

Award No. 18045

Docket No. CL-18117

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John J. McGovern, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6531) that:

1. Carrier violated, and continues to violate, the Clerks' Rules Agreement at Austin, Minnesota by its failure to assign employee E. L. Gudgel to Keypunch Operator Position 8867 beginning July 21, 1967.
2. Carrier shall not be required to assign Keypunch Operator Position 8867 to employee and applicant E. L. Gudgel.
3. Carrier shall not be required to compensate employee E. L. Gudgel for eight (8) hours pay at the straight time rate (\$23.29) of Keypunch Operator Position 8867 for July 21, 24, 25, 26, 27, 28, 31, 1967 and for all subsequent days on which the violation continues.

EMPLOYEES' STATEMENT OF FACTS: Employee E. L. Gudgel, who has a seniority date of January 26, 1962 in Seniority District No. 42, is the regularly assigned occupant of Steno-Clerk Position 5306 at Austin, Minnesota.

On May 31, 1967, Regional Data Manager J. J. Komurka hired his son, D. K. Komurka, who is 16 years of age and a 10th grade high school student, to perform vacation relief work in the Regional Data Office, Seniority District No. 156 at Austin, Minnesota.

On July 12, 1967, Bulletin No. 14 was issued by Regional Data Manager Komurka advertising vacancy on Keypunch Operator Position 8867 in the Regional Office at Austin. See Employees' Exhibit "A".

1967) and employe M. K. Carroll (seniority date — July 7, 1967), both of whom properly establish seniority in Seniority District No. 156.

Claimant Gudgel was "placed" on Keypunch Operator-Clerk Position No. 8867 on November 6, 1967 and subsequently paid, without foundation, the difference between what he had earned on his regularly assigned position in Seniority District No. 42 and the rate of Keypunch Operator-Clerk Position No. 8867 for the period July 24 through November 3, 1967.

When General Chairman Hopper appealed the instant claim to Mr. Amour, former Vice President-Labor Relations, he (Mr. Hopper) advised that "* * * paragraphs 1 and 2 of the claim were disposed of by agreement" and that the appeal to Mr. Amour was only "* * * with respect to paragraph 3 of the claim * * *". In this regard, please see Carrier's Exhibit "G" which is a copy of General Chairman Hopper's letter to Mr. Amour under date of January 11, 1968.

Attached hereto as Carrier's Exhibits are copies of the following letters:

Letter written by Mr. Amour to Mr. Hopper under
date of March 6, 1968 Carrier's Exhibit "H"

Letter written by Mr. Amour to Mr. Hopper under
date of March 26, 1968 Carrier's Exhibit "I"

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant Gudgel, seniority date of January 26, 1962 in Seniority District No. 42, is the regularly assigned occupant of Steno-Clerk position 5306 at Austin, Minnesota.

On July 12, 1967, Carrier issued Bulletin No. 14 to employes in Seniority District No. 156 advertising Keypunch Operator-Clerk Position No. 8867 in the Austin Regional Data office (Seniority District No. 156). Mr. Komurka, who held a May 31, 1967 seniority date in Seniority District No. 156 and the Claimant, who did not hold seniority in Seniority District No. 156, were the only two applicants. Komurka as senior was assigned the position. Originally, Komurka was hired on May 31, 1967 to perform vacation relief work in the Regional Data office, Seniority District No. 156 at Austin, Minnesota.

The Organization contends that Claimant had a prior right to the position and alleges that the Carrier violated the Agreement by not assigning Claimant to the position beginning July 21, 1967. Organization further demands that Claimant be assigned to the position and paid the rate of the position commencing July 21, and subsequent dates. The Claim was discussed by the General Chairman with a Carrier official and as a result of such discussion, Carrier made an offer of settlement of the claim by which Claimant was to be given a seniority date of May 30, was to be placed on the position and Claimant was to be allowed the difference in earnings for the claim dates.

The General Chairman, although agreeing to the May 30 seniority date and Claimant's assignment to the position, appealed the Claim on the grounds that the allowance of difference in earnings was inadequate and demanded

that the total wages of the position be paid. Carrier's highest Officer stated that the alleged violation was no violation at all and the proposed settlement was erroneous and arbitrary in giving Claimant position 8867 and a seniority date in District No. 156.

Petitioner admits that items 1 and 2 of the Claim are no longer issues. The proposal of settlement made by a lower Carrier Official was accepted by the General Chairman except for that Clause which provides for only difference in earnings for the Claimant for the period involved. Claimant accepted the terms of the Agreement "in toto", although he did accept the difference in earnings under protest and has retained that payment.

The argument is propounded by Carrier that the Employees are bound by the Rule that a settlement must be accepted or rejected in its entirety; that one cannot accept the parts he likes and reject that which he dislikes; that since Claimant has taken the position and the seniority date and the difference in earnings the claim should be dismissed on the grounds that he is bound by the entire settlement.

Petitioner on the other hand asserts that Claimant was placed on position 8867 "not because of any Agreement reached with the Organization", and Carrier responds that if this is the position of the Organization, then there was no settlement at all, only an offer; further Carrier argues that an offer of settlement is not an admission of violation, nor is it admissible evidence. We agree with the Carrier in this respect, and taking the Organization at its word as evidenced by the record itself, we do not conclude that the settlement was in fact a settlement but merely an offer of settlement. Further we agree with Carrier that the Carrier representative making the offer was not the Carrier officer authorized to make and interpret agreements.

Petitioner is relying on the provisions of Rules 3 and 11 reading:

"RULE 3 — SENIORITY

"(a) Where an employe is hired to temporarily fill a vacancy pending assignment and an employe from another seniority district is assigned to the position, he will establish a seniority date one day in advance of the employe hired."

"RULE 11 — FILING APPLICATIONS — OTHER SENIORITY DISTRICTS

"Employes filing applications for positions bulletined on other seniority districts will, if they possess sufficient fitness and ability, be given preference on a seniority basis over non employes and/or employes not covered by these rules."

Since Komurka had a seniority date in District No. 156 and Claimant did not during the entire period covered by the bulletin advertising position 8867, we agree with Carrier that he and not Claimant was entitled to the position. Komurka was not hired for that vacancy. Not only was there no violation of the Agreement, the so-called settlement was no settlement at all, and in fact was made by a Carrier employe not authorized to bind the Carrier. For these and other reasons, we will deny the Claim.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of July 1970.