

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Spencer, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers, Southern Pacific Company, Pacific Lines, that Mr. H. W. Adams was improperly displaced by C. E. Warren as agent at Stege on June 2nd, 1932, and that he should be returned to that position and compensated for all monetary loss sustained as a result of this displacement."

EMPLOYEES' STATEMENT OF FACTS: "On or about June 1st, 1932, Warren was permitted to displace H. W. Adams as Agent at Stege. Warren had been improperly displaced at South Berkeley through action of the Carrier in permitting W. W. Wilkes to be returned to the position of agent at South Berkeley after Wilkes had secured a correction in seniority date, subsequent to being displaced at South Berkeley through negotiation conducted by the Carrier and representative of the Employees, which correction in seniority date did not carry a retroactive application."

There is in evidence an agreement between the parties bearing effective date of September 1, 1927, as to rules, and May 1, 1927, as to wage scale.

POSITION OF EMPLOYEES: "Rule 17 covering the establishment of seniority rights and Rule 21 (c) covering displacement privileges are involved in this dispute.

"Adams was improperly displaced by Warren and filed a protest against such displacement, asking that he be returned to Stege and compensated in full for all time lost (see EXHIBITS 'A' and 'B'). When Warren filed a displacement against Wilkes at South Berkeley, May 2nd, 1932, the seniority of Warren, Wilkes and Adams was:

Warren's seniority, August 28th, 1914
Adams' seniority, February 23rd, 1919
Wilkes' seniority, August 26th, 1922.

It is seen that Wilkes was the junior of Adams and the party Warren was entitled to displace under the agreement. Therefore, the displacement of Wilkes by Warren was proper and in accord with the agreement, (Rule 21).

"Subsequent to being displaced by Warren, Wilkes contended for the establishment of a prior seniority date and the Carrier representative and the Organization representative, after investigation, agreed that it would be proper to give Wilkes a seniority date of March 15th, 1917 but such agreement between the representative of the Carrier and representative of the Organization did not carry any retroactive application.

of Adams, (the instant case.) In the case of Wilkes it was possible to return him to the position from which he had been displaced, for the reason that at the time he was displaced by Warren, he (Wilkes) was not the youngest assigned in Group 2 of Rule 21 (c), and the man who displaced Wilkes, namely Warren, still retained the position at South Berkeley. In the case of Warren and Adams, at the time of according Adams a corrected seniority date, the position from which he had been displaced was no longer held by the man who had displaced him; instead, that man had relinquished the position of Agent at Stege and had procured by bulletin another position, following which, a third party, one Cowdin, had procured by bulletin the position from which Adams had been displaced, and as Cowdin was senior to Adams, to have returned Adams to the agency at Stege, would have necessitated removing therefrom, not the employe who displaced Adams initially, but another employe who had in good faith secured the position by bulletin, and in addition to which, was senior to Adams. It will be readily apparent to the members of this Board that the two cases are not in any way analogous.

"Mr. Beach pointed out to Mr. Adams that his situation was not then analogous to the Wilkes-Warren case, due to the fact that Mr. Warren (who displaced Mr. Adams at Stege) was no longer agent at Stege, but position was held by Mr. Cowdin, who was senior to Mr. Adams. Mr. Adams left stating he would return February 23, 1933; nothing further was heard from Mr. Adams, except he called on telephone February 21st, cancelling his appointment for the 23rd, and asked that if agreeable the matter of his return to Stege be held in abeyance for a time.

"So far as the Carrier knows, no further action was taken, either by Mr. Adams or the Organization, with respect to this matter, until letter of December 14, 1936, from Local Chairman Dean was received by Superintendent Gaylord, (Carrier's Exhibit 'I'). It is obvious that the Organization failing to obtain a favorable Award in case Docket TE-192, Award 317, dated October 13, 1936, decided to present the instant claim in favor of Mr. Adams.

"Claim was appealed to Mr. R. E. Beach, Supervisor of Wage Schedules, on January 4, 1937 (Carrier's Exhibit 'G'), who replied January 6, 1937, (Carrier's Exhibit 'H'), pointing out the existence of the agreement of January 19, 1933, (Carrier's Exhibit 'D'). In response, General Chairman Pritchett advised the claim was based upon improper displacement, and that change in seniority date was not involved. (Carrier's Exhibit 'J'). If this is the basis of the claim, how can it be reconciled with Mr. Pritchett's action in entering into an agreement which provided that Mr. Adams not be returned to the agency at Stege, (Carrier's Exhibit 'D'). Perhaps the Board will be interested to learn why the Petitioner remained silent so far as presenting claim in favor of Mr. Adams for more than four years.

"Conferences were held March 12th, and May 20, 1937, at which this claim was declined on the grounds that the Carrier was requested by representatives of the Organization not to return Mr. Adams to Stege. (Carrier's Exhibit 'D')."

OPINION OF BOARD: For a proper understanding of the present controversy, it is necessary to review briefly the facts in the record of Award 317 of this Division as well as the facts in the present record.

On May 2, 1932, the carrier permitted C. E. Warren, with a seniority date of August 28, 1914, to displace William Wilkes, with a seniority date of August 16, 1922, as agent at South Berkeley, California. Wilkes immediately communicated with the carrier, challenging the accuracy of his seniority date. On May 26, 1932, representatives of the parties to this dispute agreed that his seniority date should be March 15, 1917. The representative of the carrier stated that it was understood at the time of this agree-

ment that Wilkes should be returned to his former station. The representative of the petitioner denied that this was a part of the understanding which resulted in the correction of Wilkes' seniority date. However this may be, the carrier restored Wilkes to South Berkeley as of May 28, 1932.

The carrier, proceeding on the assumption that Warren had lost his position "through no fault of his own" within the meaning of Rule 21 (c) of the agreement between the parties permitted him, as of June 2, 1932, to displace Adams at Stege. At this time, Adams' seniority date was February 23, 1919.

On June 6, 1932, a few days after his displacement at Stege, Adams, in a communication to Superintendent Gaylord protested his displacement, stating that "telegrapher Wilkes was illegally permitted to resume position as agent at South Berkeley and hence telegrapher Warren was not entitled to displacement." In the same communication, he made the request that he be "permitted to be returned to position of agent at Stege." In a separate communication of the same date, Adams filed with the carrier a "claim for all time lost because of such displacement." On June 14, 1932, Local Chairman Dean filed a protest with Superintendent Gaylord, closing with the request: "Will you not recommend that Warren be returned to the agency at South Berkeley, and agent Adams to Stege, in line with the telegraphers' agreement and past practices?" Although the carrier asserts that it immediately denied Mr. Adams' claim, it is noted that the Superintendent's letter of June 16, 1932, to Local Chairman Dean, does not mention the claim of Adams. On July 26, 1932, General Chairman Pritchett wrote to Mr. Beach, Supervisor of Wage Schedules, stating: "I am in receipt of file covering the claim of Telegrapher C. E. Warren, requesting that he be returned to the position of agent at South Berkeley account improperly displaced by Mr. Wilkes." It is also noted that the General Chairman in this letter does not refer to the claim of Adams, the present claimant.

The record is silent as to the further handling of Adams' request until December 14, 1936, when Local Chairman Dean wrote to Superintendent Gaylord, calling his attention to Adams' claim of June 6, 1932. On January 4, 1937, the General Chairman wrote to the Supervisor of Wage Schedules, stating that "there has been appealed to me claim in behalf of Telegrapher H. W. Adams, Western Division, account being illegally displaced as agent at Stege, Western Division, by Telegrapher Warren in 1932."

On January 19, 1933, representatives of the parties to this dispute reached an agreement, evidenced by a memorandum jointly signed by them, changing Adams' seniority date from February 23, 1919, to February 9, 1914. The record does not clearly indicate when Adams raised a question with respect to the accuracy of his recorded seniority date. In its submission, the carrier states that "on June 6, 1932, Adams filed protest with Superintendent, protesting against being displaced, on the basis that his seniority date of February 23, 1919, was incorrect, and should be February 9, 1914." The carrier, however, produced no documentary evidence tending to establish the accuracy of this statement. The first written evidence relating to the issue of Adams' seniority is found in a communication, dated October 7, 1932, from the General Chairman to the Supervisor of Wage Schedules in which he states: "I am in receipt of file covering claim for proper seniority date on behalf of Telegrapher H. W. Adams of the Western Division." In a letter of October 19, 1932, to the Supervisor of Wage Schedules, the General Chairman states that "Mr. Adams' claim for additional seniority was objected to by Mr. Gaylord in a letter to our Local Chairman, Mr. D. W. Dean, under date of August 27, 1932, no file."

On August 27, 1935, the petitioner notified this Division of its intention to file a claim against the carrier based on its contention that the carrier had improperly permitted William Wilkes to displace C. E. Warren as agent

at South Berkeley on May 28, 1932. This Division in its Award 317, rendered October 13, 1936, dismissed the claim "for lack of equity." This action was based on the finding that Warren had suffered no pecuniary loss by reason of the displacement. The Division did not, however, pass any judgment on the legality of the carrier's action complained of in that as well as in this dispute.

On September 20, 1937, the petitioner notified the Division of its intention of filing this claim on behalf of Adams. This claim is based upon the contention that Wilkes' displacement of Warren was wrongful; that it was the proximate cause of Adams' displacement by Warren; and that, in the circumstances, Adams is entitled to be returned to his former position at Stege and to compensation for the loss suffered by him meanwhile.

The contention of the carrier that this claim has been adjudicated in Award 317 is without merit. The Division in that award dismissed the claim for the reason that the claimant was unable to establish any pecuniary loss as a result of the action of the carrier; it did not pass any judgment on the propriety of the displacement complained of.

The carrier urged that in the circumstances of this dispute, Warren's displacement of Wilkes on May 2, 1932, was illegal and improper under the agreement, and that the restoration of Wilkes to his former post was necessary to right a wrong which had just been committed. The Division cannot accept this interpretation of the facts and the rules of the agreement. When the carrier closed the office at which Warren had been stationed, he was entitled under the rules of the agreement to exercise his seniority by displacing the youngest employe in one of the categories mentioned in Rule 21 (c). In the category in which Warren elected to exercise his displacement right, Wilkes was found to be the youngest employe in point of seniority. In its submission in Award 317, the carrier, although denying it in other connections, admits the regularity of Warren's displacement of Wilkes in the statement that "C. E. Warren, with seniority date of August 28, 1914, acquired a displacement right, and under the provisions of Rule 21 (c) elected to and did displace William Wilkes from the position of Agent at South Berkeley, (Western Division) in Group 2 of Rule 21 (c), on May 2, 1932." When thus properly displaced, Wilkes was in precisely the same status that Warren found himself in when the carrier closed the station at which he had been working; and was privileged under the rules of the agreement to exercise a displacement as to any position to which his seniority and training entitled him.

If, as claimed by the carrier, the restoration of Wilkes to his position at South Berkeley, following the correction in his seniority date, was necessary to correct a wrong, it follows, of course, that the carrier, when Adams' seniority date was corrected, should have restored him to his former position at Stege to correct a wrong which had been committed there. In one part of its defense, the carrier states that it would have taken this action but for the fact that a representative of the petitioner requested that Adams be not returned to Stege. This phase of the carrier's defense will be examined in a subsequent connection. In another part of its defense, the carrier stated that it explained to Adams that it could not take the action in his case that it had taken in the case of Wilkes because meanwhile the situation had so far changed that to restore him to Stege would have involved the removal of an employe whose seniority was in excess of his. If it be assumed, however, that the carrier's position is valid, the mere fact that the return of the claimant to Stege would have resulted in confusion, and in the displacement of a senior employe should make no difference. In passing it is worthy of note that the return of Wilkes to South Berkeley has been productive of displacement, confusion, and controversy.

In passing judgment on the action of the carrier in returning Wilkes to his former position, it is important to note that the record indicates that

a greater or less degree of pressure was brought to bear on the carrier by one or more of its patrons with a view of securing the return of Wilkes to South Berkeley. While this evidence should not be given too much weight, it does tend to give color to the action taken by the carrier. It certainly indicates that the carrier, in taking the action it did, might have had some motive other than the desire properly to interpret and apply the rules of the agreement.

In the circumstances, the Division is of the opinion that Warren's displacement of Wilkes on May 2, 1932, was proper and regular under the rules of the agreement. It follows that the carrier was not justified in returning Wilkes to the station in question unless, under a proper interpretation of the seniority rules, a correction in a seniority date operates retroactively.

The petitioner largely bases its claim on the contention that a correction in an employee's seniority date does not, except by express agreement, operate retroactively. The petitioner, however, was not able to offer convincing evidence of precedents or past practice to justify this contention. The carrier did not seriously contend that a correction in a seniority date should have such operation. It elected to rest its defense primarily on other grounds. As a matter of fact, the record indicates that both parties were in substantial agreement that this precise situation had never before arisen on the property of the carrier. The Division is of the opinion that under a proper interpretation of the seniority rules of the agreement, a correction in a seniority date should not operate retroactively unless the parties in making the correction expressly agree that it shall. Any other interpretation would be too productive of confusion, controversy, and expense.

Even assuming that the return of Wilkes to his former position was wrongful, the carrier insists that this claim cannot be sustained because there is no connection between the displacement of Warren and the displacement of Adams. The carrier states that Warren, having lost his position through no fault of his own, was rightfully entitled under Rule 21 (c) to displace Adams. From this premise, the carrier argues that it was Warren's rightful displacement, and not Wilkes' wrongful displacement, that brought about Adams' displacement. The petitioner in reply argued that a wrongful displacement does not give the employee displaced the right of displacement against another employee. The Division passes no judgment on this contention. It elects to rest its conclusion, that Adams was improperly displaced at Stege, on the broader ground that the carrier's wrongful return of Wilkes to South Berkeley was the proximate cause of Adams' displacement and the monetary loss that he has suffered meanwhile.

In support of its contention that the present claim should not be sustained the carrier relies primarily on the contention that the petitioner, by conduct and agreement, has surrendered any right which Adams might have had to return to Stege and to the monetary loss sustained. The carrier states that on one or more occasions, Adams, in discussing his displacement with the Supervisor of Wage Schedules, had stated that he had raised the question with representatives of the organization but that "they had declined to give favorable consideration." The General Chairman stated, however, that he merely told Adams that the organization was then handling Warren's claim, and that the disposition of Warren's claim would dispose of his claim.

The carrier strongly urges that the petitioner expressly agreed in the joint memorandum of January 19, 1933, that Adams should not be returned to Stege following the change in his seniority date. The provision of the agreement relied upon in support of this contention follows: "Pritchett requested no change in Adams status as result of seniority change." This phraseology, standing alone, seems clearly to indicate that the parties wished to avoid the establishment of a precedent that a correction in seniority dates should operate retroactively. It certainly does not prohibit the return of

Adams to the station in question on some basis other than on the basis of the correction in seniority.

The carrier states that the General Chairman, at the time he signed the memorandum in question, knew that Adams' claim was pending. From this premise, it argues that the failure of the General Chairman to state that he intended to press Adams' claim on some other ground is evidence of bad faith and operates as an estoppel, barring the present claim. The General Chairman, in reply to this, stated that at the time, the claim of Adams was still in the hands of Superintendent Gaylord and that the conference in question was concerned solely with Adams' seniority.

The record seems clearly to indicate that Mr. Pritchett at the time of this conference, even though at the time he may not have had Adams' file in his possession and even though he was primarily concerned with the question of seniority, did have in mind the claim which Adams had filed on June 6, 1932. Evidence justifying this inference is found in the correspondence of 1932 between Local Chairman Dean and Superintendent Gaylord in which the Local Chairman had made a claim both on behalf of Warren and on behalf of Adams. The record indicates that this correspondence later came to the General Chairman in connection with Warren's claim.

The Division however, concludes that the conduct of the parties, including the agreement of January 19 and the circumstances under which it was entered into, cannot operate as an estoppel to bar the present claim, and is not sufficient evidence to justify an inference that the petitioner surrendered its right to press the claim of Adams on grounds other than that of the correction in his seniority date. The Division is further of the opinion that the record contains ample evidence to support the petitioner's contention that from the outset it has pressed Adams' claim, not on the basis of the correction in his seniority but on the basis of the wrongful displacement of Warren by Wilkes, resulting in Adams' subsequent displacement. It is difficult to believe, if, as urged by the carrier, the quid pro quo for the correction in Adams' seniority was the promise of the General Chairman that Adams should under no circumstances be returned to Stege, that the representative of the carrier would have accepted the provision in the agreement of January 19, 1933, that there should be "no change in Adams status as result of seniority change." It is even more difficult to believe that the General Chairman would have requested that Adams should under no circumstances be returned to his former position. His request that there should be no change in his status as a "result of seniority change" fits into the pattern of the controversy as disclosed by the record both in this dispute and in the dispute covered by Award 317.

The carrier finally urges that, regardless of the merits of the present claim, the claim as presented should not be sustained because it is not the claim which was presented to the carrier and handled in conference. In brief, the carrier insists that that part of the present claim which asks for a return of Adams to Stege was never presented to the carrier and never handled in conference. It is clear that on June 6, 1932, the claimant presented a written claim to the carrier both for his return to Stege and for the monetary loss which he sustained by reason of the improper displacement. It is equally clear that the General Chairman, when he communicated with the carrier on January 4, 1937, about the claim of Adams, made a request for the payment of the monetary loss sustained by the claimant but did not expressly request that the claimant be returned to his former post. Mr. Beach in his reply of January 6, 1937, stated: "I observe that notwithstanding Adams is not now the agent at Stege, no request is made to have him returned to that position." The General Chairman replied on January 11 that the "claim in behalf of Adams is based upon his improper displacement which was permitted by the carrier." It is also to be noted that Local Chairman Dean, in his letter of December 14, 1936, specifically referred to Adams' communications of

June 6, 1932, in which he asked both for the monetary loss sustained and for his return to Stege. On the basis of the customary procedures in such cases, it is assumed that the letter of Local Chairman Dean was in the file of the representative of the carrier when it met the representative of the petitioner for a conference on Adams' claim. The Division is, therefore, of the opinion that the claim under consideration was presented to the carrier in substantially the same form in which it was presented to the Division. While the record contains little evidence as to what actually happened in the conference that eventually took place, it is difficult to see how the parties could have discussed the issue of the monetary loss resulting from an illegal displacement without giving some attention to the possibility of returning Adams to Stege.

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 in the circumstances disclosed by the record in this dispute and in the record of the dispute covered by Award 317 of this Division, the Carrier wrongfully displaced Warren at South Berkeley which resulted in the wrongful displacement of Adams at Stege, causing him monetary loss meanwhile.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of July, 1938.