

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

George E. Bushnell, Referee

PARTIES TO DISPUTE:

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

MIDLAND VALLEY RAILROAD COMPANY

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

(1) The Management's refusal to permit Clerks Overby and Bradburry to exercise their seniority on vacancy of Louis Schott violated their agreement, Rules 3, 4, and paragraphs (a), (c) and (f) of Rule 8 of Article III of the Clerks' Agreement, and,

(2) Claim for the rate of pay for the position of Louis Schott is made for A. L. Overby, and claim for the position of A. L. Overby is made for O. S. Bradburry during the period March 7th to May 7th, 1938, inclusive, less 12 working days in which Mr. Schott was carried on payroll and paid for a 'sick leave,' allowance."

EMPLOYEES' STATEMENT OF FACTS: "Louis Schott, Clerk Interline Department, Auditors' Office, was absent account sickness from March 7, 1938, to May 7, 1938, inclusive, a total of 52 working days. He was carried on the payroll for 12 working days during his absence. His rate was \$7.40 per day applicable to his position, plus 20 cent arbitrary, which under Rule 10 (b) was applicable to him only and not to the position.

"Carrier failed and refused to Bulletin the position.

"The vacancy caused by the absence of Mr. Schott was not filled and no employe promoted."

POSITION OF EMPLOYEES: "The Rules involved in this dispute read as follows:

'RULE 3—Seniority Datum.—Employes seniority begins at the time their pay starts in the respective seniority district and the respective seniority group in which employed.'

"Supplement No. 1 applicable to Rule 3.

'RULE 4—Seniority Basis.—Employes may exercise their seniority rights when vacancies occur, new positions are created, their positions abolished, or they are displaced by senior employees. These moves to be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail, the highest officer in the department to be the judge.'

"Supplement No. 2 applicable to Rule 4.

regularly assigned employee was not absent at the direction of the company. Even if it is considered that the job was temporarily abolished, there was no failure on the part of the company to comply with the agreement. The agreement then in effect did not require a bulletin when positions were abolished or forces reduced and it had never been the practice to post a bulletin when a job was abolished. Rule 15 provides that when reducing clerical forces, employees affected will be given six days advance notice of such reduction. Under this rule and 20 years accepted practice, six days notice to the employee occupying the job was full compliance with Rule 15. In this case of course no notice by the company to the occupant was required, as he was not taken off by the company but by reason of his own illness.

"It has been the practice during 20 years operation under the agreement to fill or not fill temporary vacancies, according to the requirements of the work and the conditions existing at the time, and prior to this case there was never any exception taken to such practice.

"To sustain the contention made in this case would take from the carrier the responsibility of determining what work is necessary and when it should be done. There is nothing in the agreement of June 14, 1921, which could possibly be so construed. Regularly assigned clerks are protected by a guarantee of not less than six days work per week and they have the assurance of wages at the established rate for their assigned position. They cannot properly demand that the management, contrary to its desire and judgment, provide clerical work which the company does not consider desirable or necessary to be done, and in addition take other employees from their own work and assign them to work which they could not do satisfactorily even if the company needed or wanted such service performed. That would be an outrageous invasion of the rights and responsibilities of the management with respect to determining what clerical work is necessary. When it is found necessary or desirable to have clerical work done, the carrier does not question its obligation to conform to the requirements of the agreement with respect to the assignments of employees.

"There is no merit in the claim and it should be denied."

OPINION OF BOARD: Clerk Louis Schott, who is number 20 on the seniority list and whose rate of pay is \$7.40, was absent on account of illness from March 9, 1938, to May 7, 1938. His duties consisted largely of rechecking the bases of divisions on interline shipments. Although not required to do so under the agreement, the carrier paid Schott for the first twelve working days of his absence. Clerk H. E. Graham, who is number 14 on the seniority list and whose rate of pay is \$8.83 kept up about one-fifth of Schott's work during his absence and the remainder of his rechecking work was allowed to accumulate until his return to duty. When Schott was taken ill it was not known how long he would be absent. He returned to service on May 8, 1938.

The employees claim that since the vacancy was not bulletined, Clerk A. L. Overby, who is number 19 on the seniority list and whose rate of pay is \$6.78 should be allowed the differential in his rate and that of Schott (\$7.40) for a period of 40 days. They further claim that Clerk O. S. Bradburry who is number 10 on the seniority list and whose rate of pay is \$6.40 should be allowed the differential between his rate and that of Overby (\$6.78) for the same period.

These claims are based on Rules 3, 4 and 8 of the agreement. It is argued, in effect, that we should hold that Rule 8 requires the carrier to bulletin all indefinite vacancies which exist for more than 30 days; the vacancy in this instance being claimed as existing for 52 working days.

The carrier insists on the application of Rule 24, the seven day complaint rule, but we prefer to pass upon the application of Rules 3, 4 and 8 to the situation thus presented.

Since the bulleting required by Rule 8 (a) is on new positions or **vacancies** and we have great doubt under the facts in the instant case whether a vacancy of any nature existed, the claim might possibly be determined on that question. Assuming, however, that a vacancy of indefinite duration existed (Rule 8 (f)) but not temporary because it existed for more than thirty days (Rule 8 (e)), was the carrier required by Rule 8 (a) to bulletin this vacancy?

Rule 8 (e) says with respect to temporary vacancies that they "**may** be filled without bulletining" and section (f) of the rule says that "vacancies of indefinite duration **need not** be bulletined until the expiration of thirty (30) days from the date of * * * vacancy."

No claim is made that carrier attempted to evade the application of the rule as prohibited in section (g).

As was said by Referee Swacker in Award 934 when a referee cannot in good conscience follow the last precedent he should be able to advance sound reasoning to warrant overruling the award.

This referee feels bound on the facts here presented by the clear application of the principles enunciated by Referee Swacker in Award 934, by Referee Sharfman in Awards 1124, 1150 and 1177, by Referee Danner in Award 1216 and Referee Rudolph in Award 1293. Like Referees Danner and Rudolph he can see nothing gained by repeating or adding to the reasoning of these opinions. See Awards 1216 and 1293.

We hold that the awards just cited govern the disposition of the instant claims.

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 no violations of the agreement have been shown.

AWARD

Claims 1 and 2 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 31st day of July, 1941.