan thereupon displaced a timekeeper and served in the timekeeper's position for ninety-one days. But the timekeeper's position was then abolished, whereupon Sheehan displaced a junior clerk, served in that position for sixty-seven days and then quit the service (June 4, 1933) and has not returned since. Thus no claim can be made on behalf of Sheehan unless he can be located and the employes wish to represent him. The loss to the timekeeper was a minor one since the job was very soon abolished. And the junior clerk was not displaced by Sheehan until March 29, 1933, long after the posting of the January roster, on which Pfeiffer had a right to be included. If Pfeiffer had been included on the January roster he would presumably have displaced Sheehan, who would have displaced the timekeeper and later the junior clerk, so that the latter would have suffered nothing. The timekeeper's loss through his premature displacement amounted to a little over a month from the time Sheehan displaced him to the posting of the January roster, when presumably he would have been displaced had Pfeiffer then exercised his rights.

Whether the employes wish to submit a claim on behalf of the timekeeper for this short period and possibly a claim on behalf of Sheehan, we do not know. Their whole case is predicated upon the proposition that Pfeiffer's service was not continuous and that he, therefore, never had any rights whatever on the Decatur Division. That proposition has fallen and with it the petitioner's case. Possibly because of the ground upon which the employes rested their case they did not think it important to question the Carrier's displacement statement and the allegation that it was Sheehan who was displaced and not Sencenbaugh. But if the employes wish now to claim an adjustment because of the improper exercise of Pfeiffer's seniority rights in November, we think they are entitled to do so. Pfeiffer had no right to appear on the roster or to displace other employes until January, and when the Carrier permitted him to displace in November, other employes were injured and are entitled to redress. We do not think their rights should be foreclosed by technical defects in the pleadings.

AWARD

Pfeiffer should not have been permitted to displace in November 1932. He had a right to appear on the January 1933 roster and to exercise his displacement rights at that time. The case is dismissed, subject to the right of the petitioners to assert a claim for the reimbursement of any employes affected by the premature displacement to the extent of the monetary loss caused thereby. The amount of such claim, if a claim is asserted, must be adjusted by the parties subject to the right of either party to present the facts to this Board if they cannot be agreed upon.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary.*

Dated at Chicago, Illinois, this 21st day of April 1936.