

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

James M. Douglas, Referee

PARTIES TO DISPUTE:

MISSOURI PACIFIC RAILROAD COMPANY

Guy A. Thompson, Trustee

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

STATEMENT OF CLAIM: Claim of the Missouri Pacific Railroad Company, denied by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that Mrs. Edith Flake having established seniority date of August 16, 1923 on the Clerks' Seniority Roster—offices of General Superintendent and Superintendent, Carrier's Southern District, was unjustly denied her seniority rights and that her name was improperly removed from the Clerks' seniority roster following her return from leave of absence on September 2, 1939, therefore, Mrs. Flake should have her full seniority rights on the Clerks' Seniority District of General Superintendent and Superintendent's offices restored and her name with original seniority date of August 16, 1923 returned to the seniority roster.

CARRIER'S STATEMENT OF FACTS: Mrs. Edith Flake, principal in the instant case, having a seniority date of August 16, 1923, on the Clerks' seniority roster, Offices of General Superintendent and Superintendent on Carrier's Southern District lines, holding position of Stenographer in the Superintendent's office at Monroe, Louisiana was displaced by a senior employee in the ordinary exercise of seniority on September 8, 1932. At this time no employee having seniority junior to Mrs. Flake was filling any regularly assigned position on this seniority district covered by the scope rule of agreement with the Clerks' Organization. Mrs. Flake, therefore, was unable to place herself on any regularly assigned position and in this situation her status became that of a furloughed employee, covered by the provisions of Rule 19 of Agreement with the Clerks' organization, effective August 1, 1926, which existed at that time, reading:

"Reducing Force, Rule 19.

"When reducing forces, seniority rights shall govern. Employees promoted from positions as other office and station employees, or as laborers to positions as clerks, will have the privilege of exercising their seniority in the class from which promoted. In general reduction of forces in a seniority district, Local Chairman will be furnished with a list of the employees to be laid off. Employees displaced account position abolished or reduction of force must exercise their seniority rights in displacing junior employees within ten (10) days.

having overstayed her leave of absence and by so doing having forfeited her seniority. Exhibit "2" carried the name of Mrs. Flake as No. 45 on the Superintendent's roster of the Arkansas Division for the year 1926, with a date of August 16, 1923, and Exhibit "3" shows the name of E. Langley as No. 49 as of August 16, 1923, Arkansas Division, for the year 1925. This was Mrs. Flake. However, Exhibit "4", page 3, seniority roster for 1940 does not bear the name of Mrs. Flake and the red arrow on page 3, between No. 122 and No. 123 indicates the position Mrs. Flake did hold on the roster, that is, the seniority rank she would hold if the Carrier's claim were sustained, listing thirty names on that roster that she would go ahead of, when as a matter of fact she surrendered her seniority by reason of her own acts. That roster is approved by both Carrier officers and Organization representatives.

As stated in our Statement of Facts, Mrs. Flake's name does not appear on the rosters of 1940, 1941, 1942 and 1943, copies of which have been submitted for the record as Exhibits by the employees.

The seniority roster for the year 1944, Exhibit "5", page 2, designated by red arrow between Nos. 113 and 114, shows the rank on the roster that the Carrier is seeking to give Mrs. Flake contrary to Agreement provisions and the same Exhibit on page 3, designated by red arrow shows the name of Mrs. Edith Flake as No. 205, with a date of January 22, 1943, thus indicating that the Carrier is seeking through its claim presented to Your Honorable Board to move the name of Mrs. Flake around that of 91 employees, as recorded on the 1944 Southern District Superintendent's seniority roster.

The Southern District Superintendent's Seniority Roster for the year 1945 Group 1, lists the name of Edith Flake as No. 194 with a seniority date of January 22, 1943 on page 3 of Employees' Exhibit "6" while it will be noted that on page 2 of the same Exhibit, designated by red arrow between Nos. 109 and 110, the rank which Mrs. Flake would hold on that roster if the Carrier's position were sustained, thus moving her name around 84 employees as listed on that roster, which we hold to be contrary to Agreement provisions and contrary to the facts in this case as recorded in our submission to Your Honorable Board.

The 1946 Southern District Superintendents' Group 1 roster is, as it is designated, a 60-day protest roster, and on page 2 of that roster, Employees' Exhibit "7" is listed the name of Edith Flake as No. 185, with a seniority date of January 22, 1943, while on the same page of the same Exhibit, designated by red arrow between Nos. 105 and 106 is shown the rank which she would be given if the Carrier's claim were sustained, which we hold would be contrary to Agreement provisions and also a contradiction to the facts in the case as submitted to Your Honorable Board.

Mrs. Flake was reemployed on January 22, 1943 and was recorded on the seniority roster with a seniority date pursuant to Agreement provisions, and the employees hold that she is not entitled to be given any other date, and that to do so would result in gross injustice to those employees listed on the roster, Nos. 106 to 184 inclusive, or 79 employees.

The employees have supported the position which they take herein both factually and documentarily and on the basis of the record itself, we hold, that the Carrier's claim should be denied, and we request that Your Honorable Board deny same.

OPINION OF BOARD: This is a claim instituted by Carrier seeking to have restored to its employee, Mrs. Flake, an original seniority date which Carrier alleges she lost by being improperly removed from the seniority roster. After its request was denied by the Brotherhood, Carrier lodged this claim with the Board.

The facts are not in dispute. Mrs. Flake was first employed by Carrier on June 13, 1923. On August 16, 1923, she was employed in the Superintendent's Office at Monroe, Louisiana, and originally established her senior-

ity as of that date on the Clerks' Seniority Roster, Offices of General Superintendent and Superintendent, Carrier's Southern District. In 1932 she was displaced from that position by a senior employee. She later took a position at Little Rock. It was abolished April 30, 1939. Apparently she had married and established a residence at North Little Rock in the meantime. The Seniority District included, besides Little Rock, offices located from Monroe, Louisiana to St. Louis, Missouri.

No other position was available on April 30, 1939. She took a 60 day leave of absence from May 1 to July 1, 1939. On July 15, 1939 she waived her right to extra or relief work. She requested a second leave of absence, this time for 30 days, and was granted a leave of absence "from August 3rd to Sept. 2, 1939".

The sole dispute arises from the interpretation of the final limit of such leave which in turn bears on the question whether Mrs. Flake reported for duty at the expiration of her leave, as required by the Agreement.

Rule 43 of the then prevailing agreement provided that except for physical disability, leave of absence in excess of ninety days in any calendar year would not be granted except by agreement. It further provided that an employee who fails to report for duty at the expiration of a leave of absence shall be considered out of service. Although Mrs. Flake suffered from hay fever and sinus trouble the record shows her leave of absence were not for physical disability.

On September 1, 1939, Mrs. Flake visited the General Superintendent's Office in Little Rock. At the moment the Chief Clerk was temporarily out of the office. Mrs. Flake did not report for duty on that date. She did not intend to report for duty on that date because it was her understanding, so she states, that her leave extended through September 2nd and she would be protected until September 5th because September 3rd fell on Sunday, and September 4th was Labor Day, a holiday.

However, on September 4th Mrs. Flake went to the General Superintendent's Office to report for duty and was advised by the Chief Clerk that since she had failed to report for duty at the expiration of her leave she was out of service and had forfeited her seniority.

On September 13, 1939, she complained of this by letter to the Local Chairman. He advised her she had overstayed her leave and had thereby forfeited her seniority rights. On October 14, 1939, she complained by letter to the General Chairman. He advised her he could do nothing because of her violation of the rules.

In compliance with Rule 20 requiring seniority rosters to be revised and posted in January of each year, Carrier posted such rosters in 1940, 1941, 1942 and 1943 omitting Mrs. Flake's name from them. The rule also provided that rosters will be open for protest for 60 days from date of posting.

In January 1943, Mrs. Flake reentered Carrier's service in the General Superintendent's Office at Little Rock, and established a seniority date of January 22, 1943 which has been carried on the seniority rosters for 1944 and 1945.

On January 11, 1945, over five years after Mrs. Flake lost her original seniority date, Carrier wrote the General Chairman asking that Mrs. Flake be restored to her original seniority date of August 16, 1923. This was denied.

Carrier's position appears to be that a leave of absence "from August 3rd to Sept. 2, 1939" extends through September 2nd. A common practice in computing a period of time is to exclude the first date mentioned and to include the last date mentioned. But, if August 3rd was the first day of the leave of absence, as contended, then since August has 31 days, the thirtieth day would be September 1st, and therefore the leave would extend up to or until September 2nd, and not through that date. This assumes importance because Mrs. Flake was entitled to only 30 days, having already

used up 60 days of the total of 90 allowed by the rule. Carrier further contends that Mrs. Flake actually reported for duty on September 1, 1939. Even if her visit to the General Superintendent's Office on that date may now be construed as reporting for duty it was not then so understood by the Carrier, by the Brotherhood, or by Mrs. Flake herself.

It is not necessary for us to go into that question because it may not now be raised with propriety.

At the time, Mrs. Flake could have requested a hearing and appeal had she felt Carrier had improperly forfeited her seniority rights by removing her name from the seniority roster. She did not do so. No protest was made upon the annual posting of the seniority rosters. During the intervening years seniority rights have become vested in a number of employees. To sustain this claim would harm those employees by reducing their respective rights. They acquired their rights in good faith. By apparent acquiescence in Carrier's action, as evidenced by her subsequent failure to follow the remedies provided, Mrs. Flake may not now be heard to claim restoration of her original seniority date. The Carrier has no more at stake in this claim than Mrs. Flake. Since she would now be barred it follows that the Carrier is likewise barred.

Any criticism of the harshness of the rules should be directed to the parties who made them, not to this Division whose duty it is to enforce them as written.

The claim must be denied.

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 Employees involved in this dispute are respectively carrier and employees 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 claim should be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of April, 1947.