

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violates the rules of the Clerks' Agreement at Cleveland, Ohio, when it assigned an employe holding no seniority under the Clerks' Agreement to position of Stenographer and Secretary in the Office of the Superintendent of Transportation thereby denying employes holding seniority the right and opportunity to fill short vacancies on those positions, and,

That Carrier shall now compensate Miss Jane Barta and all other employes in seniority order affected for wage loss sustained during the period June 20, 1949 to June 30, 1949 and during the period August 15, 1949 to August 27, 1949, inclusive. (Docket 902)

EMPLOYEES' STATEMENT OF FACTS: Commencing June 20, 1949, Miss Margaret Kadar regularly assigned incumbent of position of Stenographer rate \$262.60 per month, in office of the Superintendent of Transportation, Cleveland, Ohio began her annual vacation. Mr. Henry Seib Chief Clerk to Supt. of Transportation ordered Mr. Gail Farron, a regular assigned stenographer, rate \$262.60 per month, and instructed Mr. Farron to vacate his position and perform the duties of Miss Kadar's position. The carrier filled the vacancy created on Mr. Farron's position by engaging the services of Miss Marilyn Seise an individual holding no rights in the Office of the Superintendent of Transportation. Miss Jane Barta, seniority date of April 1, 1947 was denied the right to fill the vacancy on Mr. Farron's position.

On August 15th, 1949, Miss Clair C. Carter, regularly assigned incumbent of position of Secretary, rate \$295.17 per month in Office of Superintendent of Transportation began her annual vacation. The position was filled by Miss Eileen Craig, a Junior Employee. Miss Craig's position was filled by Gail Farron and Gail Farron's position was filled by Helen Masterson an employe holding no seniority rights under the Clerks' Agreement. Miss Jane Barta, Seniority date April 1st, 1947, the senior employe was denied the right to fill the vacancy on Miss Carter's position.

POSITION OF EMPLOYEES: There is in effect between the parties an agreement bearing effective date of December 1, 1943, amended July 1, 1945, supplemented July 20, 1949 which contains the following rules:—Rule 6, (Promotion) reads as follows:

Carrier asserts that any claim for persons other than those named cannot be valid because none of the provisions of Rule 42 have been complied with.

Carrier protests against and objects to any proceedings therein by the National Railroad Adjustment Board, Third Division where any claim for employees, other than those now named in this dispute, is considered.

The First, Third and Fourth Divisions of the National Railroad Adjustment Board have held that consideration is restricted to claims of named parties for specified dates and locations. See First Division Awards 11293, 11642 and 12345; Third Division Awards 549, 906, 1566, 2125, 3103, 4304, 4372, 4557, 4576, 4580 and 4710; Fourth Division Awards 206.

During the handling of these claims on the property, the General Chairman alleged violation of Rule 7(e) of the applicable agreement, reading:

"New Positions or vacancies of thirty (30) calendar days or less duration shall be considered short vacancies and may be filled without bulletining. When there is reasonable evidence that such new positions or vacancies will extend beyond the thirty (30) day limit they shall then be bulletined, showing probable duration."

The Carrier submits that Mr. Farron's vacancy which resulted when he was used to fill Miss Kadar's position while she was absent on vacation during the period June 20, 1949 to June 30, 1949, was properly filled in accordance with Rule 7(e).

The Carrier further submits that X-3 positions are filled by appointment, and because the Claimant was not selected to fill Miss Carter's position (X-3 position) while she was absent on vacation during the period August 15, 1949 to August 27, 1949, does not justify a claim under Agreement Rules.

The Claimant, Miss Jane Barta, made no request to work other than her regularly assigned position of stenographer and cannot now complain.

The Carrier denies violation of any Agreement Rule and states that these claims are without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim of the System Committee on behalf of Miss Jane Barta covers two periods of time and two classes of positions. One claim is premised on these facts: When an employee in the Transportation Section, Office of Superintendent of Transportation, was absent on vacation, the Carrier filled her position by a regularly assigned employee in that Section and, in turn, filled the latter position with an employee who was regularly hired for summer vacation relief work but who had not yet established a seniority date on the roster. The claimant, Miss Barta, was regularly assigned in the Car Section, which was also in the Office of Superintendent of Transportation, and had established seniority. Both Sections are in the same seniority district. She has premised this claim on the theory that as she desired the work of filling the temporary vacancy of less than thirty days' duration, she had a right thereto senior to the temporary employee used. It is the contention of the Petitioners that Rules 6 (a) and 7 (e) of the current Agreement support the claim.

Rule 6 provides that employees shall be in line for promotion. The position which the claimant alleges she should have filled was at a rate \$20.00 greater than her regular assignment. Rule 7 (e) provides that vacancies of less than thirty days' duration need not be bulletined, and neither of the vacancies here involved were bulletined.

The position of the Carrier is that Rule 7 (e) does not require the Carrier to apply the seniority rules strictly, but in any event it was incumbent upon the claimant to have made application for the vacancies in the same manner as for other vacancies or positions.

The contention of the Carrier that because vacancies of short duration need not be bulletined, the seniority rules need not be followed has been before this Board in cases heretofore handled, and the Board has frequently said that such a rule (Rule 7 (e)) does not permit vacancies or positions to be filled without regard to seniority rights. (Awards 105, 132, 1058, 2426, and others.) Most of these prior Awards have dealt with the situation where a furloughed or extra man was involved. But there is no distinction in principle between such cases and the one now confronting the Board.

The Carrier makes the further contention that as the rule does not require bulletining for vacancies of short duration it is not required to apply seniority unless it knows that a senior employe desires the vacant position, and that in this case the claimant did not make known her desire for the positions until the vacancies had terminated. Having determined, as we do here, that seniority applies, there is a consequential obligation on the Carrier to determine if any senior available employes desire the promotion even though it be for a short time. The knowledge of the impending vacancy is in the Carrier, and the employe has no ready way of learning of the opportunity until it happens. There is, of course, the attending duty on the employe to let his desires be known, even though the rules does not prescribe a formal application. The Carrier contends that it had no knowledge of claimant's desire for the higher position until the claim was filed on July 1, 1949. However, it appears from the record that the Organization's Division Chairman and Committeeman conferred with the Chief Clerk regarding the position then occupied by the temporary employe, and they advised him that Miss Barta should have been used. There is no specific denial of this by the Carrier. The first written claim, however, was not filed until after the vacancy had terminated.

We believe the conference with the Chief Clerk was notice to the Carrier that claimant desired the temporary position to which her seniority entitled her; and that the Carrier was on notice to make inquiry whether she in fact would take the short promotion. The claim for this first period is therefore valid. Of course, the Carrier cannot require a regularly assigned employe to fill another position against her will without running counter to other provisions of the Agreement.

The other claim, for the period of August 15 to August 27, is premised on the fact that an employe junior to the claimant was permitted to fill a temporary vacancy of Secretary, a partially excepted position. The promotion and bulletining rules do not apply to this position. In the absence of a showing that the Carrier acted arbitrarily, it may be presumed that the Carrier made the temporary promotion on the basis of fitness. The burden was on the claimant to show the Carrier had acted capriciously. No such showing appears. We cannot, therefore, find that the rules support the claim for the second period.

The claim is made for "all other employes in seniority order affected", but the submissions do not show that any others were affected, and the claim should be allowed as indicated only for Miss Jane Barta.

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

The Carrier violated the Agreement.

AWARD

Claim sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 9th day of March, 1951.