

Award No. 546
Docket No. CL-547

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Arthur M. Millard, Referee

PARTIES TO DISPUTE:

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

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of W. J. O'Brien for wage losses sustained January 19 and 26, 1935, and February 2, 1935, account violation of seniority rights as hereinafter stipulated."

STATEMENT OF FACTS: The parties jointly certified to the following statement of facts:

"W. J. O'Brien holds seniority under clerks' agreement on seniority district 70 (a), as of September 25, 1922. On November 16, 1934, Mr. O'Brien was laid off in force reduction, at which time he filed his name and address, in compliance with Rule 31, clerks' agreement, reading:

'Employees laid off in reduction in force retain their seniority for a period of five years and will be returned to service in the order of their seniority for temporary or permanent vacancies, provided they have the necessary qualifications. All seniority rights lapse after a period of five years from date of last layoff. Employees desiring to avail themselves of the provisions of this rule must file their name and address, also telephone number, if any, with the employing officer at the time of last layoff and keep such officer advised of any change therein and must report for service promptly but not to exceed seven days after being notified by mail at the last address on file. Employees not desiring consideration for temporary employment must notify the employing officer in writing, otherwise they will be expected to return for duty when called.'

'Employees failing to respond for a vacancy for which they are qualified forfeit all seniority rights, unless just cause can be shown why they failed to report.'

"On January 19 and 26, 1935, Miss Josephine Madigan requested and was permitted to be absent from her regularly assigned position of price clerk, which position is included in seniority district 70 (a). Miss Madigan's position was not filled on the dates she was absent.

"On February 2, 1935, Miss Irene Louis requested and was permitted to be absent from her regularly assigned position of price clerk, which position is included in district 70 (a). Miss Louis' position was not filled on the date she was absent.

"On February 2, 1935, W. J. O'Brien filed claim for wage loss account alleged violation of his seniority rights."

OPINION OF BOARD: In this claim for wage loss alleged to have been sustained on January 19 and 26, 1935, and February 2, 1935, account of seniority rights said to have been violated by the carrier, each of the parties to this dispute have submitted various rules of the existing agreement between the parties, effective January 1, 1936, and certain awards and decisions in support of their respective contentions.

The facts on which this claim is based are that W. J. O'Brien who held seniority in District 70 (a) as of September 25, 1932, was laid off on November 6, 1934, on account of force reduction. On the dates indicated in the claim two of the clerks in the same seniority district were absent from their positions for a total of three days and neither of these positions was filled during the absence of regular incumbents. O'Brien's qualifications for the vacancies are not in question.

According to the evidence submitted Miss Madigan and Miss Louis were regularly assigned to positions of six days per week under the application of Rule 29 of the agreement between the parties. On the dates indicated in the claim these employees were absent on leave from their regular assignments and, from the facts in evidence, the positions or assignments were reduced to five days per week during the weeks in which the vacancies occurred, and during the absence of these employees the work and duties of the positions or assignments were undoubtedly divided, at least in part, among other employees.

Rule 31 of the agreement quoted in the joint statement of facts and in effect on the dates in question is specific in its requirements that, "Employees laid off in reduction in force . . . will be returned to service in the order of their seniority for temporary or permanent vacancies, provided they have the necessary qualifications." Other provisions of the rule designate the manner and the requirements of the employees in order to take advantage of the basic purpose of the rule specified.

Rule 23 and other rules cited are not contradictory to Rule 31 and do not in any manner qualify its application or purpose.

In the instant case no question has arisen or evidence been presented reflecting on the ability and fitness of Mr. O'Brien for the position in dispute, neither has any question arisen that this man had not met the requirements of Rule 31.

In further connection with this case the Board submits that one of the purposes of seniority lists is not alone to fill vacancies established by bulletin, but to as well fill vacancies existing in established positions with qualified employees whose services have been dispensed with on account of reduction in force or other justifiable causes, and where the services of a qualified employee may be indicated.

In view of the conditions in evidence that temporary vacancies did exist on the dates and in the positions or assignments indicated in the claim, and that an employee laid off in reduction in force and qualified by fitness, ability and seniority was available, the Board submits that the Carrier violated the terms and principles of the agreement between the parties in not filling the existing vacancies in the manner designated in the agreement.

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 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 Carrier violated the terms and principles of the agreement between the parties in not filling the existing vacancies in the manner designated in the agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 15th day of December, 1937.

DISSENT FROM AWARD 546 IN DOCKET CL-547

The effect of this award upon the relations between the parties to the agreement, that it purports to interpret, holds the prospect of being more far reaching than a casual reading will suggest, because, as will be made apparent, the interpretation placed upon Rule 31 brings it into conflict with other rules of the agreement.

This case represents the third effort by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, representing employees on three different carriers, to secure a ruling by this Board that temporary vacancies in regular assigned positions, occasioned by the voluntary absence of the regular assignee, must be filled even though the needs of the carrier's service do not make it necessary, and each time the claim has been based on a different rule. The first effort was represented by a group of four cases on one railroad, covered by our Awards 413, 414, 415, and 416, brought under the so-called six-day per week guarantee rule; the second was covered by our Award 460, Docket CL-432, under a rule captioned, "Filling Vacancies," and the third, the instant case, invoking Rule 31, captioned "Increasing Force Subsequent to Reduction," as quoted in the award.

Each of the three agreements involved in these cases deals in its own way with the subject matter covered in the rules relied upon in each case. It challenges the imagination to conceive that rules dealing with such diverse subjects as those severally invoked in these cases could all have for their purpose the requirement that the carrier fill temporary vacancies in regular assigned positions, occasioned by the voluntary absence of the regular assignee, even though the requirements of the service do not make it necessary to do so; yet, that is exactly what the employees in these cases have asked this Board, in effect, to do.

In the instant case the current agreement between the parties contains Rule 23, "Filling Temporary Vacancies," where reasonably, one would expect to find the terms of the agreement dealing with the condition here presented, and in fact there they are found and not in Rule 31.

The condition laid down in Rule 23 is that employees who have filed written request for assignment to temporary vacancies will be used on the basis of seniority. O'Brien did not comply with this requirement. But even had he done so, there is no mandate contained in Rule 23 that vacancies of the nature of those dealt with in this case must be filled.

Rule 31 deals with the matter of increasing forces subsequent to a reduction in forces. There is no contention by the employees in this case that a two-day absence in one instance and a one-day absence in another resulted in or required an increase in forces.

The referee says that on the dates indicated in the claim the regular assigned employees were absent on leave from their regular assignments, and from the facts in evidence the assignments were reduced to five days per week. From its context the implication is clear that he is invoking Rule 29. However, there was no reduction in the assignment by the carrier and manifestly the employee is powerless to change the assignment. Therefore, the assignment was not reduced to five days per week and there are no facts in evidence to indicate to the contrary, and the mere fact that the regular assignees, for reasons of their own, were absent from their work for one or two days on different occasions, affords no reasonable basis for finding to the contrary. If such reasoning were sound, then in the event of an epidemic, temporarily incapacitating large numbers of employees and making it impossible for the carrier to fill all positions, the carrier would be guilty of violating Rule 29 by reason of having reduced the assignments of the unfilled positions below six days per week. Such a charge would be absurd, but not more so than the assertion that an assignment is changed because an employee lays off.

The referee further says that during this temporary absence the work and duties of the positions were undoubtedly divided, at least in part, among other employees. It is not material to a determination of this case on its merits whether they were or not, but there is no evidence or suggestion in this record that any of the work of the positions was performed by other employees.

The referee states that Rule 31 "is specific in its requirements that, 'employees laid off in force reduction . . . will be returned to service in the order of their seniority for temporary or permanent vacancies, provided they have the necessary qualifications.'" This language, from the fourth paragraph of the Opinion of the Board, read in connection with the last paragraph, that in view of existence of a temporary vacancy and the availability of a qualified employee, laid off in force reduction, the carrier violated the terms of the agreement by not filling the vacancies, can scarcely be read otherwise than as a pronouncement that furloughed employees, in the order of their seniority, and subject to their qualifications, have a vested right to fill temporary vacancies in regular positions.

The entire agreement between the parties to this dispute was before the referee for his consideration in connection with this case. That agreement contains Rule 65, dealing with "Annual Vacation Allowance—Clerks," and "Sick Allowances—Clerks," reading in part as follows:

"Clerks coming within the scope of this agreement who on January 1 of a given year have been in continuous service of the Railway Company as clerk one (1) year or more will be granted annual vacations with compensation, provided the work is kept up by other clerks and there is no additional expense to the Railway Company, on the following basis:

"Where the work of a clerical employee is kept up by other employees without additional cost to the Railway Company, a clerk who has been in continuous service as such one (1) year or more will be allowed compensation for time absent account bona fide sickness on following basis: . . ."

Upon the premise laid down in this award, that furloughed employees have a vested right to fill temporary vacancies, it is pertinent for the parties to the agreement in this case to consider how, in the light of this award, vacations with pay and leaves of absence for sickness without loss of pay, can be afforded. This award brings into the picture furloughed employees not heretofore concerned with vacation and sick leave allowances. It will not hereafter be enough that other clerks shall be able and willing to keep up the

work of the absentee without additional expense to the company, and that the company shall be willing to accord the privileges of Rule 65, but the vested rights of the furloughed employes must be considered; this award says that under rules of the agreement in effect on this carrier, subject to their qualifications, they must be placed in temporary vacant positions, thus creating an irreconcilable conflict of existing rules.

GEO H. DUGAN

The undersigned concur in the above dissent:

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