# Award No. 5306
# Docket No. CL-5243

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**Hubert Wyckoff, Referee**

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## PARTIES TO DISPUTE:

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

## THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood that:

(a) Carrier violated the provisions and intent of the Clerks' Agreement when on or about October 1, 1947, it failed and refused to recognize the seniority and promotion rights of Cecil A. Glenn upon the position vacated by Wm. F. Mayberry; and

(b) Cecil A. Glenn shall be permitted to exercise seniority rights and shall be assigned and permitted to work the position of his choice; and

(c) Cecil A. Glenn shall be paid thirty (30) minutes per day at the rate of time and one-half retroactive to October 15, 1947, and for all other wage losses resulting from these rule violations.

**EMPLOYES' STATEMENT OF FACTS:** The regular cleaning forces in the Carrier's General Office Building at Topeka, Kansas, consisting of approximately forty positions, constitute one seniority district and are under the direct supervision of the Building Superintendent. For a long time prior to October 1, 1947, that portion of these employes composing the main night forces were assigned 5:30 P. M. to 2:00 A. M. with a thirty minute meal period. Some of these employes are assigned to cleaning certain private offices, some operate the elevators and check people in and out of the building, some clean windows, toilets, wash basins, drinking fountains, do the dusting, etc., and some are assigned to sweeping and mopping, some work in gangs while others work independently, **but all are assigned to specific locations and specific daily tasks.** On October 1, 1947, there were in the Topeka General Office cleaning forces, among others, the following employes filling the positions shown:

| Name | Assignment and duties | Class 3 Seniority Date |
|---|---|---|
| Cecil A. Glenn | Assigned 5:30 P. M. to 2:00 A. M., 30 minute meal period, Monday through Friday, and 1:30 P. M. to 6:30 P. M. on Saturdays. Duties: pick up waste paper on first floor and clean toilets in North end of building. | January 23, 1936 |

The Carrier can only view this phase of the claim as an unwarranted presumption on the part of the Brotherhood for the reasons that:

1. The claimant has not worked any overtime for which he has not been properly paid in accordance with the current Clerks' Agreement.

2. The claimant has suffered no wage losses.

3. The Brotherhood has not cited what service it is that the claimant performed which would entitle him to payment of thirty (30) minutes per day at the rate of time and one-half retroactive to October 15, 1947, neither has the Brotherhood cited any rule of the current Clerks' Agreement in support of such payment.

4. Article VII, Section 1, of the current Clerks' Agreement ("Carrier's Statement of Facts", page 2 of this submission) provides for payment at the rate of time and one-half for time in excess of eight (8) hours on any day, which definitely rules out Article VII, Section 1, as having any application whatsoever to the instant dispute.

5. Without prejudice to the Carrier's position that there is no merit to the Employes' claim in this dispute it is desired to point out that the Third Division in numerous awards has held that the right to work is not the equivalent of work performed for the purposes of applying the overtime rules. (See Third Division Awards Nos. 3191, 3192 and 3504.)

The instant dispute is clearly without merit or schedule support and must be denied.

(Exhibits not reproduced.)

**OPINION OF BOARD:** This claim involves the seniority rights of janitors.

The Carrier employed 38 janitors who performed all janitor service in its General Office Building at Topeka. The rate of pay is not based on the various types of service performed; and the base pay of all 36 janitors is the same with accretions based on length of service.

The main night forces, some 22 in number, were assigned 5:30 P. M. to 2:00 A. M. Some were assigned to sweeping and mopping; some worked in gangs while others worked independently; but all were assigned to specific locations and specific daily tasks. None of them was specifically assigned to operate elevators. Each position was assigned a "position number" which is said to be "a requirement of the Carrier's Accounting Department for timekeeping identification purposes only."

The employes directly involved, their assignment and seniority dates are as follows:

| Employe | Assignment | Seniority Date |
|---|---|---|
| Glenn (Claimant) | Pick up waste paper on first floor and clean toilets in North end of building. | 1/23/'36 |
| Stribling | Sweeping floors | 8/17/'43 |
| Mayberry | Clean wash basins and drinking fountains and sack waste paper. | 9/ 7/'44 |

Mayberry became ill and was absent from duty October 2 to 7, 1947. The Carrier used Stribling to perform Mayberry's duties during his absence; and when Mayberry returned, the Carrier put him to sweeping floors and

left Stribling on the wash basins, whereupon the Claimant applied for the wash basin assignment but was refused, though he was senior to Stribling. On October 11 a formal claim was presented on Glenn's behalf and on October 13 the Carrier set back the hours of the wash basin assignment one-half hour and put Stribling to operating a passenger elevator one-half hour each day in addition to the other tasks. Whereupon the claim was again denied.

The Agreement was negotiated with the Brotherhood in 1942; but in 1936 the Brotherhood had apparently continued in effect a prior agreement negotiated by another organization, the terms of which do not appear but under which the current practices of the Carrier with respect to seniority were in vogue; and this state of affairs appears to have continued after the adoption of the 1942 Agreement and until this claim was filed.

The Carrier took the position that these employes have not been permitted to select the work that they desire to perform in accordance with their seniority rights under the Agreement; that the exercise of seniority by janitors has been and must be confined to having enough seniority to permit of continued employment in the event of force reductions and the right to recall after having been laid off in force reductions; that all janitors simply perform janitor work at the same basic rate of pay and that there are no avenues of advancement from one janitor position to another and no preferred jobs; that neither a vacancy nor a new position was created by the "rearrangement" of the janitor duties to be performed by Stribling and Mayberry when Mayberry returned to work on October 7, 1947; and that "the Claimant, from the observation of his immediate supervisors over a period of fourteen years, is temperamentally unsuited and lacks the judgment and sense of responsibility necessary to fulfill the duties of operating a passenger carrying elevator, which work is part of that attaching to the position for which the Claimant attempted to assert rights on October 7, 1947."

**FIRST.** There is nothing indefinite or ambiguous about the seniority provisions of this Agreement.

Article I, Section 1 provides that the Rules shall govern the working conditions of three classes of employes; and janitors are specifically listed in Class 3. Article III, Section 3 provides that "employes covered by these rules shall be in line for promotion"; and that promotions, assignments and displacements shall be based on seniority, fitness and ability being sufficient. Article III, Section 4 defines when seniority may be exercised. Article III, Section 8-c dispenses with bulletin in cases of vacancies or new positions in Class 3 but requires that they be filled by senior qualified Class 3 employes (see Award 4854). Section 8-c also provides that those so advanced shall protect the vacancy or new position for a period of ten days, whereupon the senior qualified Class 3 employe, who has made application during that ten day period, shall be assigned to the vacancy or new position.

Assuming that these provisions of the Agreement have been entirely disregarded by the Carrier for many years, they are still enforceable, although acquiescence in the breach may bar specific claims (Awards 3518, 3231, 2623, 2576, 2261, 2146, 2137, 2126, 1645 and 1289). It is well settled that past practices cannot control definite and unambiguous terms in an agreement (Awards 5100 (5 years), 4664, 4513 (30 years), 4070, 3979 (30 years), 3890, 3696, 3603 (32 years), 2926 (45 years), 2812 (20 years), 2550, 2281, 1671, 1518 (15 years), 1492 (20 years), 1456 (10 years), and 422).

The awards cited on behalf of the Carrier are not to the contrary. A prior practice may have controlling effect when an agreement is adopted after the proposal and rejection of an amendment which provides for the abrogation of all prior practices (Awards 3338, 2436, 1102) or when the agreement is ambiguous and reasonably susceptible of two interpretations one of which is consistent with the practice (Awards 4366, 3194, 3002,

2466, 2278, 1609, 1178, 945, 213 and 72) or when the agreement is indefinite, an example of which is the usual Scope rule (Awards 4791, 4638, 4593, 4464, 4348, 4335, 4277, 4208, 4104, 3932, 3727, 3604, 3603, 3526, 2326, 2090, 1811, and 1320). These are not hard-and-fast rules but rather established means of ascertaining the intention of the parties to a contract for the purpose of determining its meaning.

The Agreement upon which this claim is based is definite and unambiguous; and prior practices therefore are not controlling.

Nor do we find anything in the Agreement which limits the application of Article III Section 3 in such a way as to support the Carrier's contention that the exercise of seniority by Class 3 employes is restricted to cases of reduction in force.

**SECOND.** It is doubtless true that the duties assigned to these janitors were not static and that many variations occurred from day to day, such as moving furniture, loading and unloading supplies, etc. Few if any positions are static and these were probably less so than most.

But it seems clear to us that there were identifiable positions here with regular assigned duties; and that a vacancy occurred in one of them. There was not a conglomerate mass of janitors at work in the sense that the Carrier would not have known whom to discipline when the toilets in the north end of the building were not kept clean or when the Building watchman's place was not taken on Saturday night.

Nor can we agree that there was nothing hereupon which seniority might operate, merely because all janitors received the same basic rate of pay. It seems to us, as it apparently did to the Claimant, that there were preferred jobs here; and the claim asserted rests upon the not unreasonable assumption that cleaning wash basins is preferable to cleaning toilets.

**THIRD.** In this view of the Agreement a vacancy arose in the position occupied by Mayberry. The Carrier should have filled the vacancy by advancing a senior qualified employe. This the Carrier did not do; but if no one senior to Stribling had made application for the vacancy within ten days, that would have been an end of the matter.

However, the Claimant, who was senior to Stribling, did make application for the vacancy within ten days and so was entitled to the position if he was fit and able. No claim is made by the Carrier that the Claimant did not possess fitness and ability to perform the work of the position vacated by Mayberry. It follows that the Agreement was violated on October 7 and October 11 when the Claimant's applications for the vacancy were denied; and this determination can in no way be affected by subsequent events including what happened on October 13.

We do not question the general right of the Carrier to reduce forces and to re-arrange assignments. But this record furnishes no reason for the addition of the half-hour elevator assignment to this particular position on October 13 notwithstanding at least twenty opportunities to assign it elsewhere. The inference is irresistible that the change of the assignment could have served no purpose except to frustrate the Claimant's seniority rights.

Both Items (a) and (b) of the claim should therefore be sustained.

**FOURTH.** Item (c) of the claim asks for 30 minutes per day at the rate of time and one-half from October 15, 1947 and for all other wage losses resulting from the rule violations.

The usual award is for the difference in the rates of pay between the position held by the Claimant and the position wrongfully denied him (Awards 2143, 2815, 3419, 3380, 4183, 4431, 4438, 4940, 4541). There

was no such loss here because the basic rates of pay for the two positions were identical.

The claim for overtime is based upon Article VII Section 6 which provides that employes will not be required to suspend work during regular hours to absorb overtime. There was no overtime worked on either position, no overtime absorbed and no suspension of work to absorb overtime (compare Awards 5284 and 3416).

No other basis for reparation is claimed. In Awards 5150, 5186 and 5284 actual monetary loss was claimed and shown. Item (c) must therefore be denied.

**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 Agreement was violated.

AWARD

Items (a) and (b) of the claim sustained; item (c) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 5th day of April, 1951.