

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

George E. Bushnell, Referee

PARTIES TO DISPUTE:

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

THE LONG ISLAND RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of the System Committee-of the Brotherhood that:

"(1) Extra Clerk G. A. Wright, with seniority date April 13, 1927, should have been permitted to exercise seniority to position held by Extra Clerk W. A. Filby, at Union Course, N. Y., whose seniority date is June 29, 1929, and

"(2) That Extra Clerk G. A. Wright should be compensated for the difference between what he earned and the rate of \$135.45 per month between November 4, 1938 and January 14, 1939, and

"(3) That senior qualified employees affected in like manner, by failure of the Carrier to make assignments in accordance with seniority, be compensated for all monetary losses retroactive to November 4, 1938."

EMPLOYEES' STATEMENT OF FACTS: "Since the inception of the Clerks' Regulations, it has been the established practice to assign and permit the exercise of seniority, in accordance with seniority rights as provided for in the Regulations and the Memorandum of Understanding, Regulation 5-C-1. Due to a limited force which the Carrier maintains in various other crafts it quite often develops the necessity to use an employee from one craft on a position in another craft. This situation exists particularly between Station Clerks and Station Agents and when there are no available employees who hold seniority rights under the O. R. T. agreement, station clerks are assigned to temporary agent vacancies. Such temporary assignments are made with the understanding that station clerks will not establish any seniority date or rights under the O. R. T. agreement.

"On October 18, 1938, the regular assigned Agent at Union Course, N. Y., reported off duty account of illness. All available Agents were assigned at other locations and in accordance with past practice, Extra Clerk W. C. Filby was assigned to fill the vacancy. On November 3, 1938, Extra Clerk G. A. Wright who is senior to Extra Clerk W. C. Filby, requested in writing his desire to exercise seniority to the temporary position held by a junior employee at Union Course, N. Y. This request was made in accordance with the provisions of the Memorandum of Understanding, Regulation 5-C-1, and Management refused to permit the request.

"Extra Clerk G. A. Wright has seniority date of April 13, 1927 and Extra Clerk W. C. Filby has seniority date of June 29, 1929.

governed by the Agreement between the Carrier and its Agents to which he has been properly assigned from the list of Substitute Agents established under that Agreement. Claimant Wright, therefore, was not entitled to displace W. C. Filby from the Agent position at Union Course, and neither he nor any other Clerk is entitled to compensation because the Carrier denied his request to displace Filby.

"III. Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, Is Required to Give Effect to the Agreement between the Carrier and its Clerical Employees and to Decide the Dispute in Accordance Therewith.

"The Railway Labor Act, in Section 3 (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 dispute in this case grows out of the application of an Agreement governing hours of service and working conditions. It is respectfully submitted, therefore, that your Honorable Board is empowered only to decide the present dispute and to determine the claims herein in accordance with the Schedule of Regulations and Memorandum of Understanding entered into by the Carrier and its Clerical and Miscellaneous Forces employees, which constitute the Agreement between the parties to this dispute.

"IV. Conclusion.

"The Carrier has shown that W. C. Filby was assigned from the list of Substitute Agents to fill the Agent position in question, in accordance with the Agreement between the Carrier and its Agents and Telegraph Department employees, and that nothing in the Agreement between the Carrier and the Clerical and Miscellaneous Forces employees required or could in any way operate to require the Carrier to permit the Claimant Wright to displace Filby from this position.

"Consequently, the Claimants are not entitled to any compensation, and the Carrier respectfully requests your Honorable Board to dismiss the claims of the employees in this matter."

OPINION OF BOARD: The facts are not disputed but the parties are unable to agree as to the applicable agreement.

The clerical employees assert that since Wright, the claimant, and Filby, the appointee, are both extra clerks their status and rights are controlled by the Clerks' Agreement with the Carrier, effective December 1, 1935 and that under Regulations 3-A-1, 3-E-1, 5-C-1, 9-A-1 of this agreement, and a certain "Memorandum of Understanding," effective December 10, 1935, Wright being the senior extra clerk was entitled to displace Filby, his junior, in the position of Substitute Agent.

The Carrier argues that Filby was appointed not as extra Clerk but as a substitute agent from a list of available substitutes created under a "Schedule of Regulations, effective June 1, 1938," which it negotiated with The Order of Railroad Telegraphers. It maintains that under Regulations 1-B-2 and 4-A-2 (b) of that agreement it could appoint the "senior qualified substitute shown on the list." That in making up this list from "Telegraph, Clerical and Station employees who have made known, in writing, their desire to be so considered" * * * "on the basis of ability, fitness, qualifications for further promotion and length of service with the Company" it is only restricted to those "employees who are accepted as substitute agents or assistant agents" and who "rank on such list in order of their length of continuous service with the company."

The clerical employees reply that they are not required to recognize a substitute agent's list created under an agreement with another organization. They argue that they are thus deprived of rights under their agreement. They say they are only concerned with a situation which arises when an

extra clerk is appointed a substitute agent and insist that under their agreement with the carrier in such event it is required to appoint the senior available extra clerk.

The respective agreements which are claimed to be in conflict may nevertheless be harmonized in their application to the facts in the instant case.

The Clerks' agreement with this Carrier had been in force for two years and six months when the Carrier's agreement with the Telegraphers became effective June 1, 1938. The latter agreement provides in Regulation 4-A-2 (a) that in the preparation of the list of employes available for filling positions including those of substitute agents and assistant agents, with certain exceptions not material to this issue, consideration will be given to Telegraph, Clerical and Station employes, etc.

This 1938 agreement in making clerical employes available must be read in the light of the Carrier's then existing agreements, especially in this instance, with the Clerks' agreement of 1935 and the "Memorandum of Understanding to govern the handling of extra employes—Regulation 5-C-1, effective December 10, 1935."

We do not agree with the Carrier's contention that this Memorandum is restricted in its application to positions under the Clerks' agreement. No such limitation can be found in its language. The Telegraphers' agreement of 1938 provides for the appointment of clerks as substitute agents and it must follow that if those from an extra clerks list are selected the Carrier is required to use the "senior available qualified extra man." It did not do this but appointed a junior.

We are mindful that the Railway Labor Act, Sec. 2, requires that the agreements not only be made but also maintained.

The Carrier in this instance has elected to maintain the Telegraphers' agreement of 1938 and ignore the Clerks' agreement of 1935 and the Memorandum of 1935 revised in 1937. The Carrier cannot take the position that the later agreement overrules the earlier or conflicts therewith. If a change is needed in either, the agreements provide the method for accomplishing such change. See Regulation 9-A-1 of the Clerks' agreement of 1935 and the last paragraph of the Telegraphers' agreement of 1938.

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 the action of the carrier constituted a violation of the existing agreement between the parties.

AWARD

Claim sustained for reparation of wage losses to affected employes.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of September, 1941.

Dissent to Award No. 1565, Docket No. CL-1381

This Award constitutes an enlargement of the Agreements between the parties in its holdings in respect to such Agreements,—the Clerks' Agreement and the "Memorandum of Understanding" effective December 10, 1935,—which in effect but in error extend the application of those Agreements to positions of Substitute Agents, which positions are established in accordance with the provisions of the Telegraphers' Agreement.

The totally unsound basis and consequent impractical result of this Award in its determination of the meaning of the Clerks' Agreement is reflected in the closing paragraphs of the Opinion which give its conclusions and provide the base for the Award.

In the third from last paragraph of the Opinion there is found the heretofore unheard-of declaration of disagreement with an assertion, commonly understood and accepted, that the agreement made with one craft (here, the Clerks) "is restricted in its application to positions under the Clerks' Agreement." Such declaration to the effect that an agreement with one craft applies to positions which may come under agreement with another craft is indication of the mistaken foundation that leads to the error of this decision.

The declaration in the last paragraph that the Carrier has elected to maintain one agreement and to ignore another has no support whatsoever from the record. No true evaluation of the action of the Carrier in this case, measured by any agreement or understanding between the parties and by any precedent of record, will show other than harmonious action in respect to both the Clerks' Agreement and the Telegraphers' Agreement there referred to.

Here we have two unsound bases for this Award: The first is a declaration to the effect that an agreement is not restricted to positions coming within its scope, and the second a declaration that the Carrier elected to ignore one of its agreements. From such bases, contrary to the fundamental basis of all these separate crafts' labor agreements and contrary to that exhibited by the record, naught but error in award, as is here expounded, can be expected to evolve.

S/ C. C. COOK
S/ A. H. JONES
S/ C. P. DUGAN
S/ R. F. RAY
S/ R. H. ALLISON