

Award No. 2341

Docket No. CL-2431

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that C. E. Welborn, Roy A. Porter and H. A. Moore be paid one day's pay at time and one-half the rate of Mail and Baggage Handlers for Saturday, January 2, 1943.

EMPLOYEES' STATEMENT OF FACTS: The employees affected by the claim have regular assigned positions as Mail & Baggage Handlers, with Saturday as their rest day. Prior to the seasonal increase in the volume of U. S. Mail occasioned by the Christmas holiday, all Mail and Baggage Handlers and other employees in the Department were notified by Bulletin or otherwise to work their assigned rest days until further notice. Prior to Saturday, January 3, 1943, the employees on the shift worked by the claimant employees had been notified to resume their regular rest days, and, in accordance with these instructions Welborn, Porter and Moore did not report for work on that date. Upon their return to work the following day they learned that four Mail and Baggage Handlers, namely H. L. Baker, H. Weatherman, M. J. Davis and H. P. Hutchison, who were junior to them in seniority rank, and WHO ALSO HAD SATURDAY AS THEIR ASSIGNED REST DAY had been called or notified to work and did work, being paid at the rate of time and one-half as provided by the rules. The seniority dates of the several employees are as follows:

Roy A. Porter	June 10, 1927
C. E. Welborn	Oct. 8, 1936
H. L. Baker	Oct. 8, 1936
H. Weatherman	Apr. 8, 1937
H. A. Moore	May 21, 1937
M. J. Davis	Oct. 1, 1937
H. P. Hutchison	Nov. 19, 1940

The following Rules are quoted from the Agreement of October 1, 1942, between the parties governing hours of service and working conditions:

"RULE 2 SENIORITY (first paragraph) Seniority begins at the time employe's pay starts in the department and in the seniority class to which assigned, except employes assigned to fill temporary vacancies will not establish seniority."

"RULE 5 PROMOTION BASIS Employes covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.

Under the rules of the agreement, mail and baggage handlers regularly assigned to six days' work per week, with one day off each week, do not have any guarantee or contractual rights to work on their assigned days off.

Based on that fact, it is logical to conclude that since neither the senior men nor the junior men have any contractual rights to any work on their assigned days off, it cannot be held that in the event it is necessary to call in some employees on their day off to augment the regular force, the senior men must be called in preference to the junior men.

While it is true that on the occasion which gave rise to your instant claim it would have cost the Company no more to have used the three claimants instead of the three men who were used, it is likewise true that the claimants suffered no monetary loss whatever in their weekly earnings, nor were they deprived of any of their regularly assigned work which is guaranteed to them under the agreement. We do not concede that the seniority rules have any application at all in the calling of employees for work outside their regular assignment, and although the Foreman may have at times called senior men for such work, it is no violation of any rules of the agreement if he does not do so.

With reference to your statement about the applicability of Rule 5 to this case, we cannot conceive of any possible connection between this situation and promotions. The broad interpretation given to Rule 5 in Award 105 was in connection with the filling of new positions or vacancies on established positions with senior employees out of service account force reductions. There is no such situation in this case, and we cannot stretch Rule 5 far enough to encompass the meaning that by working a man on his assigned day off you are giving him any promotion.

As to the allowance of such claims as this one on a previous occasion, I am informed such claims were paid inadvertently in the settlement of other matters being handled at the same.

Mr. Voorhees' decision of March 23, 1943 is affirmed.

Yours truly,

(Signed) B. J. Duffy"

OPINION OF BOARD: On Saturday, January 2, 1943, all of the available extra board and furloughed employees engaged as mail and baggage handlers were working, and the Carrier having taken no steps to augment its forces by the employment of new men, called for extra work four employees having regular assigned positions as mail and baggage handlers with Saturday as their rest day. The three claimant employees also held regular assigned positions as mail and baggage handlers with Saturday as their rest day. It is the contention of the Clerks' Organization that its Agreement was violated when the Carrier failed to call these regular assigned employees for extra work in the order of their seniority.

One of the paramount purposes of collective agreements in railroad service is the establishment and protection of seniority rights. There is no question that all the employees involved in this claim had seniority rights in their regular assignments as mail and baggage handlers. The Carrier admits this to be true, but contends that when their regular assignments have been protected, the Agreement has been fulfilled. We are not in accord with the Carrier on this point. It is well known that regular assigned employees often desire and are often required to do extra work outside of their regular assignment, generally at an increased rate of pay. This work may be said to

be incidental to their regular assignment in the sense that it would not be available to them except for the regular assignment. We think that the Agreement properly interpreted in the spirit in which it was written requires the Carrier, when it is obliged to call extra men from an established class of employees, to take notice of their seniority rights. And this is true even if the Carrier was not required to call any one of that class of employees at all. We conclude, therefore, that the Carrier was required, when it elected to call regular assigned employees for extra work on their day of rest, to give effect to the seniority rights of the men in the mail and baggage handling service. It is simply another case where "the letter killeth and the spirit giveth life."

That the foregoing constitutes the correct rule is further evidenced by the fact that the Carrier has made similar interpretations of the applicable rules in the past and paid claims identical with the one before us. The Carrier contends that these claims were paid through error and consequently do not estop the Carrier from asserting a contrary position. The record does not support the Carrier's allegations that such former claims were paid through error. The correspondence between the parties which passed during the handling of those claims indicates that the Carrier was familiar with the issues involved and construed the Agreement as requiring the use of senior employees after giving full consideration to the merits of the claims.

It is clear that the Carrier in the instant case used employees junior to each of the complaining employees. An affirmative award is required.

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 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 Carrier violated the Clerks' Agreement in calling regular assigned employees in the mail and baggage handling service on their rest day for extra work in the same service without regard to seniority.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 22nd day of October, 1943.