Award No. 6094
Docket No. CL-6198

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Dudley E. Whiting, Referee

PARTIES TO DISPUTE:

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

HOUSTON BELT AND TERMINAL RAILWAY COMPANY

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

(a) The Carrier violated the Clerks' Agreement at the McKinney Avenue and Settegast Yards, beginning in August, 1951, and continuing until in February, 1952, when it relieved the regularly assigned Callers on their rest days in violation of the Agreement. Also

(b) Claim that employes who were regularly assigned to Caller positions Nos. 79 and 124 be paid the exact amount they would have earned had the Agreement not been violated and had they worked their rest days in accordance with the Agreement.

EMPLOYES' STATEMENT OF FACTS: On July 27, 1951, and prior thereto, there were two Caller positions at Settegast Yard with hours 7:00 A. M. to 3:00 P. M., and 3:00 P. M. to 11:00 P. M.

There were, and are, three Caller positions at McKinney Avenue Yard working "around the clock".

These five Caller positions required two regular relief positions to afford rest day relief. There was, and is, six days of Caller relief work at McKinney Avenue. This required one full time relief position with one extra day.

There were four days of relief work at Settegast which with the extra day at McKinney Avenue required another full time relief position—No. 130. This relief position No. 130 was assigned and worked—

Sunday-Monday	Caller No. 124	Settegast Yard
Tuesday-Wednesday	Caller No. 125	Settegast Yard
Thursday	Caller No. 79	McKinney Avenue Yard

Friday and Saturday were the assigned rest days of this relief position.

On July 23, 1951, Carrier issued Bulletin No. 229 abolishing Caller position No. 125 at Settegast Yard "effective with termination of assignment on July 27, 1951". This left only three days' relief work for position No. 130, two days

the alleged violation was called to the attention of the Carrier. In this respect the following is quoted from Opinion of Board in Award 4281:

> "It is clear that the Claimant knew of the violations as they occurred. He made no complaint. Apparently he was willing that these violations should accumulate into a sizable number before he voiced any protests. Not until the violations totaled the number recited did he voice a protest and file a claim.
>
> We cannot sustain any such claim. By failing to protest to the Carrier the numerous violations which afforded him the basis for claim, he deprived the Carrier of an opportunity to correct the violation in order that he might receive a large sum of money in retroactive penalties. Such claims are contrary to the intent and meaning of the Railway Labor Act. Penalties are prescribed as a means of securing the enforcement of agreement provisions; not as a technical basis for the collection of unreasonable and excessive claims. When such facts are shown by the record, the claim will be sustained from the date the claim was first made."

In Award 4377 your Board, consistent with its Findings in Award 4281, supra, had the following to say:

> "Opinion of Board: From May 20, 1946 to October 27, 1947, Carrier required or permitted a section foreman at New Paltz, New York, to copy train orders outside of the assigned hours of the agent-telegrapher on the days specified in the claim. For the reasons stated in Award 4281, the claim should be sustained as to all violations occurring between October 21, 1947, the date the violation was called to the attention of the Carrier, and October 27, 1947, when the cause of complaint was eliminated."

Attention of the Board is also directed to its Findings in Awards 1125, 1289, 2137, 3136, 3430, 3503, 4129, 4312, in each of which your Board has established the principle of refusing to recognize and allow penalty claims retroactive beyond the date claim or protest was first submitted to Carrier; and particularly where, as here, the practice as a result of which this claim arose, has prevailed in the past with no exception thereto being taken by the Employes until the case covered by Award 5717. Therefore, it is the position of Carrier that should your Board again find, as it erroneously did in Award 5717, in favor of the Employes, any penalty payments imposed should be limited to the period January 7, 1952 (the date claim first filed with Carrier) and February 27, 1952 (the date the situation forming the basis for this claim was eliminated).

The Carrier also directs the Board's attention to that part of the Statement of Claim providing that "employes who were regularly assigned to Caller positions Nos. 79 and 124 be paid the exact amount they would have earned * * *. In this connection it is the position of Carrier that, consistent with the Findings of your Board in Awards 3467, 3587, 3955, 4244, 4245, 4963, 5419, 5620, 5638, in the event it is found that the Agreement has been violated in whole or in part, any penalty payment assessed against the Carrier should be not in excess of the pro rata (straight-time) rate, since the parties in whose behalf claim is presented performed no service on the rest days here involved.

The substance of matters contained in this submission has been the subject of discussion and/or correspondence between the parties.

Secretary's file.

OPINION OF BOARD: From July 27, 1951 to February 27, 1952, the rest days of caller position No. 124 and one rest day of caller position No. 79 were unassigned and the claim involves the filling of such positions on those unassigned rest days.

The Carrier states that on August 16 and 23, 1951, for position No. 79 and on September 30, October 1, and November 5, 1951, for position No. 124 the employes regularly assigned to those positions were not available for work due to being off sick or that they could not be contacted. There is no evidence to the contrary. Hence claims in favor of such occupants for those dates are without merit.

It appears that W. W. Curling, who filled these positions on five of the rest days involved, was furloughed from a relief caller position on July 27, 1951 and failed to file his name and address with the carrier official and the local chairman within five days as required by Rule 19(b). It is contended that thereby he lost his seniority. Employes' Exhibit P shows that on July 31, 1951 the assistant trainmaster advised the chief clerks at the yards involved that he had lined up extra call boy Curling to perform relief day work on these positions and that he was available for two more days work per week. Thus even if it be considered that Curling forfeited his seniority, he must be deemed to have been rehired as an extra call boy and, under such circumstances, his service would be in the same category as the relief day service performed by other employes utilized on the basis of their employe status date.

Rule 3 deals with "seniority datum" and section (a) provides:

> "An individual acquires an employe status at the time his pay starts, subject to the provisions of Rule 63, and until a seniority date is established such employes will work and be assigned on the basis of the date they established an employe status if work and assignment is available under the rules of the agreement."

Section (b) of that rule provides:

> "Seniority begins at the time an employe is assigned to a position, by bulletin, in the seniority district and group where assigned."

That rule is perfectly clear and unambiguous. A new employe is provided work available to him under the agreement on the basis of his employe status date until he acquires seniority. Since he acquires seniority by assignment to a position by bulletin, he is meanwhile an unassigned employe. Thus it is proper to use such employe to perform any work which under the agreement may be performed by an unassigned employe.

Rule 37 (d-6) provides:

> "Work on Unassigned Days—Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employe."

That rule governs the rest day service here involved so it was perfectly proper for the carrier to utilize unassigned employes, who had not otherwise worked forty hours that week, to perform such service.

The organization relies upon our Award No. 5717 which sustained a similar claim involving the same parties and the same rules. Whether a prior award constitutes a controlling precedent is dependent upon the soundness of the reasoning upon which it is based or upon its being one of a long and consistent line of decisions. Award No. 5717 is not the latter because it is the only award cited involving rules similar to those confronting us here.

That award relied upon an interpretation of a rule comparable to Rule 3 (a) in our Award No. 4278 but that award did not involve any rule comparable to Rule 37(d-6). It also relied upon an interpretation of a rule comparable to Rule 37(d-6) in our Award No. 5240 but that award did not involve any rule

comparable to Rule 3(a). The interpretation and application of a rule requires consideration of the full context of the agreement, so an interpretation or application of a similar rule in another agreement containing different provisions may not be applicable to the problem presented. It appears that the result reached in Award No. 5717, by reliance upon the awards cited, is contrary to the clear and unambiguous language of the rules agreed upon by these parties, as set forth above. Hence we decline to be governed thereby.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties to this dispute waived oral hearing thereon:

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 24th day of February, 1953.