Award No. 3694
Docket No. 3597
2-P&BR-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 30, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Carmen)

PATAPSCO & BACK RIVERS RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1 — That under the current agreement the Carrier improperly compensated Carman David Kelly at the straight time rate of pay for each of June 20 and 26, 1958, on which dates he was required by the Carrier to change shifts.

2 — That accordingly the Carrier be ordered to additionally compensate the aforenamed employe in the amount of four (4) hours at the straight time rate for each date involved.

EMPLOYE'S STATEMENT OF FACTS: The claimant while holding a regular position on the 7:00 A. M. to 3:00 P. M. shift was requested by the supervision to fill jobs on the 3:00 P. M. to 11:00 P. M. and the 11:00 P. M. to 7:00 A. M. shift on June 20 and 26, 1958, respectively, caused by other employes being on paid vacation. Mr. Kelly did not hold a regular vacation relief turn.

The supervision refused payment of David Kelly's service cards for June 20 and 26, 1958, which were made out for time and one-half. He was paid straight time rate for the shift changes for the days in question.

The dispute was handled with carrier officials designated to handle such dispute, who all declined to adjust it.

The agreement effective March 1, 1958 is controlling.

POSITION OF EMPLOYES: It is submitted that the carrier violated Rule 5(f), which reads in pertinent part as follows:

to 11:00 P. M. shift during the week of Hopkin's vacation. **Similarly, on** June 26, Hopkins returned to work, and Kelly was assigned to fill the vacation vacancy of Carman Long. Thus Kelly was assigned to an 11:00 P. M. to 7:00 A. M. shift, all in accordance with Rule 16(c).

In both these instances, as well as those hereinbefore set forth, Kelly was paid at the straight time rate in accordance with provisions of Rule 5 — Shifts, paragraph (f), which provides as follows:

> (f) An Employee who is changed from one shift to another at the request of the Company shall be paid at the rate of one and one-half times his straight time rate of pay (unless a higher overtime rate shall be applicable) for time worked by him on the first shift of each change. For the purpose of this provision, an Employee working two shift or more on a new shift shall be considered transferred. **This paragraph shall not apply to a change of shift under a relief assignment that includes different shifts, or to a change of shift resulting from an exercise of seniority by an Employee, whether by bid or displacement, or from the assignment of an Employee by the Company in accordance with these Rules.** (Emphasis added)

This claim has been handled on the property in accordance with the schedule rules and is now properly before the Board.

POSITION OF THE CARRIER: The only question before the Board is whether the carrier improperly compensated Carman Kelly under the provisions of Rule 5(f) for June 20 and 26, 1958. There is no disagreement between the carrier and the Brotherhood as to the propriety of upgrading a carman helper or assigning a qualified employe to work vacation vacancies.

The carrier submits that Kelly was properly compensated under the provisions of Rule 5(f). The rule prescribes the payment of overtime to those employes who are changed from one shift to another, with three specific exceptions. The carrier is not required to pay overtime to those employes who change shifts under a relief assignment that includes different shifts; or to a change of shift resulting from an exercise of seniority by an employe, whether by bid or displacement; **or from the assignment of an employe by the company in accordance with these rules.** Moreover, the last exception was written into the agreement with exactly the fact situation here presented in mind. (Emphasis added)

Since Claimant Kelly was properly assigned under the provisions of Rule 16(c), the carrier properly paid Kelly under the saving provision of Rule 5(f), and the claim should be denied on the clear, unambiguous language of the rule.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties waived right of appearance at hearing thereon.

Prior to June 19, 1958, Claimant was the senior Carman Helper, with a regular assignment to the first shift. Vacations were assigned for Carman Hopkins, of the second shift, to begin on June 20, and for Carman Long, of the third shift, to begin on June 26. As it was necessary to fill the position of each during his vacation, and no Carman was available, Claimant was upgraded, was used to fill the vacancies caused by the two vacations, and was paid the regular rate for this service.

The claim is that he should have been paid for the first day of each temporary assignment at one and one-half times his straight rate under Rule 5(f), the applicable part of which is as follows:

> "(f) An Employee who is changed from one shift to another at the request of the Company shall be paid at the rate of one and one-half times his straight time rate of pay * * * for time worked by him on the first shift of each change. * * * This paragraph shall not apply * * * to a change of shift resulting * * * from the assignment of an Employe by the Company in accordance with these Rules."

The Company contends that this case comes within that exception because Claimant had been assigned in accordance with Rule 16(c), the applicable portion of which is as follows:

> "(c) Vacancies of 30 calendar days or less duration caused by absence due to sickness, injury or other good cause shall be considered temporary vacancies, and any such vacancy may be filled by the Company without bulletining by assignment of the junior qualified Employee."

The Employes' contention is that Rule 16(c) does not apply to absences caused by vacations. They state:

> "The very language of Rule 16(c) reflects that it was intended to apply to **unforeseen** circumstances, such as sickness, injury or other good causes, **such as personal business, death in the family or sickness in the family.** If Rule 16(c) were intended to apply in connection with vacations, the parties would have included it in the Rule, as it would have been a simple thing to add the word 'vacation'." (Emphasis added.)

The trouble with this argument is that it would have been equally simple to add the words underlined and to include the word "only".

However, neither those nor any other words were used to limit the meaning of "other good cause", and it is impossible to infer any such intention from the wording of Rule 16(c) or of the Agreement as a whole.

In the first place, the words in question are used to define "temporary vacancies", to distinguish them from permanent vacancies, thus indicating clearly that the distinction depended upon duration rather than other considerations. This fact is emphasized by the last sentence of paragraph (c), which provides that if there is reasonable evidence that such vacancy will last more than 30 days, it shall be bulletined as required by paragraph (b) for "all new jobs and permanent vacancies".

Finally if under Rule 16(c) vacancies of less than 30 days caused by vacations are not to be considered due to "good cause" and therefore are not to be considered temporary vacancies, the Agreement is entirely silent as to their classification or how they are to be filled. The only such provision in the Agreement is Rule 16, which is headed: "Bulletining New Job and Vacancies". Paragraphs (a) and (d) relate in general to the right of employes to fill new job vacancies, and to return to their positions after absences. Paragraph (b) requires that "all new job and **permanent** vacancies" shall be filled by advertisement; and paragraph (c) defines "**temporary** vacancies" as of thirty calendar days or less duration caused by absence due to sickness, injury or other good cause", and as above noted, adds that if reasonable evidence indicates that they will exceed thirty days they shall be filled under paragraph (b), like permanent ones.

If Rule 16(c) does not mean that vacancies of less than thirty days caused by vacations are temporary vacancies and are to filled in accordance with its provisions, there is no limitation on the Company's authority in that respect and it can fill them as it sees fit. Rule 5(f) would impose no limitation; it would merely impose the overtime rate for the first day the vacancy was filled if it involved a change of shift.

By its own terms Rule 5(f) does not apply to a change of shift resulting "from the assignment of an Employe by the Company in accordance with these Rules", including Rule 16(c).

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1961.