

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Angus Munro, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY
COMPANY**

STATEMENT OF CLAIM: (1) Claim of the System Committee of the Brotherhood that the Carrier violated its Agreement with the Brotherhood at South Hammond, Indiana, when on September 23, 1949, thru deception, misrepresentation and falsification, it arbitrarily removed Yard Clerk J. T. Miller from his assigned position of Day Yard Clerk with hours 7:00 A. M. to 11:00 A. M. and 11:30 A. M. to 3:30 P. M., Wednesday thru Sunday with Monday and Tuesday as assigned days of rest, by permitting Relief Clerk C. D. Church with his unqualified bid to take and hold the position until November 4, 1950, on which date Clerk Miller was returned to his regular assignment upon orders from Director of Personnel M. E. Strother, and

(2) That by reason of the violation the Carrier shall now be required to compensate Clerk J. T. Miller at the pro rata pay of \$11.708 per day for each day he was withheld from his assigned position with hours 7:00 A. M. to 11:00 A. M. and 11:30 A. M. to 3:30 P. M., for the period September 23, 1949 through October 2, 1950, except for those days in that period when he acted as vacation relief clerk on other positions by his own choice, and

(3) That by reason of the violation the Carrier shall now be required to compensate Clerk J. T. Miller at the penalty rate of one and one-half times the rate of \$11.37 for all time worked on other positions outside the hours of 7:00 A. M. to 11:00 A. M. and 11:30 A. M. to 3:30 P. M., except for those days when he acted as vacation relief clerk on other positions by his own choice, for the period September 23, 1949 through October 2, 1950.

EMPLOYEE'S STATEMENT OF FACTS: There is an Agreement in effect between the parties bearing effective date of November 1, 1944, with subsequent amendments, governing the hours of service and working conditions of employees of the Carrier represented by the Brotherhood, copies of which have been furnished the Board. This Agreement, as to certain rules, was revised effective September 1, 1949, to conform to the Agreement entered into by the parties at Chicago on March 19, 1949, which provided for the establishment of a forty-hour week. The Employees request that the entire text of such Agreements (including Supplement No. 29 of February 19, 1949—Brotherhood Exhibit "X") be considered in evidence in this dispute and treated as having been cited by the Employees.

The Employees hereby submit the following statement of such facts as are material to the determination of this dispute.

The instant claim was first presented to Terminal Trainmaster Kozubal under date of November 6, 1950, which was after the protest concerning Miller's seniority date had been handled and disposed of by the carrier making the adjustments requested by the organization representatives as described in the preceding paragraph. Therefore, the Carrier submits that there is no merit to the claim of the employees for retroactive penalty payments, and ask that the claim be denied on those premises; this without waiving our contentions that the claim is otherwise without merit. The principle of recognizing claims only from the date the claim was first presented to the Carrier has long been followed by your Board, as Awards 463, 500, 540, 4182 and many other awards attest.

As stated in the Carrier's Statement of Facts, Clerk Miller worked on a Relief Position from September 23, 1949 to September 29, 1949 and starting on September 30th he was used on the 3:45 P.M. Yard Clerk position and to which position he was assigned on November 22, 1949. He lost no time whatever by reason of the assignment of Clerk Church to the Day Yard Clerk position.

CONCLUSION

The Carrier has shown that Clerk Miller was not removed from his assigned position, withheld from his assigned position nor worked on other positions outside the hours of his own assignment for the simple reason that **he was not assigned to the Day Yard Clerk position; that the assignment of Clerk Church to the position on a late bid was made in accord with an understanding with the General Chairman to do so, and that similar assignments recognizing a late bid through understanding with the General Chairman have been made before and since the assignment of Church; that the only cut-off date that could be recognized in giving consideration to this claim must necessarily be November 22, 1949, which was the date of the first assignment of Miller to a position following the initial date of claim; that the time claim was submitted subsequent to disposal of protest of Miller's seniority date which was accomplished in full accord with the request of the organization and should be denied on that premise.**

Therefore, the Carrier respectfully ask that your Honorable Board deny the claim of the Employees in this matter.

(Exhibits not reproduced.)

OPINION OF BOARD: On or about September 1, 1949 one Miller, hereinafter called Claimant, acquired the status of an employee with reference to Carrier. On August 27, 1949 Carrier caused to be posted its bulletin No. 257, with reference to the job of Day Yard Clerk. Subsequently, on September 9, 1949, Carrier caused to be posted its bulletin No. 257-A which stated the job mentioned in the first above bulletin had been awarded to 'none', meaning no person. Subsequent to the date of bulletin 257 and prior to bulletin 257-A, Claimant began to perform the duties of the job described therein. Later, on September 21, 1949 Carrier caused to be posted, its bulletin No. 257-B, which stated the above described job had been awarded to one Church, and that he had submitted his bid therefor subsequent to September 2, 1949, by reason of being confined in a hospital during the time bulletin No. 257 was posted.

Thereupon Church displaced Claimant, who in turn displaced one Moore, from a job styled Relief Clerk No. 4. Later Claimant was directed to perform the duties of a job styled 3:45 P.M. Yard Clerk. Carrier then issued its bulletin No. 398 on November 14, 1949, to the effect a temporary vacancy existed on said last mentioned job. Claimant bid for this job and was awarded it by Carrier's bulletin No. 398-A issued on November 22, 1949, and which stated Claimant had previously been unassigned. Again, on January 17, 1950, Carrier issued its bulletin No. 3-A which recited that Claimant had been awarded said last described job permanently in response to his bid

with reference to Carrier's bulletin No. 3, and which also described Claimant as having been previously unassigned. Later, Claimant responded to Carrier's bulletin No. 161 and by bulletin No. 161-A, issued on September 28, 1950, was awarded the job of Burroughs Machine Operator-Accounting Clerk.

In the meantime Claimant had been issued a seniority date of November 22, 1949, which is when he was assigned to the temporary vacancy. Claimant vigorously protested such action under date of March 11, 1950, and in the subsequent exchange of correspondence and by way of conference, it was determined said Church, in truth and in fact, was not confined to a hospital all of the time bulletin No. 257 had been posted, but instead had performed his duties and that he could have bid for the job described therein within the time set out therefor. Thereupon, Carrier, under date of November 1, 1950 corrected Claimant's seniority date to read September 1, 1949, cancelled bulletin 275-B, permitted Claimant to bump Church and to return to the job first above mentioned.

The somewhat detailed recital of events is made necessary by the nature of the relief herein sought. In part (2) of the claim pro rata pay of the job first mentioned is sought, from the time Church bumped Claimant until Claimant secured the Burroughs job, while part (3) of said claim the punitive rate of pay is sought for the period covered in part (2) when Claimant worked outside the hours of the first described job. Both parts, (2) and (3) contain certain exceptions.

The Brotherhood, hereinafter called Petitioner, contends Claimant was assigned to the first named job with retroactive seniority to September 1, 1949, by virtue of Schedule Supplement 29.

There is no question but that Claimant, during the time he performed the duties of the first named job, was that class of employee referred to in Schedule Rule 24½. As such, Carrier was under no obligation to give or grant to Claimant an assignment, as that word is used in the Schedule when it directed him to perform the duties of such job. Because Claimant was covered by Rule 24½ it was entirely proper for Petitioner and Carrier to agree upon excepting Church from his obligation to bid for the job within a time certain. When it developed Church was not entitled to an exception, the question arose with reference to how that affected Claimant. Carrier contends it acted as it did on November 1, 1950 "on the assumption that had the late bid by Clerk Church not been mutually accepted and understanding reached to assign him to the position it is likely that Miller would have been appointed to fill the position." But the point is, Carrier was under no obligation to continue Claimant in the Day Clerk job had no bids been submitted. What then is the effect of Carrier's letter of November 1, 1950? Since Claimant could have been removed without cause at the time he was removed, the act of Carrier in regard to Church could not vest in Claimant rights he did not possess.

Accordingly, the provisions of Supplement 29 do not apply, as contended by Petitioner.

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 Carrier and 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 evidence of record does not sustain an affirmative finding.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 21st day of May, 1952.