

Award No. 6962

Docket No. CL-6891

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

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

SEABOARD AIR LINE RAILROAD COMPANY

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

The Carrier violated the Rules and provisions of the Clerks' Agreement when,

(a) On May 16, 1951, they refused to permit Telephone Operator Mary T. Fisher, hereinafter referred to as Claimant, to displace her junior occupying a telephone operator's position in the diagram room at Miami, Florida, and when,

(b) On July 26, 1951, they refused to permit Claimant to displace her junior occupying a position designated as Office Boy (Girl) in the Passenger Department at Miami.

That as a penalty for the violation of said Agreement, Claimant be paid,

(1) Twenty-two days at the rate of \$11.29 per day, plus subsequent wage increases, this being the number of days Claimant would have worked the telephone operator's position shown in (a) above, and that,

(2) Claimant be paid for the hours and amounts paid the incumbent of the Office Boy's (Girl's) position for July 26, 1951, and the same for each and every day subsequent thereto, until the violation is corrected.

(3) Hours and amounts under (2) to be obtained from Carrier's records.

(4) That item (2) bear interest at the rate of ten per cent per annum from July 25, 1951, until settled.

EMPLOYEES' STATEMENT OF FACTS: Claimant was first employed as Telephone Operator in June, 1945 and worked approximately ninety days before being displaced by senior employe through exercise of seniority. She was again employed in the same capacity from February 24 to March 25,

"Conduct may be, frequently is, just as expressive of intention and settled conviction as are words, either spoken or written. Here there is so much uncontradicted evidence of unambiguous conduct by both parties to the issue, evidencing the conclusion which is considered determinative, that no course is open for a judicial pronouncement other than that the claim be denied."

(10) Assuming, but not conceding, Claimant should have been assigned to the position of relief telephone operator advertised in Bulletin A-487 of January 18, 1951, and that she had established seniority as of January 29, 1951 under Rule 21, first paragraph, she was obligated to exercise seniority within 15 days from May 15, 1951, the date that the seasonal position terminated, but she failed to do so and instead was absent from duty for about 30 days and elected to work vacation and excused time for about 30 days beginning July 16, 1951. Any rights that she may have had to displace the Office Boy disappeared 15 days subsequent to May 15, 1951 (Rule 21, first paragraph), as no attempt was made or desire expressed to exercise seniority on position of Office Boy until July 17, 1951, consequently there is no basis whatever for the claim as set out in Item 2 of the Statement of Claim.

Item 4 of the claim is untenable because the agreement makes no provision therefor and, additionally, it seems that this was an after thought on the part of the General Chairman, as it never appeared in the claim until it reached the Director of Personnel (see Addendum 15 and Third Division Award 5077).

In view of the practice and application of Rule 21 for nearly ten years, as it relates to seasonal employees in the Passenger Traffic Department, evidenced by Carrier's Exhibit "A", we respectfully urge that the claim be denied.

Carrier affirmatively states that all data used herein has been discussed with or made available to or is well known by Employee representative.

(Exhibits not reproduced.)

OPINION OF BOARD: Petitioners contend that Claimant with a seniority date of January 29, 1951, which was awarded to her on December 20, 1951, should have been in the position in question alleged to have been held by an employee junior to her in seniority. Citing in support thereof Rules 21, 5, 12, 15 and 16 and correspondence between the parties and awards of this Division.

The record shows that Claimant was hired as an extra or Seasonal Telephone Operator in the years 1945; 1949 and 1950 during which period she did not acquire seniority. That since her position was of indefinite duration it did not have to be bulletined until 30 days from date of employment, Rule 15, and had to be bulletined and filled, Rule 16. On January 18, 1951 Claimant's Telephone Operator position was advertised for bids with others, Rule 12. Claimant bid on one of the three positions bulletined, however, when Carrier's assignment Bulletin No. A-402, was issued on February 12, 1951 only one Telephone Operator position was assigned. No employee with seniority bid in or was assigned to the position.

Petitioner's claim that by reason of this situation, Carrier's failure to assign Claimant to the position, was contrary to the specific provisions of Rules 5 and 12 and resulted in the filing of a claim for a seniority date for Claimant and she was awarded a seniority date of January 29, 1951. Claimant remained on the Telephone Operator position which she had held prior to bulletining until May 16, 1951, on which date the position was abolished and Claimant laid off. Claimant protested Carrier's action in retaining in service another operator with no seniority, however, Carrier continued the other employee in the position until June 16, 1951 when

Claimant was again allowed to occupy the position. That Claimant notified Carrier on July 17, 1951 that since the Telephone Operator position she was working was to be abolished she wished to exercise her seniority on position of Office Boy (Girl) held by a junior employe with seniority date of February 22, 1951. Carrier refused stated:

"It is necessary that I inform you that you have no bidding rights inasmuch as you have no seniority."

Petitioners further contend that it is a compounding of an injustice on Claimant to refuse to compensate her as claimed as it was Carrier's initial violation of Rules 5 and 12 which caused Claimant to be denied the right to exercise her seniority rights. Citing the first paragraph of Rule 21, reading:

"When reducing forces, seniority rights, if exercised within fifteen days, shall govern according to seniority districts provided in Rule 7."

Respondent Carrier contends that an assignment to a bulletined position by bulletin is a condition precedent under paragraph (a) of Rule 5 to establishing seniority. Also that (b) of Rule 5 makes no provision for establishing seniority. And that Rule 21 was not violated as the practice in effect since 1941 shows that Seasonal employes in the Passenger Traffic Department establish no seniority. Cited are Awards 1397, 1645, 1435, 2436, 1289, 6487 and 6650.

The difficulty in the instant case with the position taken by Carrier is that although it may have been a practice in effect since 1941, here that practice was abrogated by the fact that Claimant was given a seniority date as of January 29, 1951. By this act on the part of Carrier it admitted that Claimant was entitled to such seniority date. Therefore, even though this date was not awarded Claimant until at a later date it is retroactive in its application as we view the matter. In Awarding the date of January 29, 1951 Carrier admits that an injustice had been done Claimant and such act recognized this fact and sought to rectify it.

Claims (a) and (b) should be sustained. Also b (1) is sustained; b (2) sustained to the extent of days proven to have been lost by whatever practice is used on the property to ascertain the same. B (3) sustained to the extent as provided in the finding on b (2). B (4) denied for the reason that the agreement makes no provision for interest payments in such cases.

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 Agreement was violated.

Claims (a), (b) and b (1) sustained.

Claims b (2) and b (3) sustained as limited in the Opinion.

Claim b (4) denied.

AWARD

Claims (a), (b) and b (1) sustained.

Claims b (2) and b (3) sustained in accordance with Opinion and Findings.

Claim b (4) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 15th day of April, 1955.