Award No. 9442

Docket No. CL-9102

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Merton C. Bernstein, Referee

PARTIES TO DISPUTE:

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

FLORIDA EAST COAST RAILWAY COMPANY

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

(1) The Carrier violated provisions of the current agreement, as hereinafter stipulated, when it refused to permit Clerk W. E. Owings, at Miami Passenger Agency, to displace junior employe on Ticket Clerk Position No. 7 beginning December 17, 1955, and

(2) that Clerk W. E. Owings be compensated at the penalty rate for all time worked outside of the assigned hours of Position No. 7 beginning December 17, 1955 until he is placed on that position.

EMPLOYES' STATEMENT OF FACTS: On November 30, 1955, Clerk W. E. Owings was incumbent of Southern Zone Assignment No. 11, at Miami Passenger Agency, relieving Ticket Clerk Position No. 35, working 3:00 P. M. to 11:30 P. M. on Wednesday and Thursday, relieving Ticket Clerk Position No. 5, working 2:30 P. M. to 11:00 P. M. on Friday and Saturday, and relieving Ticket Clerk Position No. 42, working 7:30 A. M. to 3:30 P. M. on Sunday. On November 30, 1955, the Ticket Agent at Miami issued the following bulletin addressed jointly to Ticket Clerk E. W. Pollard, regularly assigned to Position No. 5, and to Ticket Clerk W. E. Owings, regularly assigned to Southern Zone Assignment No. 11:

"Effective Sunday, December 4, 1955, the hours of Ticket Clerk Position No. 5, Miami Depot Ticket Office, will be:

"1200 Noon to 8:00 P. M. Daily

"Rest days Friday and Saturday."

On December 15, 1955, Ticket Clerk Owings made written request on the Terminal Superintendent to displace a junior employe on Ticket Clerk Position No. 7, with starting time of 2:30 P. M. This request was denied with advice that Rule 21 would not apply on Relief Assignment No. 11 until December 23. Later this advice was cancelled and Clerk Owings was notified he would not be permitted to exercise displacement right on Position No. 7

OPINION OF BOARD: The major question in this case is whether Rule 21 governing rights of employes affected by changes in the starting time of positions, is applicable to an employe holding a relief position consisting in part of a position whose hours are changed.

Rule 21 provides:

> "Regular assignments shall have a fixed starting time and a designated point for the beginning and ending of tour of duty and the regular starting time shall not be changed without at least 36 hours' notice to the employes affected. When the established starting time of a regular assignment is changed one hour or more for more than five (5) consecutive days, or changed in the aggregate in excess of one (1) hour during a period of one year, the employes affected may, within ten (10) days thereafter, upon 36 hours' advance notice, exercise their seniority rights to any assignment held by a junior employe. Other employes affected may exercise their seniority in the same manner."

There is no dispute about the facts. The Claimant's regular assignment consisted of relieving three positions for a total of five days a week.

On November 30, 1955, Claimant and the regular incumbent of one of these positions on which Claimant relieved two days a week were given notice that on December 4, 1955 the starting time of that position was being changed more than one hour, i.e. from 2:30 P. M. to noon.

On December 15, 1955, Claimant attempted to exercise his seniority rights to another position, assertedly "in accordance with Rule 21". Initially he was told he could not do so until December 23. Later his application was denied on the ground that Rule 21 did not apply to relief assignments.

Defense That Claimant's Assertion of Seniority Was Not Timely

Carrier contends Claimant did not act in timely fashion because he did not seek to assert his seniority within ten days after receipt of notice of the change in starting time, i.e. by "noon on December 14".

We find this contention without merit. The provision is clear on this point at least. So it provides:

> "When the established starting time of a regular assignment is changed one hour or more for more than (5) consecutive days . . . the employes affected may, within ten (10) days thereafter . . . exercise their seniority right . . . "

No mention is made of notice as the point at which time to exercise seniority begins to run. The required exercise is timely "within ten (10) days thereafter". "Thereafter" clearly refers back to a starting time "changed . . . for more than five (5) consecutive days". It follows that the conditions of the rule are met if the employe acts within ten days after the fifth consecutive day is completed.

The Claimant's action was timely.

Applicability of Change in Starting Time Provision to Holders of Relief Positions

This is the first controversy of this type to arise as to the application of the provision in dispute on this property.

The only Board case cited as dealing with a comparable provision was Award 4082 (Carter). In that case the Carrier did not dispute the applicability of the provision to relief positions in a similar situation. Of course, the action of another carrier there is not binding upon the Carrier in this case. The case is an interesting example of the interpretation placed upon a similar provision in similar circumstances and to that extent provides support for Claimant's position.

Claimant also stresses that Rule 21 requires notice of starting time change to the "employes affected" and that it is the "employes affected" who may exercise their seniority rights. Claimant argues that this shows that more than the incumbent of the regular full time position is covered by the notice and exercise of seniority provisions of Rule 21. As the only other employe affected is the relief, it is contended, the Rule must refer to those filling relief positions. This is a persuasive argument.

Carrier responds that Rule 21 was agreed to in 1938 some seven years before there were relief positions. This removes a considerable amount of the force of Claimant's argument even though it renders the plural parts of Rule 21 meaningless at the time of its adoption.

Yet this Carrier argument does not negate the proposition that once practices and provisions relating to relief positions were introduced those previously unintelligible portions of Rule 21 become meaningful and were understood, or at least could have been recognized, as applicable to regular relief assignments "affected" by the change.

Carrier also insists, with some cogency, that Rule 21 cannot be applicable to relief positions because, as to them, a change in starting time of one job comprising the assignment, cannot result in a "change . . . for more than five consecutive days" as they do not fill the positions for five consecutive days.

The Carrier's original treatment of the application is relevant. Initially it advised Claimant that his claim was premature, but would be timely some eight days later. Apparently this view was taken by interpreting the "five consecutive day" test as meaning five days of work performed by the relief after the starting time change. The Carrier's first reaction was to apply the Rule to relief positions.

The Rule permits the exercise of seniority for another position when the starting time of a regular position is changed one hour or more for five (5) consecutive days or "in the aggregate in excess of one (1) hour during a period of one year".

The probable purpose of these conditions was to limit the right to exercise seniority to situations in which the change was both substantial in amount of time each day and in duration.

Viewed in this fashion, rather than as an aridly mechanical test, the povision is capable of application to employes holding regular relief assignments.

For these reasons we hold that Rule 21 is applicable to relief positions. However, the question of interpretation is a close one and the Carrier had sufficient reasons upon which to base its position in good faith. We believe we should exercise our limited discretion as to remedy and restrict the award to holding that Claimant was entitled to Position 7 as claimed. But, we do not award compensation for the past refusal by the Carrier to recognize that right.

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 Employe involved in this dispute are respectively Carrier and Employe 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 Contract was violated.

AWARD

Claim sustained as indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 25th day of May, 1960.