

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

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

**THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY
AND THE LAKE ERIE AND EASTERN RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Clerks' Agreement:

(a) When it failed to utilize the senior regular assigned employee in filling vacancy on Job 210, East Youngstown, Ohio, on May 21, 22, 23, 24 and 25, 1948:

(b) That Crew Dispatcher J. W. Gregg shall be compensated for five days, May 21, 22, 23, 24 and 25, 1948, account Carrier's action in violation of the Agreement.

EMPLOYEES' STATEMENT OF FACTS: On May 21, 1948 position of Crew Dispatcher, known as Job 210, hours 3:00 P.M. to 11:00 P.M., in the Crew Dispatcher's Office at East Youngstown, Ohio, was vacant by reason of the incumbent bidding off and obtaining another position.

As no qualified extra employees, or employees furloughed from the regular roster, were available to fill the vacancy pending assignment by bulletin, the Carrier assigned Clerk J. Garancsi, whose regular assignment was Relief Position "H" and was assigned as follows:

Sunday	Job 344	Struthers Yard	10:00 P.M. to 6:00 A.M.	\$10.25 per day
Monday	Job 336	West Yard	11:00 P.M. to 7:00 A.M.	9.62 "
Tuesday	Rest Day			
Wednesday	Job 345	Struthers Yard	11:00 P.M. to 7:00 A.M.	10.25 "
Thursday	Job 353	RS Int. Yard	10:45 P.M. to 6:45 A.M.	9.74 "
Friday	Job 335	West Yard	11:00 P.M. to 7:00 A.M.	9.89 "
Saturday	Job 343	Struthers Yard	11:00 P.M. to 7:00 A.M.	10.25 "

Relief Clerk Garancsi did not work his own assignment on the dates in question, the vacancies on his relief position being filled in the following manner.

5-21-48—Job 335—West Yard—Worked by R. L. Meyers, the regular incumbent on his rest day and compensated at the punitive rate.

The principle of denying penalty payments unless an agreement rule provides for such payments is quite clearly set forth by Referee Simons in his findings in connection with Award 5401 of the First Division of your Board, in which he states:

"In the absence of rules clearly establishing the right it will not be held that the carriers and employees contracted to pay and to be paid two days' pay for one day's work."

That principle, although worded differently was followed by the First Division in Awards 5402, 6758, 8251, 10351 and 10812. The same reasoning underlies the decision reached in its Awards 5080 and 12245.

Carrier submits that there is no basis for the instant claim and same should be denied.

Evidence and arguments presented herein have been made known to the employees.

(Exhibits not reproduced).

OPINION OF BOARD: We here concern ourselves with the claim of one J. W. Gregg that the Carrier should have used him to fill vacancy on position designated as Number 210 and a request that he be compensated for the period the alleged violation continued, namely May 21, 22, 23, 24 and 25, 1948.

Claimant held regular assignment as Crew Dispatcher (Position 110), assigned hours 8:00 A. M. to 4:00 P. M., with Sunday as rest day, in Crew Dispatcher's Office, East Youngstown yard district. The vacancy, that is Position 210, had assigned hours 4 P. M. to 12 Midnight, and it is mutually acknowledged that on the date in question there were no furloughed or extra employees available to fill this vacancy and that Respondent used a relief employee available to fill this vacancy and that Respondent used a relief clerk to fill same, who was, in so far as seniority was concerned, junior to claimant.

While under the Agreement of January 19, 1923, provision was made (Rule 10) for the filling of established positions on a temporary basis, no mention was made as to the method to be used in assigning extra employees. The parties executed a Memorandum of Agreement, effective February 1, 1945, which in a sense modified Rule 10, whereby furloughed or extra employees were given priority to assignment on the first thirteen temporary vacancies on regular assignments (all others going to regular assigned employees) during each pay period. The Memorandum of Understanding of January 26, 1945, concerned itself with future assignments of regular employees required to double over. The presently effective Agreement, that is the one bearing date of September 1, 1946, included an addendum or note to Rule 28, which is in substance identical with the first mentioned Memorandum.

The Organization asserts that Rule 28, as presently constituted (including the addendum or notes thereto), constitutes an exception to Rule 10 (a) and (b), and that inasmuch as there were no furloughed or extra employees available, the claimant, as the senior regularly assigned employee in the Crew Dispatcher's Office at East Youngstown yard, was entitled to be doubled over to fill the temporary vacancy on Position 210.

The Respondent takes the position that the Board should not consider this claim inasmuch as the Organization, in waiting four years to present the same, was dilatory to the extreme; and, further, that Rule 10 is a special rule, providing for the filling of temporary vacancies, and, as such, is controlling over Rule 28, when each is examined in light of existent facts of record.

Rules 10 (a) and (b) and Rule 28 read as follows:

"RULE 10

TEMPORARY APPOINTMENT

"(a) When filling vacancies of less than thirty days' duration, the senior qualified employe at stations, offices or departments, where vacancies exists and who desire the position, will be assigned.

"(b) When filling bulletined positions pending an assignment, the senior qualified employe at stations, offices or departments desiring same will be assigned, and in the event bulletin fails to develop an applicant with sufficient fitness and ability, the position may be filled without regard to these rules."

"RULE 28

OVERTIME ON OTHER THAN REGULAR ASSIGNMENTS

"Where extra, relief, or furloughed men are not available, employes required to double over on regular positions or bulletined positions, which may be unassigned due to no bids having been received, shall be assigned on the basis of seniority and qualifications, regardless of their rest day, and when so assigned will be entitled to eight (8) hours' pay at not less than his own rate or the higher rate of the position required to be filled.

"* * *

"NOTE 2: Extra employes and employes furloughed from the regular roster will be given prior consideration to temporary vacancies over regular assigned employes to the extent of thirteen (13) assignments in each pay period, after which all other temporary assignments shall be assigned to regular assigned employes, if qualified, on seniority basis.

Temporary assignments which are not filled by regular employes for reasons of regular employes not being available, or where regular employes decline assignments, or in cases of emergency where regular employes cannot be reached, such temporary vacancies shall then be assigned to extra employes, if qualified, regardless of their pay period of thirteen (13) assignments referred to in Paragraph 1 of Note 2.

This does not guarantee six (6) days work per week to extra clerks; further, if and when extra clerks perform more than one assignment in any twenty-four hour period, extra clerks will be paid at the straight time rate; however, if required to work overtime on a single assignment, such overtime will be paid at punitive rate."

Respondent's contention that the delay of the Organization in presenting this dispute to the Division should preclude any action thereon, except dismissal, is without merit. The Railway Labor Act contains no limitation provision and the effective Agreement between the parties contains no such limitation or cut-off provision. The Carrier has suffered no monetary loss because of the delay of the Organization. The effect of adopting the Respondent's contention would be to place a new rule in the Agreement. This we are not empowered to do. See Awards 3444, 5859 and 5920 of this Division.

It is apparent that the question to be resolved is whether or not the Memorandum in question, and its resultant inclusion as a Note to Rule 28,

had the effect of nullifying or exempting the letter and intent of Rule 10 (a) and (b) when applied to conditions such as those with which we are here concerned.

If it did, the claim here is valid. If not, the claim is without merit.

Rule 10, as initially constituted, pertained to the filling of vacancies of less than thirty days duration. The Memorandum of Agreement, effective February 1, 1945, had the effect of giving furloughed and extra employees priority to the first thirteen vacancies during each pay period. It was the intent of the Memorandum of Understanding of January 26, 1945 to describe how employees who "doubled over" would be assigned.

An analysis of Rule 10 discloses that Paragraph (a) concerns the filling of vacancies of less than thirty days, while Paragraph (b) concerns the filling of bulletined positions on a temporary basis pending regular assignment; however, the application and/or coverage of the rule is not automatic. Under ordinary circumstances the proper method of procedure thereunder is for the Carrier to inform the employee affected of the vacancy when one exists, and ascertain if he desires to fill same.

On the basis of seniority, the claimant was senior to the relief clerk who filled the vacancy in question. Inasmuch as there were no furloughed or extra employees available at the time and place in question, had the Claimant, knowing of the vacancy, expressed a desire therefor he would have been entitled to same. This he did not do.

Rule 10 (a) and (b), and not Rule 28, controls the facts at hand. This claim is without merit.

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 Employee involved in this dispute are respectively Carrier and Employee 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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of September, 1953.