

Award No. 5717  
Docket No. CL-5892

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Livingston Smith, Referee

**PARTIES TO DISPUTE:**

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

**HOUSTON BELT AND TERMINAL RAILWAY COMPANY**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood that:

(a) The Carrier began violating the Clerks' Agreement on or about July 8, 1951, by using a person who holds no seniority rights under the Clerks' Agreement to perform rest day relief work in the Information Office at Houston, Texas. Also;

(b) Claim that the two Information Clerks be compensated for all losses sustained because of being relieved in violation of the agreement on July 8, 1951 and all subsequent dates on which a like violation occurs.

**EMPLOYEES' STATEMENT OF FACTS:** Mr. J. E. Whalen is regularly assigned to Relief Position No. 44 working as follows:

Day	Position No.	Title	Relieves
Thurs.	14	Information Clerk	Mrs. Stoten
Fri.	9	Ticket Clerk	Mr. Walker
Sat.	9	Ticket Clerk	Mr. Walker
Sun.	15	Information Clerk	Mrs. Parker
Mon.	15	Information Clerk	Mrs. Parker
Tues.		Rest Day	
Wed.		Rest Day	

On July 8, 1951, Mr. Whalen began filling a temporary vacancy of Ticket Clerk, thereby leaving his regular assignment, Relief Position No. 44, vacant.

Having no one to fill Relief Position No. 44 the Carrier instructed Ticket Clerk Walker to work his rest days (Fridays and Saturday). On Sunday, Monday and Thursday the Carrier brought in an outsider, a person who holds no seniority rights under our agreement, to relieve Information Clerks Parker and Stoten.

**POSITION OF EMPLOYEES:** The issue here involved—the performance of work covered by our Agreement by those who hold no seniority rights under the Agreement—has been passed upon by this Honorable Board so many times that it is difficult to understand how the issue could again arise.

of the National Vacation Agreement. It is for these reasons that the Carrier has declined the contention and claim of the Organization and feels that your Board should likewise deny as untenable the position taken by the Organization and accordingly sustain unqualifiedly the position of the Carrier.

The matters contained herein have been the subject of correspondence and/or conference between the parties.

(Exhibits not reproduced).

**OPINION OF BOARD:** The effective Agreement between the parties bears date of July 1, 1950.

The following led to the action of the Carrier which the Organization asserts was in violation of the Agreement.

Eli Levy, Ticket Clerk, went on vacation July 8 through July 19, 1951. R. W. Robinson, Relief Ticket Clerk, moved up into Levy's position as Ticket Clerk leaving his regular assignment temporarily vacant. J. E. Whalen vacated his regularly assigned relief position and occupied Robinson's position as Relief Ticket Clerk. Mrs. Pearl Sullivan was then directed by the Carrier to fill the Whalen vacancy (in part) by relieving Information Clerks on their rest days.

It is asserted that Mrs. Sullivan was not qualified under the Agreement to perform rest day relief service as assigned to her by the Respondent since she held no seniority.

It is contended that seniority can be obtained only through a successful bid on a regularly bulletined position and that in the absence (as here) of an extra board (under Rule 25) an employee without seniority can not perform relief service on rest days, but that in such cases the regular occupant of the position is entitled to be held over and worked on his rest day.

The Respondent contends that Rule 3 (a) permits the use of workers with "employee status" if work is available; that work by such an employee in relieving others on assigned rest days is likewise proper under 37 (c-7) and 37 (d-6) which provide for the use of relief personnel, or available extra or unassigned employees.

It is further asserted that Article 6 of the Vacation Agreement contemplates that vacation relief workers will be provided and Article 12 (a) of said Agreement precludes the assumption of additional expense by the Carrier in granting vacations, the payment of time and one-half being required when employees are required to work their assignment on their rest days.

It can not properly be held that Mrs. Sullivan's occupancy of the several positions on the dates in question was primarily caused by Employee Levy taking his vacation. In truth and in fact they came into being by virtue of Employees Robinson and Whalen vacating (temporarily) their regular relief positions and moving up to take vacancies created thereby.

We do not think that the Vacation Agreement is applicable here, however, assuming that the Carrier's position in this connection is based on a sound premise, this Board has held that when provisions of the Vacation Agreement run counter to, or contravene, previously existing Schedule Rules, the Agreement must of necessity prevail (Awards 2340, 2384, 4690).

The parties are in agreement that, while Mrs. Sullivan had "employee status", she held no seniority of any nature, having never been assigned to any position by bulletin under Rule 3 (a). To assign an employee without seniority to work coming within the Scope of the Agreement has the effect of rendering seniority provisions of such Agreement meaningless and of no protective value to the regularly assigned occupant of a duly bulletined position.

The Carrier can not properly rely on Rule 3 (a) as a contractual basis for assignment of Mrs. Sullivan to perform the work in question. Rule 25 of the Agreement, the only rule under and by virtue of which seniority can be obtained, was obviously intended to limit the application of 3 (a). The only work which an employe without seniority can perform is that work which no employe with seniority rights available is willing to perform. Award 4278. In connection with the Carrier's reliance upon Rule 37 (d-7) this Board, in interpreting an identical rule, said in Award 5240:

"We find nothing in the current Agreement or the revision thereof effective September 1, 1949, that permits or authorizes work to be done by one without established seniority when there are those with established seniority available and willing to do the work. The claimants here were the occupants of the regular assignments to which the relief days related, there were admittedly no extra or furloughed employes available, \* \* \*."

That language applies in this instance.

The employe that was the subject of Award 4133 (cited by the Carrier) possessed seniority attained under the Agreement applicable thereto. Mrs. Sullivan had no seniority. This distinguishing feature of such Award renders the same meaningless when considered in light of the facts existent here.

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 Carrier violated the Agreement.

#### AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon  
Acting Secretary

Dated at Chicago, Illinois, this 9th day of April, 1952.

#### DISSENT TO AWARD 5717, DOCKET CL-5892

This Award has the effect of nullifying the provisions of Rule 3 (a), which is beyond the authority of this Board. While an individual, by Rule 3 (b), does not establish a seniority date until assigned to a position, by bulletin, yet the Rule 3 (a) grants the individual "an employe status at the time his pay starts."

The Opinion states:

*"The Carrier can not properly rely on Rule 3 (a) as a contractual basis for assignment of Mrs. Sullivan to perform the work in question. Rule 25 of the Agreement, the only rule under and by virtue of which seniority can be obtained, was obviously intended to limit the application of 3 (a)."*

Rule 25 in no way establishes seniority and is not "the only rule under and by virtue of which seniority can be obtained." Its purpose is clear and it in no way grants or limits the establishment of seniority. An employe acquires an "employe status" under Rule 3 (a) and later "seniority" under Rule 3 (b), consequently the above quoted statement from the Opinion is clearly in error.

The parties had a clear purpose in putting Rule 3 in their Agreement and to nullify it completely under the guise of an interpretation is beyond the authority of this Board.

/s/ A. H. Jones

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp