

Award No. 7309
Docket No. CL-7191

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Le Roy A. Rader, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, particularly Rules 3-E-4(a) and 3-D-1(f), at the Baggage Room, Pennsylvania Station, New York City, New York, New York Division, when it allowed J. R. Kernan a seniority date of October 22, 1942, on the Group 1 Roster.

(b) J. E. Ginivan be compensated for eight hours at time and one-half for each day this violation existed beginning October 30, 1949, and until adjusted. (Docket N-319.)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as the representatives of the class or craft of employees in which the Claimant in this case holds a position and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, as amended, covering Clerical, Other Office, Station and Storehouse Employees between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various rules thereof may be referred to herein from time to time without quoting in full.

The Claimant in this case, J. E. Ginivan, holds a seniority date on the Group 1 Roster, New York Division, of March 16, 1943, and because J. R. Kernan was allowed an incorrect seniority date of October 22, 1942, on the Group 1, Clerical Roster, New York Division, Claimant Ginivan was denied the right to displace J. R. Kernan on a day tour.

J. R. Kernan's seniority date on Group 1 Rosters, New York Division, has been the subject of protest every year beginning 1944. The Carrier in

said Agreement, which constitutes the applicable Agreement between the parties, and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i) confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions". The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employees in this case would require the Board to disregard the Agreement between the parties hereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has established that the Claimant was properly compensated for the difference between what he earned and what he could have earned on the position held by J. R. Kernan during the period involved, and that, on the other hand, there is no rule of the Agreement providing for payment of the additional compensation of eight (8) hours at the time and one-half rate during the period from October 30, 1949 until February 12, 1953. It has further shown that to allow the present claim would be contrary to the principles enunciated by your Honorable Board in previous cases, contrary to the principles of law, and contrary to previous practices on this Carrier.

Therefore, the Carrier respectfully submits that your Honorable Board should deny the claim of the Employees in this matter.

All data contained herein have been presented to the employe involved or to his duly authorized representative.

(Exhibits not reproduced.)

OPINION OF BOARD: The essential facts are not in dispute in this claim. In brief, the claim is based on a mistake in the seniority date of J. E. Kernan which was later corrected, after several protests, by Carrier. On November 22, 1943, Employee Kernan, a Group 2 employe, was awarded a bulletined Group 1 clerical position. Consequently, his name was shown with that seniority date on the Group 1, Clerical Roster, New York Division, for the years 1944 and 1945. Following the posting of the 1944 roster Kernan protested, claiming a date of October 22, 1942 as he contended he had been performing clerical work from that date. Thereafter on the 1946 and 1947 rosters Kernan's name appeared with two seniority dates in Group 1, November 22, 1943 and October 22, 1942 and in later annual rosters, 1948 through 1952, the seniority date shown was October 22, 1942.

Petitioner contends that Kernan's seniority date on the rosters was set without compliance with Rule 3-D-1(f) as follows:

"No change on seniority rosters will be made by the Management, except as provided in paragraph (d) of this rule (3-D-1), without conference and agreement with the Division Chairman. * * *

and that by reason of the failure of Carrier to comply with Rule 3-D-1(f) Claimant should be compensated for eight hours at time and one-half for each day this violation existed beginning October 30, 1949, and until adjusted.

Cited in support of Petitioner's contention is Awards 2838, 2920, 3963, 2675 and 5926, with other awards of this Division.

Carrier's position is that the claim seeks an award assessing a penalty and no agreement rule is cited to support such contention. Also that Claim-

ant has been made whole for any loss of earnings sustained as he has been paid the difference in wages that accrued because of the seniority date erroneously given to Employee Kernan and that the seniority roster has been corrected. Cited in support of the position taken by Carrier is Awards 6715, 6701, 6417, 6209, 5306, 5186 and others.

There is no question here but that there was a contract rule violation and Carrier did not comply with the provisions of Rule 3-D-1(f) in fixing the seniority date of Employee Kernan, however, in view of this violation can it be said that a penalty should be assessed against Carrier? In considering previous awards of this Division, several of which are listed above, it would seem that the proper method of compensation is the one used by the Carrier here. That is, making the Claimant whole for any wage loss sustained. While inconvenience may have resulted from the mistake made, on this record such matters can only be speculative, and we do not believe a penalty against Carrier is warranted. The assessing of the penalty claimed would be an extremely drastic measure to be invoked and one of doubtful legality under the rules of the Agreement, as no specific rule can be used as a basis for such an award. The measure of compensation used in similar cases in awards of this Division of the Board, under rules as here before us, has been on the theory of making the injured employee whole and as this has been done we conclude (b) of the claim must 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 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 Agreement as stated in the Opinion, with no penalty attached as requested in (b) of the claim.

AWARD

Claim (a) sustained.

Claim (b) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April, 1956.