NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

John P. Devaney, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM.—

"Claim of D. S. Proctor, furloughed clerk, Chattanooga, Tennessee, for pay at the regular rate per day for Tuesday, February 26, 1935, account of not being called to fill temporary vacancy during the absence of Mr. John Collins who was the regular assigned incumbent of check clerk's position in the Chattanooga Freight Agency."

STATEMENT OF FACTS.—

"D. S. Proctor was the senior qualified furloughed clerk subject to call to fill either temporary or permanent vacancies in clerical positions. John Collins, regular assigned check clerk, was off duty, without pay, on Monday and Tuesday, February 25th and 26th, 1935. Proctor was called to fill the vacancy, Monday, February 25th, but was not used to fill the vacancy on February 26, 1935."

POSITION OF EMPLOYES.—The employes contend that D. S. Proctor was *the senior qualified furloughed clerk subject to call to fill either temporary or* permanent vacancies in clerical positions; that John Collins was the regularly assigned check clerk, and on the days in question was off duty without pay; that D. S. Proctor should have been used on the position regularly occupied by Mr. Collins for the full time that Mr. Collins was off duty; that the management violated the intent, purpose, and plain provisions of paragraph (g), *Rule 20, in not retaining Mr. Proctor to fill the vacancy for both days, February* 25 and 26, 1935.

We contend that the following rules of our agreement with the carrier, bearing effective date of September 1, 1926, have been violated:

"RULE 1. *Scope.*—These rules shall govern the hours of service and working conditions of the following employees:

"(1) Clerk—

"(a) Clerical Workers, and

"(b) Machine Operators, as hereinafter defined in Rule 2;

"(2) Waybill and Ticket Assorters;

"(3) Other Office and Station Employees, i. e., employees operating appliances or machines for perforating and addressing envelopes, numbering claims or other papers, adjusting dictaphone cylinders or work of a like nature, office boys, messengers, gatemen, and train and engine crew callers.

"RULE 5. *Promotion and vacancies.*—(a) In filling promotions, vacancies, or new positions not filled by seniority, qualifications being equal, *preference shall be given employees in the service in the order of their service* age, the appointing officer to be the judge, subject to appeal to the highest officer designated by the Company, to whom appeals may be made, whose decision shall be final.

"(b) Preference in promotion or retention in the service on the respective Seniority Districts shall be given to the employees who have been *longest in the service provided they are, in the judgment of the proper*

the method of voluntarily laying off was chosen it would have to be adopted by all. The employees unanimously elected to voluntarily lay off without pay and each employee signed a statement in the following form:

"'In consideration of the Southern Railway System deferring for the present the justified general reduction in clerical forces in the General Freight Office at Cincinnati, Ohio, the undersigned voluntarily agrees that during the months of July, August, and September, 1930, and in subsequent months as are necessary, he/she will voluntarily lay off one working day per week (the day so taken to be the day most convenient to the management) without pay.'"

The carrier contends that the instances cited by the employes of settlements at Pinners Point and Spencer Transfer did not involve an analogous situation but was a protest of the employes against the use of extra clerks to an extent which they claimed was excessive and avoided the establishment of regular positions. With respect to the case at John Sevier Transfer, cited by the employes, carrier asserts that the claim arose in 1925 before the current agreement became effective and at a time when there was no six day guarantee rule in the agreement, and that the claim arose because clerical positions, authorized by a "floating authority" for the purpose of establishing three positions of check clerk which the agent might work as, and when necessary, were bulletined by the agent definitely as six day positions, and the successful applicants for the said positions bid on them with the expectation that they would receive six days' work per week, and for that reason the claims were paid.

OPINION OF THE BOARD.—The guarantee provision of Rule 20 (g) had its genesis in the National Agreement between the United States Railroad Administration and the Brotherhood of Railway Clerks, effective January 1, 1920, in which Agreement the guarantee appeared in Rule 66. Prior to that time, practically all clerical employes, or positions, were compensated on a monthly or weekly basis, and Rule 66 had for its purpose the conversion of monthly and weekly rates into daily rates. The rule said, in part:

"To determine the daily rate for monthly rated employes, multiply the monthly rate by twelve (12) and divide by three hundred and six (306)."

Obviously, the intent of that rule was to determine the rates for positions, not employes, for other rules of the same agreement stated, in part:

"Positions (not employes) shall be rated * * * (71)."

"Employes temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions * * * (72).

"The wages for new positions shall be in conformity * * * (74)."

National Agreement Rule No. 66 further provided:

"Nothing herein shall be construed to permit the reduction of days for employes covered by this rule (66) below six (6) per week, * * *."

This conclusion that the rule in dispute was intended to apply to positions is further strengthened by the interpretation placed on the word "employees" by carriers, the petitioners, and by this Division, in various rules of collective agreements.

Rule 1 of the agreement between the parties hereto provides in part:

"These rules shall govern the hours of service and working conditions of the following employes."

The rule lists the employes covered, which embraces Clerks, Clerical Workers, etc., with some exceptions. Surely, the language of this rule is intended to apply to positions, not employes, for employes are changing, entering, and leaving the service from day to day, and it was intended that the agreement would cover the positions or work in a permanent way, until changed in the manner provided therein.

It was argued by a carrier in Docket CL–129, Award No. 180, that the foregoing language covered employes, not positions and in answer thereto Referee Spencer said:

"This language, fairly construed, most certainly prohibits the carrier from removing positions from the operation of the agreement except in

the manner therein provided. If the language in question does not impose this restrictive obligation upon the carrier, then, indeed, the whole agreement is meaningless and illusory."

In another dispute before this Division, Docket CL-264, Award No. 336, the carrier contended that the word "employee", as used in the rule, did not mean positions, and in answer thereto Referee Corwin said:

> "While the rule speaks of employees, when it provides for their regular assignments, this can only be to positions, out of which it plainly states they shall be assigned to one day off out of seven."

The current agreement uses the words "positions" and "employees" synonymously in other rules. As previously shown, it specifies "employees" only in Rule 1, which is the coverage rule, yet, in the "exceptions" to the rule, we find this language: "nor to other positions therein which may be agreed upon." In the last paragraph of "exceptions," we find: "or the inclusion therein of positions not heretofore covered." In the "Note." Rule 4, we find: "clerical positions covered by schedule." Rule 20 (c) says: "The transfer of rates from one position to another shall not be permitted."

We, therefore, believe that when positions, not employes, carry the rate of pay and the guarantees as to rates apply to positions, the assigned days' work per week—the six-day guarantee—likewise applies to positions; that as in other provisions of the agreement, the word "employees" as used in the rule in question is synonymous with the word "positions" used throughout the agreement.

However, despite the conclusion we have reached that the word "employes" as used in Rule 20 paragraph (g) was intended to be synonymous with the word "positions," in view of the provisions of Rule 5 paragraph (e) we find it impossible to conclude that the employee, D. S. Proctor, was entitled to be called to fill the vacancy created by the temporary absence of John Collins. Rule 5 paragraph (e) provides:

> "Temporary vacancies of thirty 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, will be filled at the discretion of the officer in charge."

The rule clearly states that vacancies such as the one involved here of thirty (30) days or less, will be filled at the discretion of the officer in charge. It is our opinion that this rule gives to the carrier a privilege of either filling such a vacancy or leaving it unfilled within its own sound discretion. It seems too clear for argument that the phrase "at the discretion of the officer in charge" gives the carrier such discretion and does not make it mandatory that the position be filled. It is unnecessary to cite authority in support of this conclusion. To hold otherwise would be to torture the phrase as it now stands and to give to the word "discretion" a meaning which is never given either by common usage or by regular definition or otherwise.

We therefore conclude that any and all rights that the employees acquired with respect to the filling of vacancies under Rule 20 (g) have been bargained away by virtue of the provisions of this rule, insofar as Rule 20 (g) has application to the facts of this case.

Although under our conclusion, employe D. S. Proctor would have no right solely by virtue of the operation of Rules 20 (g) and 5 (e), there is a further fact not given a great deal of consideration in this case which, in the opinion of the board, brings the claim of Mr. Proctor within the operation of Rule 5 (f), which provides:

> "In the filling of temporary vacancies by the extra clerks, they will work first in, first out, rotating regardless of their seniority standing. Clerks so obtaining extra service will remain thereon during period of vacancy."

In the latter part of Rule 5 (f) it is provided that clerks who are called for extra service, "will remain thereon during the period of the vacancy." It seems quite clear that this provision gives to the employee who is called to fill a vacancy, a right to remain therein the position to which he is called, for the full period of the vacancy thereafter. There is nothing in Rule 5 (f) giving the carrier the right to retain such employee for a day or two and then remove

him, leaving the position again vacant. Rather the provision clearly requires that the carrier, if it calls an employee for extra service no matter if it is for one day after the vacancy has occurred, must keep that employee in that position from the day he is called until the day the position is restored to its former status and occupied by the regularly assigned employee. Thus, while there is no obligation on the carrier to fill such vacancy, once an employee is called, no matter for what period of time, Rule 5 (f) compels the carrier to retain such employee for the full period remaining of the so-called vacancy.

Our conclusion is that D. S. Proctor having been called on February 25 was entitled under Rule 5 (f) to remain for the full period of the vacancy, which includes February 26, and the management had no right to dismiss him prior to the time Mr. Collins, the regularly assigned check clerk, returned to duty.

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 Employee involved in this dispute are respectively Carrier and Employee 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;

That the circumstances in this case fully justify granting the claim of the employee involved.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 22nd day of April, 1937.

DISSENT ON DOCKET CL–357

I dissent from the award in this case on the ground that it is an enlargement of the claim and the pleadings of the complainant employees; that it ignores and is inconsistent with the evidence, and that the opinion upon which the award rests is strained, inconsistent, and illogical.

Under the caption "Position of Employes" we find this language: "We contend that the following rules of our agreement with the carrier bearing effective date September 1, 1926, have been violated:" following which "Rule 1—Scope" is quoted in its entirety; "Rule 5—Promotions and Vacancies" is quoted in part, paragraphs (a) to (g) inclusive; from "Rule 20—Preservation of Rates and Employment" paragraph (g) is quoted.

The language introducing these rule quotations is not to be found anywhere in the record. The employes make no reference whatever to rule 1 Scope of the agreement, and they do not allege that it is involved or related to this case. The employes in the original submission of this claim to the Board, under the caption "Position of Employes," quote rule 5, paragraphs (a) to (f), inclusive. The quotation as it appears in the statement of their position is in no wise related to the subjoined paragraphs, and no direct or inferential reference is made to it, nor is there any charge that any of the provisions were violated, nor is paragraph (g) quoted or referred to anywhere in the original submission or elsewhere in the briefs or rebuttals filed by the employes. The only definite charge of a rule violation made by the employes is to be found in the original submission under the caption "Position of Employes," in the following language:

> "The evidence in this case, * * *, clearly substantiates the employees' contentions as to the application of Rule 20, Paragraph (g), therefore, we contend that the Management violated the intent and purpose of the rule by not filling Collins' position while he was off; and that inasmuch as Proctor was the senior furloughed clerk who had been called to fill the position on previous occasions he is entitled to pay for February 26, 1935."

The only reference by the complainant employes to rule 5 occurs in their "Reply to Carrier's Rebuttal Evidence, Filed September 22, 1936," page two, in the following language:

> "It can therefore be readily seen and understood that this exhibit of the Carrier was hurriedly compiled and placed in the records of this Board with the thought and hope that it would be accepted at its face value as unchallenged evidence that the employes and their Organization had during the past ten years conceded to the Officers of the Company the power of discretion and right to fill or not to fill vacancies and thereby disregard the provisions of Rule 20, paragraph G and Rule 5 of the Agreement."

This language is not explicit as to the reference of Rule 5, but by inference from "the power of discretion" it deals with paragraph (e) of Rule 5.

In the "Opinion of the Board" the referee traces the genesis of rule 20 (g) in the present agreement to rule 66 of the so-called National Agreement; he states that rule 66 had for its purpose the conversion of monthly and weekly rates to daily rates, from which he deduces that it is obvious that the intent of rule 66 was to determine the rate for positions—not employes, and in support of this intent he quotes portions of other rules of the so-called National Agreement.

After dissecting also rules 71, 72, and 74 of the National Agreement he says, "*This conclusion that the rule in dispute* was intended to apply to positions is further strengthened by the interpretation placed upon the word 'employes' by carriers, the petitioners, and by this Division, in various rules of collective agreements." [Emphasis added.]

One is at a loss to understand by what process of logical reasoning a conclusion could be reached with respect to "the rule in dispute" by dissecting the rules of an agreement discarded by the parties more than sixteen years ago, at which time they cast out of their agreement entirely the guarantee rule, 20 (g), here in dispute. Certainly the quotations from rules 71, 72, and 74 of the National Agreement lead only to the conclusion that the words "employes" and "positions" were used with a meticulous regard to their literal meaning.

In the above-quoted paragraph the referee says that the conclusion is strengthened by the interpretation placed upon the word "employes" by carriers, etc., but a search of the records of this division does not reveal that carriers have ever contended for any interpretation of the word "employes" other than the literal one. He further refers to interpretations placed upon the word by this division, and we assume that the citations from Award 180 in Docket CL–129, and Award 336 in Docket CL–264, are in support of it, but a reading of the full awards will readily disclose that they do not justify the inferences apparently drawn from them; in neither of them do the referees hold that the words "employes" and "positions" are used synonymously.

While it may be conceded that the word "employes" may be substituted for the word "positions," or vice versa, in some of the rules of the agreement, without destroying the sense, it would frequently be found to destroy the purpose. As an example, the substitution of "employes" for "positions" in rule 20 (c), which the referee quotes as strengthening his contention that "positions" and "employes" are used synonymously, would indeed render it "meaningless and illusory."

In holding that the words "employes" and "positions," as used in rule 20 (g) are synonymous, the referee completely ignores the history of this rule as set forth in the position of the carrier. An agreement, negotiated by the parties, succeeded the so-called National Agreement on June 1, 1921; it contained no guarantee rule. The first negotiated agreement containing a guarantee rule was the current one effective September 1, 1926. The carrier asserts that the language of rule 20 (g), differing from rule 66 of the National Agreement was purposely employed for the purpose and with the understanding that it would apply only to regularly assigned employes—not positions. While this is denied by the complainant employes, the carrier submitted exhibits to show that during the entire period from September 1, 1926, to December 1934, it had been the practice to fill or not to fill regularly established positions temporarily vacated by the regularly assigned incumbent, and that this practice had gone unchallenged during that entire period. Specific positions, the period

of vacancies, instances running into the thousands, were cited in these exhibits, but they are cast aside as of no value in determining, by the action of the parties, the interpretation placed upon rule 20 (g). One can find no safer guide for the interpretation of the terms of a contract than that laid down by the court in the case reported in 18 Southwestern 457, in which the following language was employed:

> "When from the terms of a contract, or the language employed, a question of doubtful construction arises, and it appears that the parties themselves have practically interpreted their contract, the courts will generally follow that practical construction. Parties are far less liable to have been mistaken as to the meaning of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them seeks a construction at variance with the practical construction they have placed upon it, of what was intended by its provisions."

Here we have a period of over eight years when harmony prevailed, with respect to the proper application of rule 20 (g), and yet, the referee, without being confronted with the necessity of interpreting ambiguous language and contrary to the usage under the rule, holds that "employes," as used, is synonymous with "positions."

Despite his conclusion that the word "employes," as used in rule 20 (g), was intended to be synonymous with the word "positions," the referee finds that the employes bargained away, by rule 5 (e), giving the carrier the right to fill temporary vacancies "at the discretion of the officer in charge," all rights that they acquired with respect to filling such vacancies under 20 (g). Such a conclusion is inconsistent in view of the fact that in the agreement we encounter first rule 5 (e), reserving to the officer in charge the right to fill temporary vacancies at his discretion, and several pages further on we find 20 (g), the six-day guarantee for regularly assigned employes. The record does not show whether during the period between June 1, 1921, and September 1, 1926, rule 5 (e) was contained in the agreement, but that is not material. If both rules came into the agreement at the same time their arrangement confirms the carrier's contention as to the interpretation of rule 20 (g). With this the language and interpretation of rule 5 (e) are entirely consistent, but it is unreasonable to conclude, as the interpretation placed upon rule 20 (g) in this award requires, that the employes first agreed to 5 (e), placing it in the agreement, and then agreed to 20 (g) with the expectation that the latter upset the former. In view of the fact that no conflict can be found between these rules in the language in which they are written, but that they can be brought into conflict only by changing the language of one of them, it can scarcely be said that the referee has not indulged in a strained interpretation.

While the referee finds that the claim of the employes cannot be sustained under rules 20 (g) and 5 (e), he holds that the last sentence of rule 5 (f) entitles an extra employe, having once been used on a temporary vacancy, to remain in the position for the full period of the vacancy thereafter. He states that not a great deal of consideration was given to rule 5 (f) in this case. Indeed, no consideration was given to it by the complainant employes further than to quote it. The rule in its context and in its relation to other rules in the agreement clearly deals with the matter of seniority rights of employes as between themselves, and it denies to extra employes the right to displace one another while filling temporary vacancies. Claimant Proctor in the instant case had been called to fill a temporary vacancy in a check clerk's position on February 25, 1935. The same position remained vacant on February 26 but Proctor was not used on it. He claimed pay at the rate of the position for February 26 "account not being called to fill the temporary vacancy." Had the employes put any reliance in rule 5 (f) it is improbable that the claim for Proctor would be "account not being called to fill * * *" but rather "account not being allowed to remain on the temporary vacancy." Emphasis is lent to this probability when we consider that four claims were simultaneously presented to the Board; all of them were prosecuted under rule 20 (g), and all emphasis was laid by the claimant employes on that rule. In two of them, Dockets CL–357 and CL–360, the claim could have been framed to invoke rule 5 (f) in the manner above suggested, but it was not

done and nowhere in a series of briefs and rebuttals have the complainant employes urged or contended for the interpretation placed on rule 5 (f) by this award, and I contend that this Board has neither the right nor the authority to enlarge a claim as presented to it so as to bring it under a rule not cited by the complainant, for to do so deprives the carrier of its right to make a defense to any charge or claim brought against it, and in view of that fact, if no other, this claim should have been denied.

GEO. H. DUGAN.

The undersigned concur in the above dissent:

R. H. ALLISON.
C. C. COOK.
A. H. JONES.
J. G. TOBIAN.