



**Award No. 15752**  
**Docket No. CL-16052**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Wesley Miller, Referee

**PARTIES TO DISPUTE:**

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

**SOUTHERN PACIFIC COMPANY  
(Pacific Lines)**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood (GL-5873) that:

(a) The Southern Pacific Company violated rules of the Clerks' Agreement when it refused to permit unassigned employee Martin R. Duarte to exercise his seniority by displacing a junior unassigned employee.

(b) The Southern Pacific Company shall be required to allow Martin R. Duarte eight (8) hours' compensation at the pro rata rate of Janitor, Sacramento Freight Station, for June 1 and 2, 1961.

**EMPLOYEES' STATEMENT OF FACTS:** There is in evidence an Agreement bearing effective date October 1, 1940, reprinted May 2, 1955, including subsequent revisions, (hereinafter referred to as the Agreement) between the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) and its employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as the Employees) which Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

Regularly assigned incumbent of Crane Operator Position 137 was absent on scheduled vacation during the period May 15 through June 2, 1961, and the position was filled under provisions of Rule 34(c) by employee A. Tognotti, whose regular assignment was that of Position 53, Janitor.

Unassigned employee John Pivaroff, seniority date of June 28, 1951, was called by the Carrier under provisions of Rule 34(b) and utilized to fill vacancy on Position 53.

Martin R. Duarte (hereinafter referred to as the Claimant) was an unassigned employee, seniority date of January 16, 1947, who primarily had been working off the Extra Board at the Sacramento Depot performing service as an extra mail handler in the Baggage and Mail Room. Due to lack of seniority, he last worked from that Board on April 21, 1961, and thereafter

By letter dated September 29, 1961 (Carrier's Exhibit D), Petitioner's General Chairman appealed the claim to Carrier's Assistant Manager of Personnel and by letter dated December 4, 1962 (Carrier's Exhibit E), the latter denied the claim.

(Exhibits not reproduced.)

**OPINION OF BOARD:** This case is somewhat complicated because the positions of the parties appear to vary in the various stages of the handling of the Claim on the property and in this appeal to the Third Division.

The Claim arose because Mr. Duarte, an unassigned extra employe, was denied the right to displace Mr. Pivaroff, also in the unassigned extra employe category, who was then occupying a temporary vacancy, which temporary position commenced May 15, 1961, and ended June 2, 1961. The Duarte claim was to be allowed to work the position on the dates June 1 and June 2, both inclusive, 1961.

There is no doubt that Mr. Duarte had more seniority than Mr. Pivaroff, however, the Carrier denied the Duarte claim, which was made on May 31, 1961, on the basis of Claimant's alleged ineligibility to request this particular displacement. In making Carrier's first formal declination of the claim, Mr. Spence, the Superintendent of the Sacramento Division, by letter dated August 2, 1961, wrote the following:

"Investigation develops that Mr. Duarte was an extra employe who had made no displacement within five (5) days **after returning from a leave**, and had performed no service after his return prior to requesting to displace Mr. Pivaroff as Janitor, effective June 1, 1961. He thereby relinquished his right to a displacement. (Emphasis ours.)

The Claim being without merit under any of the provisions of the Clerks' Agreement is therefore denied."

This position of the Carrier was never abandoned.

Mr. Duarte during the time period in question either had or had not been on a "Leave of Absence." The true facts in regard to this would appear to be easily ascertainable. In the handling on the property, the Organization did not deny that the Claimant had been on a leave of absence, that he returned therefrom, and that he exercised no displacement rights within five days after returning from the alleged leave. The letters of the Division Chairman and General Chairman, which were written in the handling on the property (in 1961) do not rebut or contradict Carrier's factual allegations; instead, these letters present the arguments that the claim should be allowed on the basis of "practice on this division . . ." and that "the provisions of Rule 40 apply to incumbents of regularly assigned positions only . . ."

In its submission to this Board in 1965, the Organization for the first time — insofar as the Record shows — took the position that "Claimant had not been on leave of absence or vacation nor had he been absent for medical reasons. During the period prior to May 31, 1961, when the Carrier denied his written application to displace, Claimant was merely standing by waiting for a call from the Extra Board." (Emphasis ours.) Since this factual contention was never made on the property by the Organization, we are not entitled to

consider it now. We must assume and are constrained to conclude that the factual allegations set forth in Superintendent Spence's letter, supra, are correct.

There remains the question whether Rule 40 of the Agreement of the parties is applicable to the case at hand. It reads as follows:

"RULE 40.

STATUS ON RETURN FROM LEAVE OF ABSENCE

An employee returning after leave of absence, vacation or absence by reason of illness or other physical disability, may, within five (5) calendar days thereafter, return to his former assignment if still existing, or, providing he does not return to former assignment, may, within five (5) calendar days after his return, displace a junior employee who has been assigned to or who has displaced on a position advertised during his absence. Employees thus displaced may exercise displacement rights as provided in Rule 41 . . ."

After careful consideration, we conclude that Rule 40, supra, applies to unassigned employees who are granted a leave of absence with the same force and effect it does to other employees, e.g., an employee whose assigned position is abolished while he is on a leave of absence.

Finally, we are presented with the proposition that we should approve this Claim on the basis of past practice. The Employees are correct that they presented this issue on the property. The Division Chairman, Mr. Lavelle, by letter dated August 28, 1961, addressed to Superintendent Spence, made this assertion:

". . . We further stated to you that it has been a practice on this division that a senior unassigned employee has always been permitted to displace a junior unassigned employee at any time . . ."

The Employees are also correct that the Carrier did not contradict this assertion—insofar as the Record shows—on the property. However, if we accept the above assertion as undisputed and correct, this Claim cannot be approved. In a multitude of Awards, which are too numerous to require citation, this Division has held that a past practice must be system-wide in order for it to be controlling in cases where, as in this case, the Agreement is system-wide.

For the reasons stated above, the present Claim should be denied.

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

That the parties waived oral hearing;

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 Agreement was not violated.

**AWARD**

**Claim denied.**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty  
Executive Secretary**

**Dated at Chicago, Illinois, this 21st day of July 1967.**