

Award No. 15492
Docket No. CL-15816

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nicholas H. Zumas, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5831) that:

1. The Carrier violated the Clerks' Agreement August 29, 30, 31 and September 1, 1964 at Palestine, Texas, by using a person not covered by that agreement and who held no seniority rights thereunder to fill vacancy on position of Relief Caller.

2. Mr. M. E. Davis, Mr. J. F. Felder and Mr. G. B. Vinson, who held seniority rights and who were improperly relieved, be compensated as follows:

Employee	Punitive Rate	Date
M. E. Davis	8	August 29, 1964
J. F. Felder	8 each date	August 30 and 31, 1964
G. B. Vinson	8	September 1, 1964

EMPLOYEES' STATEMENT OF FACTS: The Carrier employed a new employe to perform vacation relief at Palestine, Texas. This new employe, Mr. Jimmie Carr, was not hired to protect a position under bulletin nor was he assigned to any Extra Board at Palestine; therefore, he had not established seniority rights.

At the time this claim arose there were, among others, three positions at Palestine occupied by Claimants, which were considered as necessary to the continuous operation of the Carrier and assigned to work 365 days annually. Then a regularly assigned relief Caller position was established to work the rest days of the three seven (7) day positions.

Under dates August 29, 30, 31 and September 1, 1964, the regularly assigned occupant of Relief Caller position was absent due to illness and new employe, Mr. Jimmie Carr, was used to fill the vacancy instead of calling the regularly assigned employes to work their rest days.

The Employees filed claim for eight hours at the time and one-half rate of pay for Clerks M. E. Davis August 29, 1964, J. F. Felder August 30 and 31, 1964, and G. B. Vinson September 1, 1964.

10. Carrier declined the claim as follows:

"December 22, 1964
D 280-469

Mr. T. G. Brown
General Chairman - Clerks
1303 Rosalie, Room 4
Houston, Texas 77004

Dear Sir:

Please refer to your letter of November 9, 1964, File G-2916, appealing claims of M. E. Davis for 8 hours, August 29, 1964; J. F. Felder for 8 hours, August 30 and 31, 1964; and G. B. Vinson for 8 hours, September 1, 1964, because a vacation relief employee was used to fill vacancies on caller position at Palestine, Texas.

A vacancy existed on a rest day relief caller position at Palestine, Texas on claim dates, and Clerk Jimmie Carr, who was employed by us on June 4, 1964 as a clerk, was used to fill the vacancy. Your statement that he had no rights under the agreement is in error. Rule 3(a) clearly provides that new employees will work and be assigned on the basis of the date they establish an employee status.

The facts in the instant case differ from those in Award 4278. Award 4278 dealt with a situation where a brakeman was used to perform both Group I and Group II rest day relief work, but did not become a bonafide clerical employee as he returned to train service as soon as his seniority as a brakeman permitted.

In the absence of any restrictions, Carrier was not only privileged, but obligated to use this new employee in this manner.

Claims are without merit, and are respectfully declined.

Yours truly,

/s/ B. W. Smith"

11. Claim was progressed in the proper manner on the property and is properly before the Board.

OPINION OF BOARD: Claimants charge that Carrier violated the Agreement by permitting a new employee to temporarily work a Relief Caller position instead of calling the regularly assigned employees (Claimants) to work the position on their rest days.

Claimants, through the Organization, contend that the new employee had not established seniority rights under the Agreement in that he was not hired to protect a position under bulletin, nor was he assigned to any Extra Board at Palestine, Texas.

Carrier asserts that even though the new employe had not yet established a seniority date, he was a bona fide employe under the terms of the Agreement, and such "employe status" gave Carrier not only the prerogative but the obligation to assign him to fill the vacancy.

It should be noted at this point that during the handling on the property both parties agreed that the instant dispute resembled Dockets 11 and 12, then before Special Board of Adjustment No. 564, and stipulated that this claim should be deferred pending the results of Dockets 11 and 12. Despite the fact that the Organization position was sustained in Dockets 11 and 12, Carrier did not consider those awards binding or controlling in the instant dispute.

The question to be determined is whether, under the terms of the Agreement and its interpretations, Carrier had a right, under the circumstances, to utilize a new employe to perform work prior to the establishment of a seniority date in preference to regular employees.

By reason of Award 4278 (Robertson) and the awards in Dockets 11 and 12 of Special Board of Adjustment No. 564, we must answer the question in the negative and find that the Carrier violated the Agreement.

Carrier vigorously asserts that Award 4278 is distinguishable from this dispute in that a furloughed brakeman was used to relieve the position. However, a closer analysis of the facts of that dispute reveals that after the brakeman had returned to his other work, Carrier employed "a party" for service as an extra clerk to continue the work. We quote the following from Carrier's Statement of Facts in Award 4278:

"This furloughed brakeman was so used until on or about June 3, 1947 when the service requirements permitted him to return to work as a brakeman. Following this party's return to service as a brakeman the Carrier then employed a party at Mart for service as an extra clerk to perform relief work. This party was employed in the usual and same manner as any other personnel, i.e., filled out application for employment and passed the required physical examination, following which his application was approved, and since which time he has performed extra work at Mart relieving each of the four employees above referred to on their assigned rest days."

Based on the above, we find that Carrier's attempts to distinguish to be without merit.

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

That the parties waived oral hearing;

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 Agreement was violated.

AWARD

The Claims are sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of April 1967.