Award No. 830
Docket No. CL-787

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

William H. Spencer, Referee

PARTIES TO DISPUTE:

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

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that,

"(1) The Carrier violated agreement rules when it failed and refused to promote and assign J. Pinger to vacancy on position of Sectional Stockman, rate 59¢ per hour, St. Paul Store, due to absence of regular incumbent M. Hustak on February 26th, 1938, and that

"(2) The Carrier shall be required to reimburse J. Pinger and E. Popelka for wage losses sustained as a result of said rules violation."

EMPLOYES' STATEMENT OF FACTS: "Mr. M. Hustak on and before February 26th, 1938 was the regularly assigned incumbent of position of Sectional Stockman, rate 59¢ per hour, at the St. Paul Store. On February 26th, 1938, Mr. Hustak was absent from duty. His position was not filled on that date.

"J. Pinger, Store Helper, 56¢ per hour, was the senior qualified and available employe entitled to be promoted and assigned to the said vacancy. E. Popelka, Laborer, rate 44¢ per hour, was the senior qualified and available employe entitled to be promoted and assigned to the position of J. Pinger, if and when vacant.

"Claim has been duly filed and appealed to the highest designated officer as set forth above in Statement of Claim.

"Rules 3 - 4 - 6 - 12 and 62 of current agreement dated and effective July 16th, 1926, reads as follows:

'RULE 3.

'Seniority begins at the time employe's pay starts on the seniority district and in the class to which assigned, except extra clerks will only be given seniority for the actual time worked.

'Extra clerks performing no work for a period of ninety consecutive days shall be considered out of the service.'

'RULE 4.

'Employes covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and

Pinger to fill such position—there being no rule in the Schedule requiring that he be used nor that E. Popelka, a laborer, be in turn called to fill the position that would have been vacated by J. H. Pinger, a store helper—there being no rule in the Schedule requiring that he be used, and we ask the Board to so find.

"Without prejudice to its position herebefore set out, the Carrier further submits:

1. There is no rule in the Schedule requiring it to call an employe to fill a temporary vacancy or position nor is it required if an employe is used to call junior employe holding a regular assignment.

2. There is no rule in the Schedule requiring it to call an employe to fill a temporary vacancy nor is it required if an employe is used to call a junior employe holding a regular assignment at a lower rate of pay.

3. There is no rule in the Schedule requiring it to call an employe to fill a temporary vacancy nor is it required if an employe is used to call the senior extra or furloughed employe.

4. There is no rule in the Schedule requiring it to call an employe to fill a temporary vacancy nor is it required if an employe is used to call an employe of another class who holds no rights in the class in which the temporary vacancy exists,

and we ask the Board to so find.

"A further denial of the instant claim is made by the Carrier based on the following facts:

E. Popelka is a laborer and is a Class 3 man, and is so carried on Class 3 seniority roster of Saint Paul Store; he holds no rights in Class 2, and under any theory would not be entitled to pay of a position which he did not fill.

"The Committee has cited Awards 413, 414, 415 and 416 of the National Railroad Adjustment Board, Third Division, as being applicable to the instant case. The Carrier wishes to deny this for the reason that the awards cited are not controlling nor applicable to the instant case, and wishes to point out that the rules cited in the cases covered by these awards are not comparable with the rules of the Schedule on this property and are without point in the instant claim.

"For all the reasons set out in the Carrier's position, we ask the Board to find with us and to deny the claim."

OPINION OF BOARD: This dispute presents two major issues: (1) whether the carrier, under the current Agreement between the parties, must fill temporary vacancies of thirty days or less; and (2) whether, if it is required to fill such temporary vacancies, it should have called claimant Pinger, in the circumstances of this dispute.

(1) The first issue has been before this Division in several prior disputes, but so far the Division has not been able to formulate a harmonious view with respect to it. In the dispute covered by Award No. 546, the petitioner, in support of its claim, relied primarily on a rule which provided that "employes laid off in reduction of force retain their seniority for a period of five years and will be returned to service in order of their seniority for temporary or permanent vacancies, provided they have the necessary qualifications." The Division, in sustaining the claim, said that the rule in question "is specific in its requirements" that the carrier shall call furloughed employes to fill temporary vacancies of less than thirty days.

In Award No. 413—the first in a series of claims of the same kind, Awards Nos. 413-416—the petitioner rested its claim on a rule similar to, if not identical with the rule relied upon in the present dispute. In Award No. 413 the rule in question provided:

> "Nothing herein shall be construed to permit the reduction of days for regularly assigned clerical employes covered by this agreement below six days per week, excepting that this number may be reduced in a week in which holidays occur by the number of such holidays."

In this series of awards the Division announced the general principle that the rule, in so far as it is a guarantee rule, applies to positions and not to employes. "We, therefore, believe," said the Division, "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 'employes' as used in the rule in question is synonymous with the word 'positions' used throughout the agreement."

In Award No. 792 of this Division the claim that the carrier should have called the claimant to fill a temporary vacancy was based on Rule 15 of the Agreement between the parties. This provides:

> "Except as provided in Rule 11, nothing within this Agreement shall be construed to permit the reduction of days for regular assigned employes covered by this Agreement below six (6) days per week, except that this number may be reduced, in a week in which holidays occur, by such holidays."

Rule 11 referred to provides in substance that employes "required to report for work at regular starting time and prevented from performing service by conditions beyond control of the carrier, will be paid for actual time held with a minimum of two hours." The Division, in denying the claim, stated that "the claim must stand or fall upon the interpretation of Rule 15." It then proceeded to set forth its course of reasoning:

> "If the word 'employes' as used in Rule 15 means 'positions' as was held in Award No. 413 then cases falling under Rule 11 constitute the only exceptions under which a 'position' may be filled below six days per week. Yet we find that under Rule 21 an employe may be absent on sick leave and the 'position' need not be filled provided the other employes keep the work up. The same is true under Rule 22 as to vacations and under Rule 35 carrier is allowed five days within which to fill such positions. It must therefore follow that the word 'employes' as used in Rule 15 of the current agreement does not mean 'positions' even though the words may be used interchangeably in other places in the agreement."

In the present dispute the claim is based upon Rule 62 of the agreement between the parties. This provides:

> "Nothing herein shall be construed to permit the reduction of days for the employes in Class 1 and Class 2 below six (6) days per week, except that this number may be reduced in a week in which holidays occur by the number of such holidays."

It will be noted that this rule with unessential differences is the same as that involved in Awards Nos. 413-416. It is identical with the rule involved in Award No. 792 with the important difference that it contains no reference to a rule comparable to Rule 11 involved in Award No. 792.

Technically it is possible to reconcile Award No. 792 with Awards Nos. 413-416. It seems clear that the Division in Award No. 792 seized upon the reference in Rule 15 to Rule 11 as the primary basis for its conclusion.

It may accordingly be assumed—though, of course, one cannot know this for a certainty—that but for this reference to Rule 11, the Division in Award No. 792 would have followed its Award No. 413. In this connection, however, it may be assumed that the Award No. 792 squarely conflicts with Award 413 in principle. Even on this assumption, the Division feels impelled to reaffirm the position that it took in Award 413 with respect to the obligation of a carrier to fill a temporary vacancy of less than thirty days. While it is not entirely satisfied with the course of reasoning in Award No. 413—as is evident from the vigorous dissent therein registered—it nevertheless feels that it represents the sounder view with respect to the proper interpretation of the rule involved.

(2) While the Division feels impelled to reaffirm the position taken in Awards Nos. 413-416 with respect to the obligation of a carrier to fill temporary vacancies under the rule there involved, it cannot sustain the position of the petitioner that regularly assigned employe should have been assigned to fill the temporary vacancy involved in this dispute.

In support of this portion of its claim, the petitioner relied primarily on Rule 4 of the Agreement. This provides:

> "Employes covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail except, however, that this provision shall not apply to the excepted positions."

Viewing this phraseology abstractly, it is difficult if not impossible to justify the conclusion that it lays any obligation upon the carrier to "promote" regularly assigned employes to temporary vacancies of the character here involved, even assuming that the term "promote" can appropriately be used in this connection. It is true that in Award No. 105 the Division used language which might be construed to justify the petitioner's contention here. On the other hand, in its Award No. 706 the Division, contrary to the contention of the carrier, ruled that the assignment of signalmen to temporary vacancies were not promotions within the meaning of the rules there involved. Certainly in a situation such as this, even assuming that there is doubt as to the meaning of the rule involved, the Division should not adopt an interpretation which would undoubtedly cause much confusion and produce inefficiency in many situations. Moreover, it is significant that in all prior disputes before this Division in which the petitioner has asked that the carrier be required to fill temporary vacancies of less than thirty days, the claim has been presented in the name of the senior qualified available furloughed employe. In Award No. 413 it is stated in the Position of Employes that "we contend that W. C. Brown, as is shown in the statement jointly certified by the parties, was the senior qualified furloughed clerk subject to call to fill either temporary or permanent vacancies in clerical positions." Attention is also called to certain awards of Express Board of Adjustment No. 1, presented by the petitioner to the Division in connection with the present claim, in which it was stated that "where a vacancy on a bulletined position occurs through any cause the senior furloughed employe reporting shall be entitled to work the vacancy provided, however, that final assignment therefor shall not be made more than thirty minutes in advance of the starting time of the work."

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 employes 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