

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

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

**GULF COAST LINES; INTERNATIONAL-GREAT NORTHERN
R.R. CO.; THE ST. LOUIS, BROWNSVILLE & MEXICO RY.
CO.; THE BEAUMONT, SOUR LAKE & WESTERN RY. CO.;
SAN ANTONIO, UVALDE & GULF R.R. CO.; THE ORANGE &
NORTHWESTERN R.R. CO.; IBERIA, ST. MARY & EASTERN
R.R. CO.; SAN BENITO & RIO GRANDE VALLEY RY. CO.;
NEW ORLEANS, TEXAS & MEXICO RY. CO.; NEW IBERIA
& NORTHERN R.R. CO.; SAN ANTONIO SOUTHERN RY. CO.;
HOUSTON & BRAZOS VALLEY RY. CO.; HOUSTON NORTH
SHORE RY. CO.; ASHERTON & GULF RY. CO.; RIO
GRANDE CITY RY. CO.; ASPHALT BELT RY. CO.; SUGAR-
LAND RY. CO.**

(Guy A. Thompson, Trustee)

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

(a) The Carrier violated the Clerks' Agreement, beginning in November 1948, when it withheld Mr. J. R. Armstrong from his regularly assigned position of Accountant No. 1279 and required him to work position of Chief Accountant No. 1270. Also when it withheld Mr. W. S. Goerner from his regularly assigned position of Accountant No. 1280 and required him to work position of Accountant No. 1279. Also

(b) Claim that Messrs. Armstrong and Goerner be paid an additional day's pay at the rate of their regularly assigned positions for each day they were withheld therefrom.

EMPLOYEES' STATEMENT OF FACTS: Messrs. Armstrong and Goerner were regularly and properly assigned to Accountant positions Nos. 1279 and 1280, respectively. They were assigned to those positions by virtue of their seniority rights and the requirements of the agreement.

On November 13, 1948, Chief Accountant Miller, position No. 1270, laid off because of illness. His position was not bulletined until December 8, 1948.

means of securing enforcement of agreement provisions, certainly there is no justification for the action taken by the claimants and the Organization representing them, as is present in this case. Such action, we are convinced, can serve no purpose other than to enrich these claimants by the collection of unreasonable and excessive claims. If these two claimants were not agreeable to moving up on a higher rated position under the circumstances here present, then the only decent and honorable thing they could have done was to make their position known to their supervisor at that time. Honest, conscientious and just-minded employees could have done no less.

In several previous cases actually involving an agreement violation your Board has denied penalty payments for such violation prior to the date claim was first presented to the Carrier. Some of these awards are 1289, 2137, 3430, 3503, 4281. In this connection the following excerpt is quoted from "Opinion of Board" in the more recent Award 4281:

"It is clear that the Claimant knew of the violations as they occurred. He made no complaint. Apparently he was willing that these violations should accumulate into a sizeable number before he voiced any protest. Not until the violations totaled the number recited did he voice a protest and file a claim.

We cannot sustain any such claim. By failing to protest to the Carrier the numerous violations which afforded him the basis for claim, he deprived the Carrier of an opportunity to correct the violation in order that he might receive a large sum of money in retroactive penalties. Such claims are contrary to the intent and meaning of the Railway Labor Act. Penalties are prescribed as a means of securing the enforcement of agreement provisions; not as a technical basis for the collection of unreasonable and excessive claims. When such facts are shown by the record, the claim will be sustained from the date the claim was first made."

There were 226 working days during the period here involved, i.e., November 15, 1948 to July 15, 1949, and August 9 to 29, 1949. As previously shown, the rate on Mr. Armstrong's regular position was \$11.45 per day, which, multiplied by 226 equals \$2587.70; and the rate on Mr. Goerner's regular position was \$10.70, which, multiplied by 226 equals \$2418.20. Total amount involved in the claim—\$5006.90, representing a claim for payment of monies for which no service whatever was performed, and a payment which the Board has ruled, subsequent to Awards 3416, 3417 and 3418, is not justified and accordingly denied payment because it would impose a double penalty. It is the position of the Carrier that claims in the instant case should likewise be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: When the Chief Accountant was laid off on account of illness, Accountant J. R. Armstrong was placed in his position and Accountant W. S. Goerner was placed in Accountant Armstrong's position. Both Armstrong and Goerner were at that time, November 13, 1948, holding regularly assigned positions as Accountants, and thereafter did not fill their regular assignments until July 19, 1949. Later, for the same reason, they were off of their regular assignments for the period of August 9 to 29, 1949. The System Committee of the Brotherhood now requests on their behalf payment at the rate of their regularly assigned positions for such periods, alleging a violation of the current Agreement guaranteeing them the right to work the bulletined positions to which they had been assigned by reason of their seniority. The Carrier's position is that the arrangement was in accord with Rule 25, as interpreted by an Agreement of the parties to which reference will be made hereinafter.

Heretofore claims similar in character to the one now before us were presented to the Board. The Carrier then relied on Rule 25 (b), but in its Opinions disposing of these claims (Awards 3416, 3417 and 3418), the Board

rejected the contention of the Carrier, saying, in part: "That claimant may have willingly or 'voluntarily' accepted the call to work the * * * jobs * * * in no wise affects the validity of his claim." After these Awards were made, and with particular reference to the language just quoted, the parties by conference and exchange of letters reached an understanding as to the application of them and Rule 25 (b) on this property. The understanding is embodied in the letters of May 10, 1948, from the Carrier and the Organization's response thereto of May 11, 1948. These letters, including the letter of February 25, 1947, from the Organization to the Carrier, are set forth in the submissions and need not be repeated here. They express the conditions under which an employee may fill a position pursuant to Rule 25 (b) without penalty to the Carrier.

From the language of Awards 3416, et al., hereinabove set forth and from the agreements reached by this exchange of letters, it is apparent that the essential question now before the Board is whether the claimants filled the temporary vacancies willingly or by reason of being instructed to take such positions. The question thus becomes one of fact to be determined by the record.

Under date of June 23, 1949, the General Chairman advised the claimants that if they made the change at the request of the Carrier, they were entitled to pay for both positions, and asked whether or not they filled the temporary position at their own request or that of the Carrier. To this, Claimant Goerner replied on June 25, 1949, that he went on the vacancy "at the request of the Carrier and not at my own request". Claimant Armstrong on the same day replied in identical language. On August 11, 1949, in response to a letter from the General Chairman asking Claimants to comment on the statement of the Carrier that both were "asked if it was agreeable to them to work the positions in question and they informed that they were agreeable", Claimant Armstrong replied: "I was requested to go on this position by the Chief Clerk, and I informed him that I did not want the position, and would not bid on it when it came on the bulletin board." Claimant Goerner, in replying to the same request, wrote on August 2, 1949, to the General Chairman: "* * * when requested to make the change, I made no formal refusal having no wish to leave myself open for a possible charge of insubordination for refusing to work. * * * We both showed that we were not working the positions because of our own personal desires when we refused to bid on the position on bulletin. I would not have bid on the job * * * if it had been bulletined * * *."

Opposed to the position thus taken by the Claimants is the statement of the Superintendent of August 19, 1949, that these "employees were * * * asked if they desired to work them (the vacancies) until we could secure someone to fill the positions". The Chief Clerk, who is the representative of the Carrier who talked directly to the Claimants regarding the positions, wrote, on October 27, 1949, that "I told Mr. Armstrong and Mr. Goerner of the vacancy and inquired if they desired to move up as a result of this vacancy; * * *. They did not indicate that they did not wish to work these positions; and they were not at any time told that they were compelled to work them." On November 1, 1949, the Agent at Houston wrote that he had had no complaint from the men involved being required to work these jobs and that they accepted the assignments voluntarily.

In addition to the foregoing, other facts have a bearing on our determination of these claims. On December 14, 1948, a month after the vacancy, the Organization knew of the situation. On June 28, 1949, over six months thereafter it filed these claims. We can well understand the natural reluctance of an employee to express a disapproval when his superior officer suggests that he take over the duties of a vacancy. However, his Organization can and is in a position to protect him in such situation. But here no notice was brought to the Carrier that Armstrong and Goerner were not willing to fill the positions on a temporary basis until June 28, 1949. However, at such time the Carrier did learn that these Claimants were not filling the positions voluntarily; and having such notice that the provisions

of the agreement between the Superintendent and General Chairman and the prior interpretations of this Board of Rule 25 (b) were involved, it became incumbent upon the Carrier to restore the Claimants to their assigned positions or pay the penalty imposed by the Rules.

The purpose of the understanding between the parties hereinabove referred to was to accomplish a modification of the ruling in Awards 3416, 3417 and 3418 so as to eliminate the concept that it made no difference whether the move from an assigned position to a temporary vacancy was done willingly or not. A further purpose was to retain the element of "willingness" to make the move as distinguished from obedience to a command. Thus, when requested to assume the temporary vacancies an obligation was upon the employes, or their representative for them, to manifest their attitude in the matter.

On the record of this case, we may conclude that the reasonable interpretation of the facts is that on November 13, 1948, the Claimants were not unwilling to assume the temporary vacancies; that when asked to take such positions the Carrier, in the absence of a then expressed disapproval, had a right to assume the move was made voluntarily. However, when it received notice to the contrary from the Organization, their regularly assigned positions should have been restored to the Claimants.

For these reasons we have concluded the claims are valid for days worked by Claimants off of their assigned positions after June 28, 1949.

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

Claims (a) and (b) sustained to the extent specified in 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.