Award No. 4962
Docket No. CL-5019

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

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

(a) Carrier violated the rules of the Clerks' Agreement when it required and permitted Mr. C. L. Maus, Roundhouse Laborer, Winslow, Arizona, to perform clerical work covered by the scope and operation of the Clerks' Agreement and by such action deprived employes who hold seniority rights in that district and to work their right under the Clerks' Agreement to perform such work' and,

(b) E. R. Gardner shall be compensated at Shop Timekeeper rate on the basis of eight (8) hours at time and one-half on dates when such violation occurred, viz., November 5, December 18, 19, 27 and 28, 1946, and January 1 and 4, 1947.

EMPLOYES' STATEMENT OF FACTS: In the Mechanical Department at Winslow, Arizona, there exists three positions titled Shop Timekeeper identified by payroll numbers 113, 115 and 116, the hours of assignment being 8:00 A.M. to 4:00 P.M., 7:45 A.M. to 4:15 P.M. and 4:00 P.M. to 12:00 midnight and the rates of pay being $9.85, $9.65 and $9.64, respectively. On the dates set forth in Statement of Claim above, the occupant of Position 116, with assigned hours 4:00 P.M. to 12:00 midnight, was absent from duty. Roundhouse Laborer C. L. Maus, who holds seniority rights under the Shop Crafts' agreement, but who holds no seniority rights under the Clerks' Agreement, was instructed by the Carrier to perform the duties of Position 116 notwithstanding the fact that employes holding seniority rights to such work were available, ready and willing to perform same on an overtime basis as had always been the custom and practice in similar circumstances.

Mr. E. R. Gardner, whose assignment as Shop Timekeeper immediately preceded the hours of assignment of Position 116, was available and willing to perform such overtime service but was denied this right whereupon he submitted overtime tickets to the Master Mechanic claiming payment on the basis of eight (8) hours at time and one-half rate for each day involved. These tickets were declined by the Master Mechanic on the grounds that the vacancy on Position 116, on each of the dates in question, was filled in accordance with Article III, Sections 9 and 10-a.

January 1 and 4, 1947, between 4:00 P.M. and 4:15 P.M. on December 18, 1946, and between 7:45 A.M. and 8:00 A.M. on December 20, 1946.

(Exhibits not reproduced).

OPINION OF BOARD: This dispute involves the protection of three temporary vacancies in the Carrier's Mechanical Department at Winslow, Arizona.

It is conceded, in fact if it was not we would be compelled to so hold (see Awards 1314, 3375 and 4921), that on all dates in question there was an Agreement between the parties and that under its scope rule the vacancies involved should have been filled by members of the Clerks' Organization unless the provisions of Article III, Section 10-a of the contract were subject to the interpretation that they created an exception to the scope rule and authorized the Carrier under the existing facts and circumstances, to assign employes outside the Agreement to do the work of such vacant positions. Thus it appears the section of the Article just identified is decisive and should be quoted in full. It reads:

> "Vacancies of fifteen (15) calendar days or less duration shall be considered temporary and, if to be filled, shall be filled (1) by recalling the senior qualified and available off-in-force-reduction employe not then protecting some other vacancy; (2) if there is no such off-in-force-reduction employe available, by advancing a qualified employe in service at the point who makes application therefor. If neither of these alternatives produces an occupant for the vacancy, it may be filled without regard to these rules, but employes holding seniority in Class 3 on the same seniority district, whether in regular employment or otherwise, shall be given preference in accordance with Section 8-e of this Article. Individual Class 3 employes shall not be compelled to protect such temporary service, but those accepting it will do so at the rate applicable thereto and without penalty to the Company, either through payment of expenses or otherwise. If taken from regular employment, they will return thereto when released from the temporary vacancy."

The facts are not in controversy and, since they are set forth at length in the respective submissions, need not be detailed. It suffices to say it is clear from the record: (1) that the positions involved were temporarily vacant on the dates set forth in the claim and were worked, under assignment of the Carrier, by C. L. Maus who was not a Clerk but a Roundhouse Laborer, carried on the seniority roster of the Shop Craft Organization; (2) that at the time Maus was assigned to and worked on such positions there were no off-in-force-reduction employes available and no qualified employe in service at the point who had made application to protect such vacancies; (3) that there were other employes under the Clerks' Agreement available who could have been called, assigned to the positions and paid at the overtime rate, and (4) that Gardner, the claimant herein, was assigned to other positions on the dates involved, the hours of which overlapped by fifteen minutes the hours of the vacant positions for which he has made claim for compensation.

Nothing would be gained by spelling out at length the contentions made by the parties. Summarized, the Carrier contends that since the alternatives of the rule heretofore quoted did not produce an occupant for the vacancies in question it was thereafter free, by reason of the phrase, "it may be filled without regard to these rules" as used therein, to fill such positions without regard to any other rules of the Agreement; or in other words, in a manner solely at its discretion and without penalty, even though its action resulted in the seceltion of some employe who belonged to another craft, the only requirement being that the employe so used should be compensated in accord with the rules of the Clerks' contract. On the other hand, the Brotherhood contends the effect of giving the work to Maus and permitting him to fill the vacant positions on the days he worked them removed such positions, and their work, from the scope and operation of their contract, since he was ont only

covered thereby but at the same time held employment and seniority rights which were confined to the Agreement between the Carrier and its Mechanical Department employes.

It cannot be disputed that the primary purpose of a collective agreement is to preserve and insure to an organization and its members the positions and work of the particular craft involved. Neither can there be doubt under our decisions, as we have heretofore indicated, that when, as here, the scope rule of the Agreement includes work of the type in question a Carrier cannot let out the performance of that work to others unless it is specifically excepted under the terms of such rule or other rules to be found in the contract. Nor should it be questioned that language to be found in a rule and relied on as creating an exception limiting the general terms of the scope rule as to work covered by the Agreement should be so definite, clear and concise as to definitely indicate it was the intent and purpose of the parties that it should be given such force and effect. Indeed we have recently held (Award 4921) that very definite proof of such exceptions is necessary in order to establish their status as a limitation upon an Agreement.

Turning to Article III of the instant Agreement, of which Section 10-a is a part, we note that it treats and deals with seniority rights entirely. The section just mentioned is not a separate and distinct provision of the Agreement but one of many to be found in an Article wherein the parties contract with respect to seniority rights of employes covered by the Agreement. In that situation it is hard for us to conceive, and we are cited no decision which can be construed as upholding any such theory, that the phrase "it may be filled without regard to these rules" has reference or application to anything but the rules of the particular subject, namely, seniority rights, within the scope of Article III. Of a certainty it cannot be said, that in that situation, it is clear the parties contemplated that it should be given the force and effect of an exception to the scope rule. Therefore we hold that such phrase is limited and restricted to the Article of the contract of which it is an integral part. This construction of the Agreement finds support in Award No. 1060 when, although an entirely different factual situation was involved, we reached a similar conclusion respecting the import to be accorded language used in a rule which was dealing with and had reference to a particular subject.

Based on the conclusion just announced it necessarily follows that the Carrier in assigning Maus to the involved vacancies took work from the Clerks which belonged to them under the terms of the current Agreement.

The Carrier argues the instant claim cannot be upheld because Gardner was not available during the entire period of the assigned position worked by Maus. Assuming without deciding the point it is entitled to little weight. Under repeated decisions of this Division of the Board we have held that the question whether there has been a violation of the contract is the important thing and that the claim of a particular individual is of no concern to the Carrier since it cannot be required to pay but one claim (Awards 1646, 2282, 3376).

The record is none too clear as to whether all the involved positions were of the type that were necessary to the continuous operation of the Carrier. At least some of them were. In any event, under what are now established precedents of this Division the penalty rate for work lost because it was given to someone not entitled to it is the rate the regular occupant of the position would have received had he worked his regular assignment (Awards 4102, 4103, 4244, 4646). Claimant's recovery will be so limited.

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

That the Carrier violated the Agreement.

AWARD

Claim sustained as per the Opinion and the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 31st day of July, 1950.

DISSENT TO AWARD 4962, DOCKET CL-5019

This Award has, under the guise of an interpretation, in effect, added language to Article 3, Section 10 (a). If the parties had intended the language "without regard to these rules" to mean "without regard to these seniority rules", they could have expressly so provided. To, in effect, to revamp the rule is beyond the authority of this Board.

The Opinion referes to Award 1060, and while admitting an entirely different situation was there involved, nevertheless accords it some standing when reaching the conclusion in the instant dispute. Suffice to say the dissent to Award 1060 fully demonstrates the fallacy of any attempt to use that Award as a precedent.

/s/ A. H. Jones
/s/ R. H. Allison
/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ C. C. Cook