

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5988) that:

(a) The Carrier violated the Agreement when it failed and refused to assign Miss Estelle M. Brown, Adjustment-Account Clerk, to a temporary vacancy on Mr. L. R. Walker's position when he was on sick leave. In lieu thereof, this position was assigned to Mr. J. J. Moore, a junior employe.

(b) Carrier shall now compensate Miss Brown for the difference between what she was paid during the period of the vacancy and what she would have earned at \$21.82 per day had she been assigned to the temporary vacancy.

EMPLOYEES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimant in this case holds a position and the Southern Railway Company.

Miss E. M. Brown is carried on Accounting Department, Office of Director, Revenue Accounting, Group 1 Seniority Roster with a seniority date of March 24, 1943. Mr. J. J. Moore is carried on the same roster with a seniority date of March 30, 1943.

On December 1, 1964, Mr. L. R. Walker went on sick leave, and as the custom was to move lower rated employes up to the higher rated temporary vacancies, Miss Estelle M. Brown requested she be assigned to Mr. Walker's temporary vacancy, rate \$21.82 per day. The Carrier refused to assign Miss Brown to the temporary vacancy, instead they assigned Mr. J. J. Moore, a junior employe. Chairman, Protective Committee, Mr. E. E. Yancey, on December 7, 1964, filed the following claim, Employees' Exhibit A, and stated:

"This claim is filed for and in behalf of Miss Estelle M. Brown, Claim Clerk, account of not being assigned to a temporary position

NOTE NO. 1: When such temporary vacancies are filled, either for the entire period or portion thereof,, as provided in Rule 8, preference for such work shall be given to employes holding seniority in group or class in which vacancy occurs, * * *

(Exhibits not reproduced.)

OPINION OF BOARD: The material facts are not in dispute.

The Brotherhood submits this claim on behalf of Miss Estelle M. Brown, an Adjustment-Account Clerk in the service of the Carrier.

The record discloses that Miss Brown is carried on Accounting Department Office of Director, Revenue Accounting, Group 1 Seniority Roster of the Carrier, with a seniority date of March 24, 1943.

J. J. Moore, who is also involved in this dispute, but not as a claimant, is carried on the same roster with a seniority date of March 30, 1943.

L. R. Walker, who was the assigned occupant of Adjustment Account Clerk position No. 235, went on sick leave and Miss Brown requested that she be assigned to Walker's temporary vacancy. The Carrier did not assign Miss Brown to the vacancy, instead it assigned J. J. Moore, who, Miss Brown and the Brotherhood contends was a junior employe.

The Brotherhood contends that the failure of the Carrier to assign Miss Brown to the vacancy was a violation of the Agreement between the parties.

The Carrier contends that the assigning of Moore to the vacancy did not and does not violate the provisions of the Agreement between the parties.

The Rules of the Agreement with which we are concerned in this dispute, are as follows:

"RULE 1. SCOPE

(Revised, effective October 1, 1938)

These rules shall govern the hours of service and working conditions of employes described in the following respective groups in general and district offices, and similar employes in offices and operations under jurisdiction of other officers and subordinate officers in the various departments of each of the Carriers named in the caption of this agreement:

GROUP 1. Clerks —

- (a) Clerical Workers, and
- (b) Machine Operators, all as hereinafter defined in Rule 2.

* * * * *

RULE 2.

DEFINITION OF EACH GROUP OF EMPLOYEES AS COVERED BY RESPECTIVE SECTION OF SCOPE RULES

(a) (Revised, effective October 1, 1938) Clerical Workers — Employees who regularly devote not less than four (4) hours per day to the writing and calculating incident to keeping records and accounts, rendition of bills, reports and statements, handling of correspondence and similar work, including Depot Ticket Agents and Depot Baggage Agents.

(b) (Revised, effective October 1, 1938) Machine Operators — Employees who regularly devote not less than four (4) hours per day to the operation of office or station mechanical equipment requiring special skill and training — such as typewriters, calculating machines, bookkeeping machines, dictaphones and other similar equipment, not including those specified under paragraph (d) of this rule.

* * * * *

RULE 3. EFFECTIVE DATE

(Revised, effective October 1, 1938)

This agreement becomes effective October 1, 1938, and supersedes and cancels all former agreements but does not, unless rules are specifically changed, alter practices or working conditions established by or under former agreements.

RULE 4. SENIORITY DATUM

(a) (Revised, effective July 16, 1943) Except as to employees covered in Group 4-(c) and 5, seniority will be effective and will date from the last time entering the service on the respective seniority district in the respective groups and/or classes of service embraced by this agreement. It is understood that 'the last time entering the service' as used in this paragraph shall be deemed to be the date the employe is assigned by bulletin. Provided if a new employe entering the service is assigned by bulletin, seniority shall not begin until such employe actually fills the position to which assigned.

* * * * *

RULE 15.

PROMOTION, VACANCIES OR NEW POSITIONS NOT FILLED BY SENIORITY

(Revised, effective October 1, 1938)

Promotions, vacancies or new positions (either excepted or scheduled) which are not filled by seniority shall be filled as follows:

Qualifications, merit and capacity being equal, preference shall be given employes in the service in order of their service age, the appointing officer to be the judge, subject to appeal to the highest

officer designated by the Carrier to whom appeals may be made, whose decision shall be final.

* * * * *

RULE 16.

FILLING VACANCIES UNDER SENIORITY RULES

(a) (Revised, effective October 1, 1938) Except as otherwise provided in this agreement, Rules 7, 8, 9, 13, 14, 15 and 17 in particular, vacancies covered by this agreement will be filled in accordance with principles defined in Rule 15 (exclusive of the notes) in the following manner, except that merit, capacity and qualifications being sufficient, seniority shall govern:

The officer in charge where vacancy occurs will, within two days, bulletin such position to all employes of the group or class on the seniority district in which the vacancy exists. Bulletin to show location, title, rate of pay, and preponderating duties of position, number of hours assigned per day, and number of days assigned per week, subject to reduction in weeks in which holidays occur by the number of holidays. Employes desiring such position must, within five calendar days (except in General Offices at Washington, Cincinnati, Atlanta and Chattanooga, where the period shall be two working days) after bulletin is posted, make written application to the officer issuing the bulletin. The bulletin shall expire at twelve o'clock midnight on the fifth or second day, as the case may be. From these applications the senior qualified employe shall be assigned to the position within fifteen (15) days, and bulletin will be posted giving name of successful applicant. If requested, copy of all bulletins will be furnished Local Chairman.

NOTE NO. 1: The word 'sufficient' as used above is intended to establish the right of the senior qualified employes to be assigned to new positions or vacancies covered by Section (a) of this Rule 16 over junior qualified employes.

RULE 17. TEMPORARY VACANCIES

(Revised, effective October 1, 1938)

Temporary vacancies of thirty (30) days or less, or temporary vacancies up to ninety (90) days, when occasioned by the granting of leave of absence, or absence on account of sickness, may be blanked for all or any part of the period of the vacancy; should such position be filled it may be done at the discretion of the officer in charge.

NOTE NO. 1: When such temporary vacancies are filled, either for the entire period or portion thereof, as provided in Rule 8, preference for such work shall be given to employes holding seniority in group or class in which vacancy occurs, but this privilege does not extend to employes in other groups or classes unless an employe holds seniority in the group or class in which vacancy occurs.

NOTE NO. 2: See letter agreement dated December 26, 1939
with respect to displacing on temporary vacancies
filled under Rule 17, on page 110."

The letter agreement dated December 26, 1939, as it appears on page 110
of the Agreement rules, reads as follows:

"DISPLACING ON TEMPORARY VACANCIES FILLED
UNDER RULE 17

Washington, D. C.
December 26, 1939

Mr. G. A. Link, General Chairman
Brotherhood of Railway Clerks
Chattanooga, Tennessee

Dear Sir:

Your letter of November 27th, in regard to the rights of a clerical employe to whom a displacing right has accrued under schedule rules to displace a junior clerical employe filling a temporary vacancy under the provisions of section (g) of Rule 4, Article 2, Clerks' Agreement.

My understanding is that the cases to which you refer in the third paragraph of your letter were cases where temporary vacancies were being filled at the discretion of the officer in charge under the provisions of section (d), Rule 5, of the agreement, and for this reason the clerical employes to whom displacement rights had accrued were not permitted to displace the junior clerical employes who were filling the temporary vacancies. The rulings were in my opinion, in accord with the technicalities of the rules. However, I am agreeable to interpreting the rules in question to permit such displacements, provided you agree that my so doing in no way affects the Company's rights under Rule 4 (e), Rule 4 (g), (1), (2), (3) and (6) and Rule 5 (d).

If the conditions contained in the preceding paragraph are acceptable to you, please sign and return the attached carbon copy of this letter, and our exchange of letters will constitute the understanding.

Yours truly

/s/ C. D. Mackay
Asst. Vice-President

Accepted:

/s/ G. A. Link
General Chairman
Brotherhood of Railway and
Steamship Clerks, Freight Handlers,
Express and Station Employes

(NOTE: Rules referred to above have been renumbered in this revised agreement of June 1, 1952, as follows: Section (g) of Rule 4 Article 2 is now Rule 8, section (d) of Rule

5 is now Rule 17, Rule 4 (e) is now Rule 7 (a), Rule 4 (g) is now Rule 8, Rule 5 (d) is now Rule 17.)”

The parties are in sharp disagreement with reference to that part of Rule 17 which reads “should such position be filled it may be done at the discretion of the officer in charge.”

The Brotherhood does not deny that the officer in charge has the right to either blank or fill the position during a leave of absence or sick leave but does contend that if the officer elects to fill the position, and there are two or more employes desiring the position, each being qualified, seniority must govern.

The Carrier contends that the discretion of the officer in charge is not limited by the rule only to the filling or blanking of the position but that he also has discretion with reference to the employe assigned to the position.

We have held on any number of occasions that we follow the basic and ordinary rules of contract interpretation and construction. We are bound by the terms and provisions of the Agreement before us. We have no power or authority and we may not make new provisions, abrogate or alter existing provisions of the Agreement. That is the province of the parties themselves. We endeavor to ascertain and to give effect to the intention of the parties and that intention is to be deduced from the language employed by them.

In interpreting and construing the provisions of an agreement, we inquire into what was the meaning of the writing at the time it was made; the circumstances under which it was made; the main object of the agreement or the purpose which the parties sought to accomplish by the agreement. We also give common or normal meaning to the language used in the agreement. If there be some ambiguous language in the agreement, but the meaning is not uncertain, we may not make a new agreement under the guise of construction. However onerous the terms of an agreement may be, they must be enforced if such is the meaning of the language used, and the intention of the parties using that language.

The intention of the parties can be and often is ascertained by their conduct and/or actions in carrying out the terms or provisions of an agreement or contract.

In Award 2436, we said:

“ * * * The conduct of the parties to a contract is often just as expressive of intention as the written word and where uncertainty exists, the mutual interpretation given it by the parties as evidenced by their actions with reference thereto, affords a safe guide in determining what the parties themselves had in mind when the contract was made.”

Both parties to this dispute have submitted statements to support their respective contentions. The statements are *contradictory of each other*. There is a sharp and direct conflict between the parties as to what the practice was in the past. We have on numerous occasions held that we cannot and will not attempt to resolve such conflicts.

In Award 14156, we said:

“There is an unreconciled difference in facts as to just what work was assigned to and performed by the Yard Clerk and what work was assigned to and performed by the Carman in this case. As between the parties, this Board cannot resolve the credibility of the evidence offered; consequently the record does not furnish any basis for determining the conflict. See Award 9486 (Rose); Award 11786 (Dorsey); Award 12011 (Christian); Awards 12360 and 12560 (Dorsey).”

See also Awards 15215; 14740; 13330; 14404.

The question as to whether or not the officer in charge has discretionary powers with reference to the employe assigned to the position has been passed upon by this Board in Award 4533 (Carter).

Although a reading of that Award discloses that the factual situation was somewhat different from the factual situation in this dispute, there can be no question but that Referee Carter had before him the interpretation of Rule 17, formerly Rule 5(d) of the Agreement.

In Award 4533, we said:

“It is clear to us that under Rule 5(d) the Carrier can fill temporary vacancies occasioned by leaves of absence or sick leave, or it may blank them, as it sees fit. The note attached to the rule permits the Carrier to use its own judgment as to the employe to be used in case it elects to fill the vacancy, except that it must be an employe holding seniority in the class or group in which the vacancy occurs, or an employe in another group or class who also has seniority in the class or group where the vacancy existed. There is no requirement in this rule that the senior employe is to be assigned; in fact, the inference is that he need not be.”

We note for the record that Award 4533 was adopted by this Board on AUGUST 12th, 1949. (Emphasis ours.)

The Carrier asserts that since the date of Award 4533, it has filled vacancies occurring under Rule 17 in accordance with the language of the Award.

It is also noted that the Agreement was revised as of June 1, 1952. An examination of the “Revised Agreement” discloses that there were no material changes made in the language of the various rules except to change the rule numbers.

In Award 11790 (Seff) we said:

“This Board has often and properly held that re-adoption of an agreement provisions in identical language evidences re-adoption of interpretation thereof. In Award 2679 it was said:

‘We think the rule is that where a portion of a written contract is carried forward verbatim into a new contract, all interpretations of the old agreement are carrier forward into the new unless there be a declared intent to the contrary * * *
See also, Awards 4791 and 7968.’

In Award 5133, this Board held that:

' * * * It does not admit of dispute that the Board's interpretation of rules becomes a part of the Agreement to all intents and purposes as though written into the rule book * * * '

These official pronouncements are sound and directly applicable to the dispute before us. The Board interpreted the rules pleaded in Award 6487, which interpretation became a part of the contract between the parties. Those same rules were carried forward, in identical language, into the new agreement. Thus the parties ratified the interpretation of Award 6487, and they may not now be heard to complain."

In Award 10585 (Russell) we said:

"When a contract is negotiated and existing practices are not abrogated or changed by its terms such practices are enforceable to the same extent as the provisions of the contract itself. (See Award 5747 (Wenke)."

We find that the practice complained of in this dispute has been followed by the Carrier, at least, since August 12, 1949; that the parties to this dispute, since that date, revised the present agreement as of June 1, 1952; that the Revised Agreement did not abrogate and/or change Rule 17, except to the changing of its number, with reference to the practice complained of in this dispute.

This Board having interpreted Rule 17 in Award 4533, such interpretation becomes a part of the Agreement. This is especially so when we find that the language of Rule 17 was not changed in the Revised Agreement of June 1, 1952. The parties by their action ratified the interpretation of Rule 17 in Award 4533. They may not now be heard to complain.

The Brotherhood refers us to Rule 15 in support of its contention.

Rule 15 reads in part as follows:

"Rule 15 — Promotion, Vacancies or New Positions Not Filled by Seniority (Revised, effective October 1, 1938); Promotions, vacancies or new positions (either excepted or schedule) which are not filled by seniority shall be filled as follows:

Qualifications, merit and capacity being equal, preference shall be given employes in the service in order of their service age, **the appointing officer to be the judge**, subject to appeal to the highest officer designated by the carrier to whom appeals may be made, whose decision shall be final." (Emphasis ours.)

We cannot see how Rule 15 is of any help to the Brotherhood.

Although the rule states that "preference shall be given employes in the service in order of their service age" where qualifications, merit and capacity are equal, it specifically gives to the appointing officer, subject to appeal, the right to be the judge as to who shall or shall not be assigned to a vacant position.

The Brotherhood refers, also, to Rule 16 in support of its position.

Rule 16 reads as follows:

“RULE 16.

FILLING VACANCIES UNDER SENIORITY RULES

(a) (Revised, effective October 1, 1938) Except as otherwise provided in this agreement, Rules 7, 8, 9, 13, 14, 15 and 17 in particular, vacancies covered by this agreement will be filled in accordance with principles defined in Rule 15 (exclusive of the notes) in the following manner, except that merit, capacity and qualifications being sufficient, seniority shall govern:

The officer in charge where vacancy occurs will, within two days, bulletin such position to all employes of the group or class on the seniority district in which vacancy exists. Bulletin to show location, title, rate of pay, and preponderating duties of position, number of hours assigned per day, and number of days assigned per week, subject to reduction in weeks in which holidays occur by the number of such holidays. Employes desiring such position must, within five calendar days (except in General Offices at Washington, Cincinnati, Atlanta and Chattanooga, where the period shall be two working days) after bulletin is posted, make written application to the officer issuing the bulletin. The bulletin shall expire at twelve o'clock midnight on the fifth or second day, as the case may be. From these applications **THE** senior qualified employe shall be assigned to the position within fifteen (15) days, and bulletin will be posted giving name of successful applicant. If requested, copy of all bulletins will be furnished Local Chairman.” (Emphasis ours.)

We note the material difference in the language used in Rules 15 and 17 with the language used in Rule 16 with reference to the appointing power.

Under the provisions of Rule 16 the officer in charge, all things being equal as to the qualifications, must assign **THE** senior qualified employe to the position. (Emphasis ours.)

We find no similar language in either Rule 15 or Rule 17.

Under the provisions of Rule 15, all things being equal as to qualification, the appointing officer is given and has the right to judge who shall or shall not be assigned to the vacant position.

Under the provisions of Rule 17, all things being equal as to qualification, “should such position be filled it may be done at the discretion of the officer in charge.”

The use of the word “the” in Rule 16 is significant. Its significance becomes apparent when we note how it is defined. Webster’s New Collegiate Dictionary defines it as follows:

“That (one) so designated or distinguished.”

When we compare the language used by the parties in Rules 15, 16 and 17 of the Revised Agreement, with reference to the appointing power of the

officer in charge, we come to but one conclusion, and that is that it was the intention of the parties that under Rule 16, "the" senior employe shall receive the assignment and/or appointment but that under Rules 15 and 17 the assignment and/or appointment was discretionary with the appointing officer or the officer in charge. We so hold.

After a careful reading of the Revised Agreement and the record in this dispute we accept as controlling the interpretation of Rule 17 as set forth in our prior Award 4533.

We are constrained to deny the claim.

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 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: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 11th day of July 1968.