

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Royal A. Stone, Referee

PARTIES TO DISPUTE:

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

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY—WESTERN LINES**

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that Dale M. Jones, line clerk, El Paso, Texas, was improperly denied the right to make seniority displacement on position of yard clerk, El Paso, Texas, upon his return to the service from leave of absence on June 24, 1938.

"Claim for all wage losses sustained by Mr. Jones, as a result of such denial from June 24, 1938 to September 21, 1938, both dates inclusive."

JOINT STATEMENT OF FACTS: "Mr. Jones was absent on sick leave from his regular position of line clerk, El Paso, March 1, 1938 to June 23, 1938, both dates inclusive. Such position carried rate of \$5.67 per day and was assigned to work six days per week.

"Effective March 18, 1938, while Mr. Jones was on leave, the hours of assignment of his regular position of line clerk were changed in excess of one hour.

"Under date of June 16, 1938, Mr. Jones advised the superintendent that upon his return to the service, which occurred on June 24, 1938, he desired to exercise his seniority displacement rights over a junior employe on position of yard clerk at El Paso, carrying rate of pay of \$5.41 per day and assigned to work seven days per week, asserting that the change of more than one hour in the starting time of his regular position on March 18, 1938, gave him this right.

"The superintendent declined to allow such displacement and required Mr. Jones to return to position of line clerk."

POSITION OF EMPLOYES: "There is in evidence an agreement between the parties bearing effective date December 1, 1929, in which the following rule appears:

'Article VII, Section 6-b: When the established starting time of a regular position is changed more than one (1) hour for more than six (6) consecutive working days the employe affected may within ten (10) days thereafter, upon proper written notice, exercise seniority rights to any position held by a junior employe. Other employes affected may exercise their seniority rights. The exercise of seniority under this Section 6-b is subject to the provisions of Section 3 of Article III.'

vided for. The fact that there are other hypothetical situations unprovided for adds nothing to the employes' contention. The recognized and proper method of providing for the present situation, and for any other similar situation, is by negotiation with the Carrier for a rule which would cover the point at issue. Certainly it would be most inequitable to award the employes a new rule by penalizing the Carrier which had done nothing more reprehensible than comply to the letter with the rule as written, and, furthermore, it is clearly beyond the power of this Board to award any new rule by construction or otherwise under any circumstances, for its jurisdiction is confined to the interpretation and application of agreements."

OPINION OF BOARD: This case presents a question which ought not to be troublesome. The Referee has found it so because of the difficulty in applying explicit rules (some of the effect of which he does not like) to facts which are not in dispute.

Generally, the question is as to the effect of leave of absence upon an employe's right to exercise seniority upon returning from leave. The entire Agreement has been searched in an effort to find everything that would be helpful.

Special provision has been made (Article VI, Sec. 2) for employes temporarily or permanently assigned as "representatives of employes." Upon return from leave their seniority rights may be "asserted within 30 days after release from excepted employment." That rule is not especially relevant now except for the fact that it does fix a special time limit after expiration of leave within which seniority rights may be exercised.

Article VI, 1(b) is important. It reads in part as follows: "An employe who fails to report for duty at the expiration of the leave of absence shall be considered out of service." The implication is irresistible that an employe on leave is considered in service notwithstanding his absence and non-performance of the duties of his position.

Could the Referee stop there, he would unhesitatingly say that seniority rights could be exercised by employes within a reasonable time after notice of the occasion of such exercise or after return from leave. The difficulty arises from the coverage of the case by other explicit rules. Even in event of abolition of a position, the requirement of Article III, Sec. 17 is that "the exercise of seniority in this respect" is "confined to a period of not to exceed five (5) consecutive days from date of abolishment of position." (Emphasis supplied.)

Section 12 (a) of the same Article, III, relied on by the employes, does not apply because the position for which the claimant applied was not one which had been "advertised" during his absence. The section does not apply to this case because by its very words it is confined to the exercise of "seniority rights to any position advertised during such absence."

Inasmuch as the position wanted by the claimant was not one advertised during his absence, section 12 (a) certainly does not apply and the Referee has been unable to find any rule justifying the procedure here attempted. There is no question but that the change in the hours of claimant's regular assignment gave him the option to exercise seniority rights if he had exercised his election within 10 days after the change as required by Article VII, Sec. 6 (b). The time limit thereby fixed is "within 10 days thereafter," that is, within 10 days after the change.

Feeling that an employe on leave of absence remains in service, the Referee considers that the result is not altogether equitable. Some method should be devised of protecting absent employes in respect to seniority rights, the occasion for the exercise of which arises during leave, and concerning which the employe has no notice and in many cases cannot be given

notice, for example, serious illness. But, to the determinative extent indicated, the rules are explicitly to the contrary. The change, if needed, must be through amendment of the rules.

Under Article VII, Section 6 (b), an employe is "affected" when his seniority status and rights are affected. The moment when his right to displace, or his liability to displacement, comes into being he is "affected" whether or not he has knowledge of the fact.

Suppose, while a man is absent on leave, there accrues to one not absent the right to displace the absentee. That right has accrued. Is not the absent one "affected" at the same instant, notwithstanding his absence and lack of notice? Just as much so, and in the same manner, is the absentee "affected" if and when the right accrues in his favor rather than against him.

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 employe involved in this dispute are respectively carrier and employe 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 no violation is shown.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 16th day of April, 1941.