

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Peter M. Kelliher, Referee

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that the Carrier violated the Clerks' Agreement:

1. When under date of June 27, 1949—Yard Clerk W. A. Perrin requested of Agent O. R. Moss in District No. 34 that he be assigned to temporary vacancy of Yard Clerk E. J. McAleenan during the period of his vacation and his request was denied by Agent Moss and junior employe assigned.

2. When on the following dates, Clerk R. E. Bamford requested of General Passenger and Ticket Agent, C. Jinks, in District No. 29, that he be assigned to short non-bulletinable vacancies, and junior employes were assigned—

Effective June 21, 1949 and for duration of vacation vacancy of Clerk E. J. Holtz, and

Effective July 21, 1949, when position of Clerk C. A. Vahey was vacant.

3. When under date of July 20, 1949 Clerk Frank Guenewig requested of General Passenger and Ticket Agent, C. Jinks in District No. 29, that he be assigned to vacancy of Clerk Judlin and junior employe was assigned.

4. When on the following dates, Yard Clerk H. G. Carpenter requested of Agent R. B. Wilson in District No. 36 that he be assigned to short non-bulletinable vacancies and junior employes were assigned on dates shown:

July 1 and 2, 1949 on vacancy of Yard Clerk John Rolf, and

July 3 to 16, 1949 on vacancy of Yard Clerk R. C. Neudecker.

5. When on the following dates, Yard Clerk Wesley E. Summers requested of Agent R. B. Wilson, District No. 36, that he be assigned to short non-bulletinable vacancies and junior employes were assigned on dates shown.

July 3 to 16, 1949 on vacancy of Yard Clerk John Rolf, and

July 17 to 30, 1949 on vacancy of Yard Clerk Oniz Buzan.

6. That Claimants be compensated for the difference in the rate of their regular assigned positions and the rate of positions which they requested to work and were denied the opportunity and junior employees were assigned, and that subsequent claims of similar nature be allowed.

EMPLOYEES' STATEMENT OF FACTS: The above claims involve employees in three different seniority districts and were handled as separate items through the regular method of procedure on the Carrier and were denied in one letter covering all by the Director of Personnel, as they all involve the same circumstances, but it will be necessary to furnish facts and exhibits in each district.

Under date of April 14, 1949, the Director of Personnel issued letter to the Superintendent with copies to the heads of Departments, advising the Supervisors how to fill vacancies as a result of Award No. 4352 of the Third Division, National Railroad Adjustment Board, which the employees felt was contrary to the proper application and copy of this letter is attached as Employees' Exhibit "A". Copies of Notices posted in the office of General Passenger and Ticket Agent dated April 14 and 20, 1949 are attached as Employees' Exhibits "B" and "C" respectively. Copy of letter dated May 10, 1949 addressed to the General Passenger and Ticket Agent, protesting this action by Carrier, is attached as Employees' Exhibit "D".

No reply was received from Carrier to letter of May 10, 1949 and letter dated June 17, 1949 addressed to Mr. Wicks is attached as Employees' Exhibit "E", in which we advised our position. Carrier's reply dated June 20, 1949 is attached as Employees' Exhibit "F", in which they agree the Award which prompted their action is not in accordance with the provisions of our agreement, in connection with the filling of temporary vacancies. Under date of June 21, 1949, we conferred with Carrier representatives and we again requested that they apply the provisions of the agreement with respect to filling short non-bulletinable vacancies, but they refused to do this until we signed an agreement or letter of understanding covering interpretations. We insisted that the agreement as now written, provides for the rearrangement of forces before the calling of a furloughed employee to fill vacancies, but the Carrier insisted they had the right to force employees to fill vacancies other than their regular positions, to which we could not agree. Carrier's letter dated June 22, 1949, together with copy of agreement proposed, are attached as Employees' Exhibits "G" and "H" respectively.

Under date of July 22, 1949, letter was written to Director of Personnel, submitting copy of agreement, which we believed satisfactory, in which we stated again that we contend that vacancies should be filled in accordance with the provisions of the rules, as outlined in letter of June 17, 1949, Employees' Exhibit "E", but in order to eliminate the necessity of filing additional claims, we would be willing to sign such an agreement. Copies of letter of July 22, 1949 and proposed agreement are attached as Employees' Exhibits "I" and "J".

Carrier's letter dated July 25, 1949 and copy of agreement, as signed, are attached as Employees' Exhibits "K" and "L".

In the case of claim of Yard Clerk, W. A. Perrin, the vacancy was caused by the fact that Chief Clerk, A. M. Meier, was on vacation and the Carrier assigned the senior employee, Yard Clerk E. J. McAleenan off his regular position to the Chief Clerk position, but refused to assign Perrin to the position vacated by McAleenan and assigned furloughed clerk F. E. McCormick, to the position.

Copies of Mr. Perrin's request, claim, replies and subsequent denials are attached as Employees' Exhibits "M", "N", "O" and "P".

Copies of Claims of Clerk Bamford and denials are attached as Employees' Exhibits "Q", "R", "S", "T" and "U".

Copies of Claim of Clerk Guennewig and denials are attached as Employees' Exhibits "V" and "W".

Copies of request, claim and denial in claim in behalf of Yard Clerk Carpenter, are attached as Employees' Exhibits "X", "Y" and "Z".

Copies of request, claim and denial of Yard Clerk Wesley E. Summers are attached as Employees' Exhibits "A-1", "B-1", "C-1", "D-1", "E-1", "F-1" and "G-1".

These claims were handled separately in proper procedure with Carrier officials and then denied by the Director of Personnel in their entirety in one letter dated August 25, 1949, which is attached as Employees' Exhibit "H-1", claims being denied on the basis that Carrier's letter of April 14, 1949 constituted an agreement, but subsequent letters addressed to Carrier stating our position, had no bearing on the matter until we signed a memorandum of agreement covering the interpretations of the rule as contended by the employees.

POSITION OF EMPLOYEES: There is an agreement between the parties bearing the effective date of April 1, 1945, from which the following rules are quoted:

RULE 7

PROMOTIONS, ASSIGNMENTS AND DISPLACEMENTS

Employees covered by these rules shall be in line for promotion. Promotions, assignments, and displacements under these rules 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 senior employee to bid in a new position or vacancy where two or more employees have adequate fitness and ability.

This is the promotion rule, which states fitness and ability being sufficient, seniority shall prevail. In the instant disputes, Carrier has not contended the claimants did not have sufficient fitness and ability and have not denied that junior employees were assigned to the vacancies described.

RULE 10

FORMER POSITIONS VACANT AND SHORT VACANCIES

(a) When employees bid for and are awarded permanent positions, their former positions will be declared vacant and bulletined. Employees will not be permitted to bid in their former positions within thirty (30) days, except when affected by reductions in force.

(b) New positions, or vacancies of less than thirty (30) calendar days duration shall be considered short vacancies and may be filled without bulletining. However, when there is reasonable evidence that such vacancies will extend beyond the thirty (30) day limit, they shall be immediately bulletined, showing, if practicable, probable or expected duration.

(c) Moves in connection with short vacancies will be definitely limited. Heads of departments and local committees will handle in a manner that will cause the least disturbance in the office or department.

non-bulletinable temporary vacancies and denying claim for the difference in rate of pay between their regular positions and the positions they requested to work, in violation of Rules 7, 10 and 17 of our current agreement.

"Yard Clerk H. G. Carpenter, July 1 and 2, 1949, in place of Yard Clerk J. Rolf, who was off on those dates, and from July 3 to 16, 1949, in place of Yard Clerk, R. C. Neudecker. Yard Clerk Wesley E. Summers, in place of Yard Clerk John Rolf from July 3 to 16, 1949 and in place of Yard Clerk Onis Buzan from July 17 to 30, 1949.

"Will ask that you reconsider the decisions of Mr. Wilson and Mr. Miller, and allow claims as presented, advising."

Under date of August 25, 1949, Director of Personnel Wicks wrote General Chairman Schmidt as follows:

"Referring to your letters of July 23, August 19 and August 22, appealing the claims of several individuals because they were not permitted to fill temporary non-bulletinable vacancies.

"Following receipt of Third Division Award 4352, the question of filling temporary vacancies was discussed with you and an agreement reached. As a result of this discussion, instructions were issued to department heads on April 14, 1949, copy of which was furnished you with the notation, 'In accordance with our conversation of Tuesday last.'

"The discussion and the letter are the equivalent of a signed agreement; as a matter of fact, the instructions were patterned after your interpretations of Award 4352 referred to. Being an agreement it was applicable to all claims arising during the period it was in effect.

"The fact that your Grand Lodge did not like the agreement and instructed you to cancel it did not have any bearing on its effectiveness during the period that it was in existence. Notwithstanding the action of the Grand Lodge, the agreement remained in effect until mutually canceled or superseded by another agreement.

"There can be no basis for claims for time under an agreement when the provisions of that Agreement are applied literally. The decisions of Messrs. Moss, Wilson, Miller, Jinks and Schmittgens are sustained."

POSITION OF CARRIER: We consider the letter of April 14, 1949, written by Director of Personnel Wicks to Superintendent Henry Miller, Jr., as an oral agreement binding upon the parties until its cancellation. That is definitely established by the correspondence quoted in the Statement of Facts; as a matter of fact, General Chairman Schmidt admits it in his circular of June 17, 1949 to his constituency. Inasmuch as the letter of April 14, 1949, constituted an agreement between the parties, its provisions remained in full force and effect until cancelled. As also indicated in the Statement of Facts, it was not cancelled until execution of the Memorandum of Agreement of August 3, 1949, quoted therein. All of the claims in question are between those dates and have no basis in fact under any contract between the company and the organization or as a matter of equity.

The claim of the Employees should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier relies upon an alleged oral understanding of April 11, 1949, to sanction a procedure at variance with the Rules

Agreement. This cannot be admitted under the parol evidence rule. This rule is not merely a rule of evidence but is one of substantive law (20 Am. Jur. 1100).

It is the Carrier's further position that an agreement was established by a letter dated April 14, 1949, from the Director of Personnel to the Superintendent, a copy of which was furnished to the General Chairman with the notation, "In accordance with our conversation on Tuesday last". It is a general rule of law that silence and inaction do not amount to an acceptance (12 Am. Jur. 40). The Board cannot agree with the Carrier's statement that "the discussion and letter are the equivalent of a signed agreement.

The principle of estoppel could be applicable only during the period prior to the Petitioner's letter of June 17, 1949. Subsequent to that date, the Carrier clearly had no right to rely on any inference based upon the silence or inaction of the Petitioner. All of the claims here presented are subsequent to June 17, 1949, and prior to the memorandum agreement of August 3, 1949.

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 Rules Agreement as contended by the Petitioner.

AWARD

Claims (1 to 6 inclusive) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of October, 1950.