

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY
(Guy A. Thompson, Trustee)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees on the Missouri Pacific Railroad that the Carrier violated the Clerks' Agreement:

1. When, effective on or about April 1, 1944, it granted Mr. E. W. Masters, Chief Clerk to Division Superintendent, Arkansas Division, permission to leave his position of Chief Clerk at Little Rock and accept outside employment, in violation of the provisions of Rule 11 of the current Clerks' Agreement and the accepted and applied construction of a proper application of the rules of the Agreement;

2. That the name of E. W. Masters, shown on the current 1944 Clerks' Southern District Seniority Roster, with a date of February 22, 1907, be eliminated and removed from the Seniority Roster.

EMPLOYEES' STATEMENT OF FACTS: Clerk Mr. E. W. Masters, listed upon the Clerks' Southern District Seniority Roster, with date of February 22, 1907 has during the period of his employment occupied various clerical positions that were subject to all of the rules of the Clerks' Agreement and also he has at different times occupied "excepted" positions. He was Chief Clerk to the Division Superintendent and was released therefrom prior to his occupancy thereof during the period when on or about April 1, 1944 he was permitted to leave his position to accept outside employment.

When Mr. Masters left his position as hereinbefore stated, the Carrier did not advise the Organization of his leaving or for what reason he had left, or that he was accepting outside employment elsewhere, and since, on previous occasion when Mr. Masters left the position of Chief Clerk, he either exercised his seniority upon some position covered by all the rules of the Agreement or he was appointed to some "excepted" position, or was made a subordinate officer, such as Yardmaster or Assistant Yardmaster or Trainmaster. The record will show the titles of any such positions and the dates Mr. Masters was so appointed and assumed the duties of same, which information is not available to the employees at this time. Hence, when he left the position of Chief Clerk to Division Superintendent on or about April 1, 1944, the Division Chairman of the Clerks' Organization on the Arkansas Division who is employed in the Supply Department at North Little Rock, was not aware of the reasons but assumed he had been appointed to some excepted

The Carrier's position, which it is felt the Board thoroughly understands from the preceding comment, is that no portion of the rule applies to employees holding excepted positions such as Mr. Masters', but in the event your Honorable Board finds otherwise, then it is recognized that Rule 11, Section (c), requires that the Chairman be apprized of all leaves of absence for periods in excess of 90 days granted to employees. The Employees were advised by the Superintendent on May 2, 1944 of Mr. Masters' absence account his physical condition. As confirmation of this fact attention is called to Superintendent Williams' letter dated May 2, 1944, addressed to Division Chairman Guesner, heretofore quoted on Pages 12 and 13 of this submission. The pertinent parts of this letter having to do with this phase of the case read:

"* * * I would advise that Mr. Masters is still my Chief Clerk and has been granted leave of absence due to his physical condition. He would not have accepted this position if he had not been acting under the direction of doctors who advised him that this high, dry climate would be beneficial and a probable cure for his bronchial trouble, * * *."

Carrier wishes to reiterate what it has heretofore said, that the Clerks' Organization in the instant case is attempting to obtain an award from your Honorable Board that would place a construction on a rule of the current working agreement that they have heretofore sought, but not obtained, in direct negotiations. Never has it heretofore been contended by the Employees' Organization that employees assigned to excepted positions were bound by such rules of the working agreement governing leaves of absence to employees holding schedule positions. The Carrier feels that the Employees are going far afield in presenting such a case to your Honorable Board when they ask that an employee assigned to an excepted position who has held seniority under rules of the Clerks' Agreement since the initial agreement between the Director General of Railroads and the Clerks' Organization in 1920, and under agreements between the Organization and the Carrier since 1922, and after 24 years' experience under the rule, forfeit his seniority because the Clerks' Chairman was not advised of his being granted a leave of absence under a rule of an agreement that specifically excepts the application of that rule from employees holding excepted positions.

SUMMARIZING: The Carrier having shown

1. That Mr. Masters' seniority dating from February 22, 1907, and so recorded on the employees' seniority roster, has been properly established in accordance with rules of the working agreements between the Carrier and the Clerks' Organization;
2. That the Clerks' Organization's request for removal of Mr. Masters' name from the seniority roster is not supported by rules of the working agreement; and
3. That the Employees are herein seeking, by the presentation of this case to your Honorable Board, a condition of employment heretofore sought by them in direct negotiations held pursuant to provisions of the Railway Labor Act, amended, and denied by the Carrier,

feels that this case is entirely without merit and should be properly denied by your Honorable Board.

OPINION OF BOARD: On March 25, 1944, E. W. Masters, with seniority date of February 22, 1907, as a clerical employe, but who occupied the excepted position of Chief Clerk to Superintendent, Arkansas Division, Little Rock, requested and was granted a six months' leave of absence by the ex parte action of the Carrier. Masters' letter requesting the leave clearly recited that it was desired so that he might accept a position with the United States Railway Mission in Mexico, and the leave was granted to enable him to do so, although said letter concluded with this further statement:

"One of the main reasons for desiring to accept this position is on account of the bronchial trouble with which I am afflicted. The doctor informs me that the high, dry climate would be beneficial and probably result in curing the trouble."

The Petitioner says that the granting of said leave, under the circumstances affirmatively appearing, constituted a violation of Rule 11 of the effective Agreement of July 1, 1943, on the part of the Carrier, and that the acceptance of the benefits of said leave by Masters warrants the elimination of his name from the Clerks' Roster. The record discloses that Masters had timely notice of this proceeding and he had made no response.

Rule 11 (a) provides that:

"Except for physical disability of the employe or his immediate family, * * * leave of absence in excess of ninety calendar days in any calendar year, shall not be granted unless by agreement between the employing officer and the General Chairman."

The leave granted to Masters cannot be justified on the ground of physical disability. There was no showing that he was disabled from performing his usual duties, and the bronchial trouble with which he was presumably afflicted appears to have induced him to accept the position in Mexico, rather than to have been the reason for his request for a leave.

The Carrier says, however, that the position of Chief Clerk to the Superintendent, Arkansas Division, is not subject to the Agreement or to the provisions of Rule 11 thereof, insofar as this alleged violation is concerned; and that if Rule 11 applies, this Board has no power to grant the relief sought by the claim because no penalty attaches for the violation thereof, and Rules 17 (c) and 18 guarantee to an employe holding seniority rights and occupying an excepted position the right of an investigation before he may be deprived of his accumulated seniority.

The contention that the excepted position with which we are here dealing is not subject to Rule 11 or to the general provisions of the Agreement is predicated upon Attachment A, considered in the light of Phases B and C of Attachment D and File A-R-205-1370, set forth or referred to in the Agreement. Without unduly extending this opinion to analyze all of said contractual provisions, we think it enough to observe that an employe who undertakes to retain and protect his seniority rights while occupying an excepted position may not be heard to say that he is not bound by the terms of the Agreement by virtue of which such rights are preserved. To hold otherwise would do violence to the old adage that, "A man may not eat his cake and have it, too." That is to say, Masters may not rely upon the Agreement as the source of his seniority rights and, at the same time, assert that he is in a different position than the other employes when it comes to the applicability of the rules by which seniority may be lost. See the Director General's Interpretations of the National Agreement, effective January 1, 1920, and U. S. Railroad Labor Board Decision No. 1973, September 25, 1923.

The argument that no specific penalty is named in Rule 11 for the violation thereof is not persuasive. Under the facts of this case and paragraph (a) of said rule, Masters was not entitled to a leave of absence in excess of ninety days, and paragraph (e) provides that "An employe who fails to report for duty at or prior to the expiration of leave of absence forfeits all seniority rights * * *." It was therefore the duty of Masters to look to the rules as the source of his rights and obligations, rather than to rely upon the unauthorized action of the Carrier in granting him an excessive leave of absence.

We find nothing in Rule 17 (c) or 18 that inures to the benefit of Masters. Rule 17 (c) provides that employes holding excepted positions and having seniority rights may only be removed from service through the procedure provided in Rule 18. Rule 18 relates to the discipline and dismissal of employes

by the Carrier and provides for an investigation before final action is taken. This claim does not involve a matter of discipline or dismissal from service. If it did, there is no complaint by Masters that he was deprived of any rights guaranteed by said rules; and surely the Carrier would be in no position to take advantage of its failure to make the investigation required by Rule 18.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 28th day of February, 1945.