

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Frank M. Swacker, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA
ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY**

STATEMENT OF CLAIM: "That Arthur Cleeton, Assistant Signalman, Eastern Division, be reimbursed for his actual living expenses while filling a temporary vacancy in Signal Relay Repair Shop at Topeka, Kansas, from May 19, 1937, to June 12, 1937, inclusive."

EMPLOYEES' STATEMENT OF FACTS: "In May, 1937, Arthur Cleeton held a regular assigned position as Signal Helper in Signal Gang No. 1 on the Eastern Division, then located at Neosha Rapids, Kansas. Effective May 19, 1937, he was transferred to Signal Relay Repair Shop at Topeka, Kansas, to fill a temporary vacancy in Assistant Signalman class at said Shops.

"This temporary assignment continued until June 12, 1937, at which time the employe regularly assigned to the position in the Signal Relay Repair Shop returned to service and Cleeton returned to his position in Signal Gang No. 1. Upon returning to Gang No. 1 Mr. Cleeton was continued in the Assistant Signalman class.

"Mr. Cleeton was assigned to fill a temporary vacancy, in Signal Relay Repair Shop, by the management without bulletining same to the employes of that seniority district."

POSITION OF EMPLOYEES: "It is the position of the Brotherhood that Sections 18 and 14 of Article II of the current agreement cover the assignment of Mr. Cleeton to the temporary vacancy in the Signal Relay Repair Shop at Topeka, Kansas.

"Section 18 reads as follows:

'An employe when sent from home station to fill a temporary vacancy for one (1) day, will be paid in accordance with Section 13 of this article; if for more than one (1) day, he will be paid in accordance with Section 14 of this article. While filling such vacancy he will be paid for the hours worked at the established rate for the position but at not less than his regular rate.'

"It will be noted from the above quoted section that an employe who is sent from his home station to fill a temporary vacancy for more than one day will be paid in accordance with Section 14 of Article II, which reads:

'Hourly rated employes sent from home station to perform work and who do not return to home station the same day will be allowed time for traveling or waiting in accordance with Section 16 of this article. All hours worked will be paid for, straight time for straight

sentative said before the Board on August 4, 1938, and that is, that in the light of the admission contained in the next to last paragraph of the 'Position of the Brotherhood' in its ex parte submission, as to which the Carrier has hereinabove commented, it is evident that Sections 14 and 18, Article II, of the agreement between the parties are inapplicable and, therefore, it is apparent there is no other basis for the claim inasmuch as the 'Statement of Claim' of the Organization does not cite any other Section of any other Article of the agreement in support of the claim.

"The Board is informed that employees assigned to camp cars (and Claimant Cleeton was so assigned when he exercised his seniority rights to the temporary vacancy in the signal repair shop on May 19, 1937) are not given any allowance by the Carrier for meals; that is the employees assume the cost of their meals, so that the claimant Cleeton while employed in the signal repair shop was not out of pocket for cost of his meals and, in any event, because he exercised his seniority rights was not entitled to payment for either meals or lodging."

There is in existence an agreement between the parties bearing effective date of February 1, 1929.

OPINION OF BOARD: The "home station" of the claimant could be changed only by bulletin; if that had been done and he had bid in the temporary vacancy he would have been exercising his seniority and would not have been entitled to expenses as away from home station. The vacancy was not bulletined however, and consequently claimant's home station remained at camp cars at Neosho Rapids, Kansas, during his tenure on the temporary vacancy at Topeka and accordingly he was entitled to expenses under Article II, Section 14.

See Awards 587 and 706 of this Division.

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 the evidence sustains the claim.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 1st day of December, 1938.

DISSENT ON AWARD 769—DOCKET SG-753

This dissent is compelled by the conviction that the award of the majority does violence to the schedule instead of applying it, and is unreconcilable with this Division's Award 132, Docket SG-149,¹ without overruling it, resulting in leaving the carrier in hopeless uncertainty as to what its rights are

¹—Award 132, Docket SG-149, involved the same parties, same agreement, and same controlling issue as in this case.

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unless it be said there is certainty that penalties will be assessed against it on theories each inconsistent with the other, regardless of what it may do in the application of the agreement.

The case arises on the following facts: A temporary vacancy of less than ninety days on a position of assistant signalman in the carrier's signal repair shop at Topeka, Kansas, was filled by offering it, in the order of their seniority standing, to employees holding seniority to such service but working at the time in a lower classification. The senior man exercised his option by declining to accept the temporary vacancy, whereupon it was offered to the man next in seniority order, who was the claimant, Cleeton, then working as a signal helper in an extra gang at Neosho Rapids. When the vacancy was tendered to Cleeton by reason of his seniority, he was informed that he was under no obligation to accept it. He stated he would like to fill the vacancy because of the benefits accruing from the experience he would obtain, and accordingly he was released from his old position and permitted to go to Topeka. When the regular incumbent of the Topeka position returned to duty, Cleeton exercised his seniority to take position as assistant signalman in a gang at Emporia. He did not return to his old position at Neosho Rapids. The temporary vacancy at Topeka was not bulletined because bulletin was not required².

The rules at issue in this controversy are the following:

Article II. "Section 14.—Hourly rated employees sent from home station to perform work and who do not return to home station the same day will be allowed time for traveling or waiting in accordance with Section 16 of this article. All hours worked will be paid for, straight time for straight time hours and at the overtime rate for overtime hours. Actual living expenses will be allowed at the point to which sent if meals and lodging are not provided by the Company or camp cars to which employees are assigned, are not available."

Article II. "Section 18.—An employee when sent from home station to fill a temporary vacancy for one (1) day, will be paid in accordance with Section 13 of this article; if for more than one (1) day, he will be paid in accordance with Section 14 of this article. While filling such vacancy he will be paid for the hours worked at the established rate for the position but at not less than his regular rate."

Article III. "Section 3.—Seniority will be exercised only when vacancies occur or new positions are created."

Article III. "Section 18.—Employees accepting positions in the exercise of their seniority rights will do so without causing extra expense to the Company. They will be allowed free transportation for themselves, the dependent members of their family and their household effects."

Article IV. "Section 1.—Promotions or transfers shall be based on ability, merit, and seniority. Ability and merit being sufficient, seniority shall prevail; the Management to decide."

Article IV. "Section 3.—Employees declining promotion shall not lose their seniority, except to the employee promoted and only in the next higher rank of service."

Article IV. "Section 5.—New positions and vacancies will be bulletined within thirty (30) days previous to or following the dates such vacancies occur, except that temporary vacancies need not be bulletined until the expiration of ninety (90) days from the date such vacancies occur, unless it is known at the time that the position is to be vacant more than ninety (90) days."

²—Under Article IV, Section 5.

The employees' position is simply that Cleeton was sent from his home station to Topeka and is entitled to an allowance for meals and lodging under Article II, Sections 14 and 18. The carrier's position is that he was not so sent, and hence there was no schedule requirement for the payment of such allowances, and that they are specifically excluded by Article III, Section 18.

The rights of the parties depend initially upon whether Cleeton's move to Topeka was in the exercise of seniority; for if his acceptance was in the "exercise" of "seniority rights," his move was expressly required to be "without causing extra expense to the Company." (Art. III, Sec. 18.) If not a seniority move, then the company would be liable for living expenses if Cleeton was "sent" from "home station" for "more than one day." (Art. II, Sec. 18.) It is apparent that the questions here posed in the alternative are interrelated; for it is evident that an employee voluntarily exercising his seniority is not being "sent" from his "home station." Article II, Sections 14 and 18, is plainly designed to cover the case of an assigned man sent out in emergency or to do special work and then returned to his regular "home station." His regular assignment is not disturbed. He leaves and returns to his regular assignment, from which he is not released. That Cleeton's move to Topeka does not involve Article II, Sections 14 and 18, is sufficiently clear from the fact that he was released from his position at Neosho Rapids after he chose to exercise his seniority rights by taking the position at Topeka; filled it; and then took, in the exercise of his seniority rights, a position at Emporia. Had he been "sent" from his "home station," (Neosho Rapids), under such circumstances as are contemplated in Article II, Sections 14 and 18, he would have been returned to that position.

It is apparent that the carrier was attempting to follow this Division's Award 132, which was an interpretation of the seniority rules of the agreement, in according Cleeton the privilege of exercising his seniority to the vacancy at Topeka. Article IV, Section 5, provides that vacancies of the character involved need not be bulletined. Very clearly it was the original intent of the parties, and indeed their long-continued practice, prior to Award 132, to regard this rule as exempting the carrier from the necessity of applying seniority rules to vacancies of less than ninety days' duration. That interpretation of the agreement was, besides being the reasonable construction, of advantage to the carrier. It was able to meet local emergencies in the most practical way. When positions were numerous, the organization never questioned that construction; indeed, the filling of such temporary vacancies was an inconvenience to be avoided as a duty and not sought as a privilege. With the disappearance of work due to slack business, the temporary work came to be desired; and under the guise of seeking interpretation of the rules, the organization sought and obtained for its constituents the privilege, as of seniority right, to fill such temporary vacancies, regardless of whether such vacancies were required to be bulletined under the bulletin rule. This result was not obtained through negotiation or mediation, the only lawful media for the promulgation of new rules, but through Award 132 of this Division.

The facts of this last mentioned case were, briefly, that the carrier had filled a temporary vacancy with someone other than the senior man, Lane. In contending that Lane should have been given the position, the very organization here complaining, in a case against the same carrier, respecting the same agreement, argued to this Board in part as follows:

"Exhibit 'A' of our submission shows various seniority rules from the agreement which is in effect. All of these rules are for the purpose of establishing a seniority system which requires that senior men be employed in preference to junior men to such work as is available and that men who have established seniority rights in any seniority class will have rights to work over men who have less seniority rights in such class or who have no rights whatever. If seniority means anything at all—if there were any reasons for including any

of the seniority rules in the agreement—it means that men with seniority rights will have the right to work instead of men without such rights.

* * * * *

“We direct particular attention to Section 3 of Article III of the agreement which is shown in our Exhibit ‘A’ and which reads:

‘Seniority will be exercised only when vacancies occur or new positions are created.’

In our attempts to settle this claim with various officers of the railway company, the management’s sole defense was that the work performed by Lawson was of a temporary nature and that the agreement did not require that such temporary work be advertised by bulletin to all employees. The company’s contention was to the effect that unless a vacancy or new position was advertised for bids, then seniority did not apply and it was perfectly all right for laid-off employees to be kept from service and new men, with no rights, employed on such temporary work. We call attention, however, to the fact that the rule just quoted does NOT refer to temporary vacancies or temporary new positions, nor to positions which are bulletined or advertised, but to ALL vacancies or new positions, without any exceptions being made.

“Section 6 of Article III states in part:

‘Seniority rights of employees to new positions or vacancies will, unless otherwise agreed, be restricted to the territory over which one signal supervisor has jurisdiction.’

Just what seniority rights to new positions or vacancies can this rule refer to if the railroad officers can arbitrarily disregard an employee with four years’ or more seniority as an assistant signal maintainer and give employment in such seniority class and in the same seniority district to a man with no seniority rights whatever? Section 6 does not refer to new positions or vacancies which are bulletined or advertised, nor does it refer to only permanent positions. It very plainly covers ALL new positions and all vacancies.”

(Emphasis supplied.)

In the same argument, Docket SG-149, Award 132, the petitioner commented upon Section 4 of Article III in part as follows:

“This rule further emphasizes the principle laid down in other rules, that seniority as applied to railroad employees is intended to provide that the senior employee of a class shall receive employment in preference to junior men or to men without seniority.”

(Emphasis supplied.)

In sustaining the position of the employees, Award 132 (Referee Spencer deciding) recites:

“Section 3 of Article III provides that ‘seniority will be exercised only when vacancies occur or new positions are created.’ Standing alone, this comprehensive provision would certainly have required the carrier to have called Lane for the two positions under consideration. It remains to be seen whether other provisions of the Agreement limit this provision which is designed to protect a most important right of employees.

“The Carrier contends that Section 5 of Article IV, which expressly permits it to fill certain positions without having previously

bulletined them, also permits it to fill such positions without regard to the seniority rights of its employees. It will be observed that this section, while expressly limiting the duty of the Carrier to bulletin positions, does not contain any express limitations upon its duty to respect the seniority rights of employees in filling positions covered by this section. If, therefore, the section in question does limit the right of seniority, it does so by implication and not by an express provision. The Division cannot accept the view that the parties to the Agreement under consideration intended that Section 5 of Article IV should by implication limit the seniority rights guaranteed to employees by Section 3 of Article III."

(Emphasis supplied.)

Having had its practices and agreement swept away by alleged interpretation in that award, the carrier adjusted itself to conform to the Board's interpretation of the seniority rules of the agreement. Required, under that award, to accord Cleeton the option to exercise his seniority rights, the carrier offered and Cleeton accepted; whereupon the organization and Cleeton contended:

"That Cleeton did not exercise his seniority rights, but that he was sent . . . by the management."

and are sustained by this award.

In my experience I recall no instance of greater judicial or quasi-judicial inconsistency. In effect it simply means that whatever the carrier does is wrong. Principles used to hold it liable will be disregarded when such disregard is necessary to impose penalty. In such inconsistencies we settle nothing, but create dispute and unrest.

I now further consider the proper interpretation of Article II, Sections 14 and 18. They apply only to employees holding regular assignments, who are sent away from their home station temporarily, and most typically in emergency, and subsequently return to their regular positions. Their regular assignments are undisturbed; and they are returned to them. They are sent, not given the option to take a new assignment or remain on the old. Cleeton was given the option to exercise his seniority to the vacancy at Topeka, and chose to exercise it. He was thereupon released from his old assignment. He never returned to it. At the end of the Topeka assignment he took another position at Emporia, Kansas, in a higher classification than that in which he had previously served at Neosho Rapids.

Cleeton, being free to go or not to go to Topeka, was not "sent from home station to perform work" within the meaning of Article II, Sections 14 and 18. In Award 115, this Division said of similar words:

"There is a material distinction between the facts in the Hartman case and the one now before us. In the former dispute the employee was ordered and sent by proper authority to a certain point to fill a vacancy. In the present case Mr. Privett was not 'ordered' or requested by proper authority to Cheyenne, but he merely elected to exercise his rights and displace junior employee, Harris. The words 'transferred to another position by proper authority' are not idle in meaning. They must be given rational interpretation. To be transferred by proper authority means that someone in authority should either order or request such transfer. In this dispute no one ordered or requested Mr. Privett to transfer, on the contrary, he elected to take over the position under his right of contract, but he was not compelled to do so.

"This Division is of the opinion that to hold that Mr. Privett is entitled to compensation for deadhead time for work which he elected to take but was not compelled to take, would place a strained con-

struction upon Rule 19 (d), and render the words 'transferred to another position by proper authority' meaningless."

The opinion of the Referee defies analysis, but is evidently based upon the premise that Cleeton's "home station" remained at Neosho Rapids. The record supports no such conclusion.

Awards 587 and 706 are cited. Award 587 dealt with a situation essentially different from that involved here. In that case, an entire gang was sent from its home station to perform work at another point, and was held at such point. The members of the gang had no option or election in the matter, there being no exercise of seniority rights. The citation of this award serves only further to accentuate the inconsistency of the conclusion reached in this case.

One does not have to go into the record beyond the Opinion of the Board in Award 706 to show that that case is not only dissimilar to the instant case, but the facts as found by the Referee are strikingly different. In the second paragraph of the Opinion, it is shown that the claimants were directed by the carrier to report to Davis and Suisun. They were given no election. In the next to the last paragraph of the Opinion (Page 8), the Referee stated:

"Assuming that these temporary assignments were promotions, the record clearly indicates that **neither claimant was given the opportunity to decline the promotion as he clearly is entitled to do under Rule 37 which provides that 'employees declining promotions shall not lose their seniority.'**"

(Emphasis supplied.)

The Referee does not mention Award 132, despite the fact that it is the most significant feature of the case, and the main reliance of the carrier. This feature of the award is in itself an admission that Award 132 cannot be distinguished, and evidence also that it is not and will not be overruled. What can the carrier conclude—how plan its future operations? I respectfully suggest that it can reasonably be assumed only that whatever it does will be wrong, and that for it there is no protection or guidance either in contracts fairly arrived at and perfectly understood, or in awards of this Division.

/s/ J. G. TORIAN

The undersigned concur in the above dissent.

/s/ R. H. ALLISON

/s/ GEO. H. DUGAN

/s/ A. H. JONES

/s/ C. C. COOK

REFEREE'S RESPONSE TO DISSENTING OPINION ON AWARD NO. 769—DOCKET SG-753

The decisions are not inconsistent and the Carrier is in no such dilemma as pictured by the dissent. What it wants to do is to take advantage of the rule allowing it to fill temporary vacancies without bulletining and at the same time avoid payment of expense allowance under Rule 14 of Article II.

In the case covered by Award No. 132, the Carrier then wanted the added privilege of filling the vacancy without regard to seniority.

All the present decision holds is that, if the Carrier wishes to avoid the expense allowance, it must bulletin the position for the simple reason that that is the only way a "home station" can be changed.

/s/ FRANK M. SWACKER