

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Horace C. Vokoun, Referee

PARTIES TO DISPUTE:

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

WESTERN WEIGHING AND INSPECTION BUREAU

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that: (a) The Bureau violated rules of currently effective agreement with the Brotherhood dated September 1, 1949, in not allowing senior employees to fill short vacancies beginning July 7, 1952, as listed herein.

(b) Mr. E. A. Reeder for the difference between his rate of pay of \$14.35 and the rate of \$16.43 per day attached to Position No. 215, Inspector, from July 9, 1952, until the position was awarded by bulletin on August 21, 1952.

(c) Mr. A. A. Chidsey for the difference between his rate of pay of \$16.16 and \$16.43 per day attached to Position No. 216, Inspector, to apply from August 4, 1952, and all other days that the position was on a temporary appointment.

(d) Mr. E. T. Escandell for the difference between his rate of pay of \$12.85 per day on Position No. 119 and the rate of \$14.41 per day attached to Position No. 147, Transit Auditor, from July 9, 1952, when junior employee W. T. Marseilles was awarded Position No. 215 until the Transit Auditor Position No. 147 was properly bulletined on August 21, 1952.

EMPLOYEES' STATEMENT OF FACTS: It is conceded the claimants were all regularly assigned employees of the Bureau with assignments Monday through Friday with Saturday and Sunday as designated rest days, New Orleans, Louisiana. Employees' Exhibits 1 and 2 covers the new Position No. 215, Inspector, that was first temporarily assigned to Mr. Marseilles and the Transit Auditor Position No. 147 vacated by Mr. Marseilles and bulletined August 21, 1952. The duties and responsibilities for the new Positions No. 215 and 216 are identical.

The Employees' Exhibit 3 dated July 11, 1952, notifying the Bureau that claim was being made in behalf of Claimant Reeder account junior employee being assigned to Position No. 215 and it is well to note the information obtained by the Employees was not from official Bureau sources that such a position was established.

(Exhibits not reproduced.)

OPINION OF BOARD: There is a contract in evidence between the parties which contains the following provisions:

"RULE 6. PROMOTIONS, ASSIGNMENTS AND DISPLACEMENTS

"(a) Employees covered by these rules shall be in line for promotion. Promotion, assignment and displacement shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.

"NOTE: The word 'sufficient' is intended to more clearly establish the right of the employee to bid in a new position or vacancy where two or more employees have adequate fitness and ability.

"(b) Senior applicants denied bulletined positions or the right to exercise seniority over junior employees, will upon request be advised in writing by proper supervising officer reason therefor.

"RULE 7. BULLETINED POSITIONS

"(a) New positions or vacancies (except those of thirty (30) calendar days or less duration) will be promptly bulletined in agreed upon places accessible to all employees affected for a period of ten working days, except where employees are furnished copies of bulletins, posting requirements will have been fulfilled. * * *"

" * * * "

"(d) Bulletined positions which are filled temporarily pending an assignment, shall be filled by the senior qualified employee requesting the position.

"(e) New positions or vacancies of thirty (30) days or less duration shall be considered as temporary and may be filled by an employee without bulletining; if filled, the senior available qualified employee requesting same will be assigned thereto.

On July 7, 1952, carrier instituted a new position of Inspector, Position No. 215, to work on the wharves at New Orleans, La. This position was originally created for less than 30 days. It was later decided to continue the position beyond August 7th so the carrier advertised the position for bid under Rule 7 (a) on the 6th day of August.

When Position No. 215 was originally created employee W. T. Marseilles, Seniority 1932, was assigned to the work on or about July 9, 1952. Claimant E. A. Reeder, Seniority date 1920, filed claim on July 11, 1952 for the difference in pay between his job and position No. 215 from July 9, 1952. His claim is based on the contention that his greater seniority required that the Company should have assigned him to this work instead of Mr. Marseilles who had less seniority.

The claim is couched in the following language in a letter by the District Protective Chairman to the District Manager of the Bureau:

"Therefore, in behalf of Mr. E. A. Reeder, whose seniority begins in 1920, and the present assignee, Marseilles seniority begins in 1932,

I am making claim for each day worked by Mr. Marseilles in the difference of the pay of the position that Reeder now holds (\$14.35 daily) against the pay of the new position of \$16.73 per day, both of which are subject to cost of living adjustments."

Position No. 216 was established on August 4, 1952, abolished August 8, 1952, reinstated Sept. 12, 1952 and abolished Sept. 15, 1952 and has remained abolished since that date.

On August 4th 1952 A. A. Chidsey, Chairman District Protective Committee filed a claim with the Bureau by letter addressed to the District Manager in the following language:

"Therefore, in my own account, I am filing claim for each day worked by Mr. Helm, on this assignment, at the difference in pay between that paid Mr. Helm on the so called pineapple job and my own rate of pay, * * *"

The Bureau made the following reply to the various claims:

"* * * you express the opinion it is the responsibility of the Bureau (not the employees) to notify the employees when there is a temporary vacancy to be filled. You further state that this the Bureau did not comply with, and the first knowledge the employees had was on July 11, 1952 only two days after the junior employee was assigned to the position.

"When the junior employee had knowledge of Position 215 on July 11, 1952, as you claim, it was incumbent on him to make application for the position as provided in Rule 7 of our Agreement. This he failed to do and as we read the rule the responsibility is one that rests with the employee because both in paragraphs (d) and (e) the language contained therein specifically states—'shall be filled by the senior available qualified employee requesting same.' * * *"

When Position 215 was bulletined neither of the Claimants made application for the position.

It is the duty of the Board to interpret agreements as made by the parties and where essential, to review the acts of the parties within the framework of that to which they have agreed.

As to the matter of notification to employees, we find no provision in the Agreement, more particularly Rule 7, which requires that the Bureau notify employees by Bulletin or otherwise about a "new position or vacancy of thirty (30) days or less duration."

As to the question of Assignment on the basis of seniority; although there are Awards to the contrary, the Board finds that the more consistent and later Opinions of the Board agree with the Rule as expressed by the Board in its Award 3232 where we held:

"* * * This particular problem has been before this Board on a number of occasions and the awards are not harmonious. Awards 1124, 1150 and 1177 hold that a carrier is not, in the absence of a specific rule so requiring, obligated to fill on the basis of seniority temporary vacancies not subject to the bulletining rule of the agree-

ment. * * * But a number of well considered awards have held that it is within the spirit, even though not within the letter of an agreement, that seniority should be recognized in filling temporary vacancies as well as permanent ones. Awards 132, 2341, 2426, 2490, 2716, 2931, 2994. Such having been the consistent holding of the later opinions of this Board we do not feel that we should now attempt to lay down a different rule."

The Bureau makes the point that the Claimants under the provision of Rule 7 (d) and 7 (e) never "requested" the positions but only claimed the difference in pay rate between the new positions and the ones they were holding.

In examining the claims as filed we find nowhere any language which would indicate that the Claimants requested assignment to the new position. As delivered to the Carrier the claim seems to say "You have made a mistake—pay me." The subsequent fact that neither Claimant made application for the new position when it was bulletined bears out that interpretation. Although no technical language is required by the Board in making claims for assignment there should be a declaration sufficiently clear to put the Bureau on notice as to the contention of the Claimant (Awards 5255 and 6350). We hold that a claim for payment, especially when made while the basis for the claim continues after the demand, and a claim for assignment on the basis of seniority are not synonymous nor does the former constitute notice of a "request" for assignment to the contended position.

No where in the record is there any evidence that the Claimants were not qualified.

In (d) above Mr. Escandell claims the difference in pay between his position and that which Mr. Marsellies was occupying when he was transferred to position 215 while it was classified as "temporary", from the date the position was vacated by Mr. Marsellies until properly bulletined. It is conceded that Position Number 147 was vacant until bulletined.

The Bureau was within its rights in keeping this position temporarily vacant and there being no employee assigned, there can be no violation of seniority rights and no valid claim for either assignment or pay during the period requested. When filled the position was filled in strict accord with the Agreement.

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 Employee involved in this dispute are respectively Carrier and Employee 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 (a) Carrier violated the Agreement; (b) (c) (d) the Agreement was not violated.

AWARD

- (a) Claim sustained.
(b) (c) (d) Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of October, 1958.

DISSENT TO AWARD NO. 8485, DOCKET NO. CL-8205

We concur in denial of claims (b), (c) and (d). However, for obvious reasons we dissent to the award sustaining claim (a). In the absence of conclusive showing that the Carrier did not allow senior employees to fill short vacancies, claim (a) should also have been denied. Admittedly, there is no provision in the Agreement which requires that the Carrier notify employees about a new position or vacancy of thirty days or less duration. In addition, as stated in Opinion, "In examining the claims as filed we find nowhere any language which would indicate that the Claimants requested assignment to the new position."

After properly analyzing the facts and the application of the Agreement rules thereto in other respects, the majority erred in applying a general rule of seniority to a situation provided for by specific rule, thus ignoring the universal rule of contract interpretation that the specific controls the general. Inasmuch as a position may be more or less desirable because of rate of pay, hours of duty, nature of work, etc., the pertinent rule specifically gives the senior available qualified employee the choice—to request it, or to refrain from doing so without peril to seniority rights.

/s/ J. F. Mullen

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp