Award No. 934
Docket No. CL-924

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Frank M. Swacker, Referee

PARTIES TO DISPUTE:

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

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that William Wilson, laborer, an available employe at Pier 10, North River, New York, N. Y., be paid one day's pay due to his being denied proper exercise of his seniority to fill a vacancy on a regular assigned position on February 12th, 1938."

STATEMENT OF FACTS: The following statement of facts was jointly certified by the parties: "On February 12th, 1938, regularly assigned laborers, George Shaw and Edward Richards did not report for work at Pier 10, North River. On this date there existed at Pier 10, North River, twenty-two regular established positions of laborers. Laborer George Shaw held position listed as number fifteen (No. 15) and laborer Edward Richards held position listed as number sixteen (No. 16), of these regular established positions and were regularly assigned thereto. The number of established positions and the employes regularly assigned thereon, is determined at this Pier through conference between the Management and the Organization.

"Extra laborer John Mulvihill, whose seniority date is March 10th, 1934 and William Wilson, whose seniority date is March 28th, 1934, reported extra at the regular starting time of 10:00 A. M. at Pier 10, North River. Extra laborer Mulvihill was assigned to fill the vacancy caused by the absence of laborer Shaw. The vacancy created by the absence of laborer Edward Richards was not filled.

"Laborer William Wilson was the senior extra laborer reporting at Pier 10, North River, and available for work after the assignment of laborer Mulvihill as stated above.

"Regularly assigned laborers Shaw and Richards returned to their established positions on Monday, February 14th, 1938, after their absence on February 12th, 1938.

"There is in existence an agreement between the parties appearing, having an effective date of April 1st, 1937."

POSITION OF EMPLOYES: "Rule No. 24 of the Agreement between the Carrier and the Clerks' Organization, effective April 1st, 1937, reads as follows:

'(a) Seniority begins at the time the employe's pay starts in a group in a seniority district on a position covered by this agreement.

"Article III, Rules 36, 37, 38, 39—None applicable, as the vacancy claimed is not subject to bulletin.

"Based on the foregoing presentation, the Carrier contends that there is nothing in the agreement that requires it fill the position of Laborer Edward Richards on February 12, 1938, made vacant by his voluntarily absenting himself; further, that if it were necessary, no rule of the agreement has been cited by the Employes that would entitle William Wilson to the position, and, therefore, the claim should be denied."

There is in evidence an agreement between the parties bearing effective date of April 1, 1937.

OPINION OF BOARD: The question in this case is whether under the six-day guarantee rule, Rule 14, the carrier is under obligation to fill the position on any day the regularly assigned employe may, for reasons of his own (not of the carrier's making), absent himself from work. Stated another way, the question is whether the guarantee is that the position will be filled six days per week or whether the regularly assigned incumbent of the position will be guaranteed six days' pay per week. The organization contends the former; the carrier the latter.

The precedents are in hopeless conflict. Awards 413 to 416 of this Division construe the guarantee as running to the position and not the employe. Award 792 directly overrules those awards and on an identical rule as that here involved holds that the guarantee is to the employe, not to the position. On the other hand, Awards 825, 829, 830, and 843 overrule Award 792 and revert to the holding of Award 413. All of the foregoing awards were rendered by referees and vigorous dissents were filed by carrier members to those holding that the rule relates to positions.

It is most unfortunate to have such confusion in the precedents, but when a referee cannot in good conscience follow the last one he should be able to advance sound reasoning to warrant overruling it. Such is the case here. I shall, therefore, proceed to analyze the previous decisions (although the rules are not identical they are similar in substance, and the difference in incidental facts is not material).

Decisions 413-416 are based wholly on the predicate that the words "employes" and "positions" as used throughout the agreements are interchangeable terms. This is patently unsound. As pointed out by Dissenting Opinion in Award 829, the term employe is used without association with the term position in 36 rules in the agreement there involved; the term position is used without association with the term employe in 3 rules; the terms position and employe are used together with unmistakable contrast of the distinct meaning each term has in 19 rules. A few illustrations suffice to show the absurdity of the contention that the terms employe and position are interchangeable. For example, under the Bulletin rule employes rather than positions would be bulletined; under the Promotion rules positions would be in line for promotion rather than employes, and many other such illustrations could be made. It should be said at this point that it was necessary to adopt this predicate because the language of the six-day guarantee rule speaks of employes, not positions. At this point then it may be observed that a fundamental rule of law governing construction of contracts was violated. There was no ambiguity, no basis, or grounds for going outside the plain language of the rule. Nevertheless, these decisions disregard the elementary rule that where language is plain there is no room for interpretation, and adopt a fallacious basis upon which to construe the rule different from the plain meaning of plain words—words which it is evident are used with discrimination throughout the agreements.

Award 792, in reaching the opposite conclusion and applying the language as written, recognizes the conflict and squarely overrules Awards 413 to 416.

Awards 825, 829, 830, and 843 overrule Award 792 and rest themselves squarely on Award 413, notwithstanding the fact that its infirmities were pointed out by the Dissent therein and notwithstanding the admission that its reasoning is not satisfactory.

These awards also seem to rely on Express Board of Adjustment No. 1 Decision E-326, quoted from the effect that where a vacancy on a bulletined position occurs the senior furloughed employe reporting shall be entitled to the work. This decision has no bearing whatever; it simply holds that where the position is worked the senior reporting employe is entitled to the work. It does not purport to hold that the position must be worked; that question was not involved. It simply decides who is entitled to the work when performed.

The six-day guarantee rule originated during Federal Control. Its obvious purpose was to make effective seniority principles as opposed to share-the-work practices. It is well-known that at times the practice has prevailed of employing a larger number of employes for a short work-week five or four days rather than a smaller number of employes for a full six-day week. This, of course, is directly contrary to the basic principle of seniority involved in substantially all railroad agreements. The effect and intent of the rule, therefore, was to require the establishment of as many full six-day week positions as possible and to guarantee to the incumbents of such assignments six days' pay per week. The guarantee was of course intended strictly to run to the employe so that he might have the advantage of his seniority. It would make a complete perversion of the language of the rule to construe it to mean that an extra or furloughed man is guaranteed the opportunity to work any vacancy on a regular assignment, created by the assignee himself, and that the carrier is obligated to fill such vacancy.

What is held herein is not to be deemed as in any respect a modification of previouus holdings of this Board concerning the Sunday rule. There the guarantee is that the position will be filled seven days a week; that is the consideration upon which the carrier is permitted to pay straight time for the Sunday work rather than time and one-half.

From what has been said it follows that Awards 825, 829, 830, and 843 must be overruled and Award 792 reaffirmed.

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

No violation of the rules is shown.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 4th day of August, 1939.