Award No. 6521
Docket No. CL-6429

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

William M. Leiserson, Referee

PARTIES TO DISPUTE:

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

SEABOARD AIR LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Rules of the Clerks' Agreement when on February 26, 1951, and subsequent thereto, it utilized an individual, namely Mrs. P. M. Austin, who had established no seniority rights under the said Agreement which would entitle her to perform Class 2 work, to work the rest days of two P.B.X. Operators Mrs. E. V. Landrum and Miss Mary Ueltschi at Raleigh, N. C.

That Mrs. E. V. Landrum be compensated for eight hours at the time and one-half rate of her position, plus subsequent general wage increases, for February 26, and the same for March 5, 1951.

That Miss Mary Ueltschi be compensated for eight hours at the time and one-half rate of her position, plus subsequent general wage increases, for March 1, and the same for March 2, 1951.

EMPLOYES' STATEMENT OF FACTS: In Raleigh, N. C., there are two P.B.X. operators' positions in existence, one is a six day position and is assigned to work Tuesday through Saturday with Sunday and Monday as rest days. The Monday rest day of this position is worked by an assigned relief clerk, but no relief clerk is required on Sundays. This six day position is filled by Mrs. E. V. Landrum.

The other P.B.X. operator's position, which is a seven-day position, is filled by Miss Mary Ueltschi and is scheduled to work Saturday through Wednesday with Thursday and Friday as rest days.

These P.B.X. operators are relieved on their Monday, Thursday and Friday rest days by a regularly assigned relief clerk who also relieves a crew caller at Raleigh Yard two days a week, thereby completing the five day assignment of the Relief Clerk.

The clerk occupying the relief clerk's position vacated the position and on February 14, 1951, in his bulletin #12 (Exhibit F), the Superintendent advertised the position of P.B.X. Operator-Crew Caller. Accordingly, Mrs. P. M. Austin submitted her application, or bid, for the position on February 17, 1951. (Exhibit A.)

There is no merit to this claim and Carrier respectfully requests its declination.

Carrier affirmatively states that all data contained herein has been made known to or discussed with representatives of the Brotherhood of Railway and Steamship Clerks.

(Exhibits not reproduced.)

OPINION OF BOARD: The two Claimants are PBX Operators, each holding a regular assignment at Raleigh, North Carolina. There is also a regular relief assignment at this point which relieves the Claimants on their rest days, and in addition relieves a Crew Caller on his rest days. This relief assignment became vacant on February 14, 1951, and on the same day the vacancy was bulletined in accordance with Rule 12 of the working Agreement between the parties. The Rule provides that bulletins remain posted for seven days within which applications for the vacancy must be filed and thereafter an assignment "will be made" within five days.

No employe holding seniority applied for the vacancy, but on February 17 (well within the 7-day period) Mrs. Austin, an extra employe who had no seniority filed an application. Under Rule 5 (a) of the Agreement, seniority begins when an employe is assigned to a bulletined position, and 5 (b) provides that extra employes do not establish seniority, but have preference over non-employes in filling a bulletined vacancy. Since there were no other applicants than the extra employe, the Carrier assigned her to fill the vacancy. But instead of making the assignment within the five-day period specified in Rule 12, this was not done until March 9, about 12 days after the period had expired.

The reason for the delay, according to the Carrier, was because Mrs. Austin did not have the qualifications to perform the Crew Caller's duties which were a part of the bulletined relief assignment. It therefore allowed her to learn these duties, on her own time, during the interim between February 17 when she applied for the vacancy and March 9 when she was given the assignment. While she was doing this, however, the Carrier used her to work the rest days of one of the Claimants on February 26 and March 5, and of the other Claimant on March 1 and 2; these days being part of the assignment to relieve them on their rest days.

The Employes do not question the right of the Carrier to assign the vacancy to Mrs. Austin. They claim only that the Agreement was violated by not permitting the regular PBX Operators to work the rest days on the above dates, and using instead the extra employe who had no seniority on those days and did not begin to acquire any seniority until March 9 when she was awarded the bulletined assignment. Because of this violation, compensation at the rate of time and one-half is claimed.[1]

The Carrier denies any violation, and relies on Rules 13 and 57 (f) to justify its position. It argues that Rule 13 authorizes temporary use of the extra employe to work the rest days in question, since no regular employe with seniority had bid for the bulletined vacancy, and further that Rule 57 (f) —"Work on Unassigned Days"—required it to give preference to the extra employe over the regular employes.

Rule 13 is titled "Temporary Assignments", and it stipulates: "Bulletined positions may be filled temporarily pending an assignment, and in event no applications are received may be permanently filled without regard to these rules." This rule obviously applies to filling bulletined positions,

[1] The evidence is clear that Mrs. Austin had the status of an extra employe without seniority, from May 1945 until she received the assignment on March 9, 1951, although the Employes argued that she had lost her seniority and had the status of a new employe.

and equally obviously the relief position in this case was not filled until March 9 when Mrs. Austin was assigned to it. What happened on the days in question was that she was used only to temporarily relieve the Claimants on their rest days. She could not fill the bulletined position because this included two days of crew calling for which she was unqualified and was still learning on her own time. Plainly the Carrier did not assign her to fill the bulletined position until March 9.

Nor can we accept the contention that the four days for which claim is made were unassigned days within the meaning of Rule 57 (f). This rule reads: "Where work is required by the Company to be performed on a day which is not part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe." The four days were part of the regular relief assignment which was bulletined, and under the rules should have been filled by February 26, the first of the days claimed. The four days were also assigned rest days of the Claimants. The fact that the Carrier failed to fill the vacant assignment within the prescribed time limit did not turn the assigned days into days not part of any assignment. The extra employe was used to relieve four days of the regular relief assignment and the rest days of the regular employes.

The Carrier argues, also, that since no applications were received from employes holding seniority during the bulletined period, it "was free and privileged to permanently fill the position without regard to the rules." Such freedom to fill a vacancy is given to the Carrier by Rule 13 quoted above. But as already pointed out the Carrier did not fill the vacancy until March 9, and then chose the extra employe which was its right. There is nothing in Rule 13, however, that authorizes the Carrier to use an extra employe lacking seniority to relieve on rest days of a regular assignment prior to the time such an employe acquired seniority on a bulletined regular assignment. And this is what the Carrier did in the present case.

We think the seniority, bulletining, and forty-hour week rules of the Agreement show a consistent intent that only employes with seniority shall relieve temporary vacancies on days that are a part of bulletined assignments. Seniority can be attained only by occupying a bulletined, regularly assigned position, and Rule 5 specifically provides that "Extra employes will not establish seniority". They have preference over non-employes in filling a bulletined vacant position when no one with seniority bids for it, but nowhere in the Agreement can we find a provision giving extra employes without seniority preference in relieving short vacancies on assigned positions over employes that do have seniority. Furloughed or other unassigned employes who have seniority would be entitled to relieve such vacancies if they would not otherwise have 40 hours work, but not extra employes lacking seniority.

The intent to restrict such relief work to employes holding seniority is further shown by "New Rule 57" of Supplemental Agreement dated June 13, 1950. This rule, titled "Service on Rest Days" makes specific provision in Paragraph II for regular employes to serve on rest days and to relieve other employes assigned to work such days. It reads:

> "(II) Service rendered by an employe on his assigned rest day, or days, relieving an employe assigned to such day, shall be paid at the rate of the position occupied or his regular rate, whichever is the higher, with a minimum of eight (8) hours at the rate of time and one-half."

Of course, if no employe holding seniority is available for such relief work on an assigned day or days, the Carrier would be free to use one without seniority, or a new employe. But except in such cases, the only provision for extra employment without seniority having preference over those holding seniority is in Rule 57 (f) when the day worked is not part of any

assignment. In the instant case it is clear that the days worked were part of the bulletined regular relief assignment and the assigned rest days of the Claimants.

Two subsidiary questions are raised by the Carrier: (1) that there was a practice of using Mrs. Austin to relieve regular employes on their rest days, and particularly that she worked on February 15 and 16 to relieve the Claimants here, without any protest or claim being filed for those two days; (2) that if a violation is found, Claimants are entitled only to straight time pay as a penalty, and not the overtime rates in view of the many rulings of the Division to this effect.

As to (1) the Employes point out that on March 8 and 9, the Carrier properly used the regular employe to work these rest days. The Carrier says this was done in error. The mere fact that a claim was not filed for February 15 and 16 is no more proof that the Employes were agreeable to working the extra employe than the Carrier's use of the regular employe on March 8 and 9 is proof that it agreed that it was obligated to use the regular employe. As to the practice prior to February 1951, the evidence shows that Mrs. Austin was used mostly to relieve employes on vacations, sick relief, and excused hours or days. There was no evidence of an established practice of extras without seniority relieving assigned positions which could be interpreted as indicating that the Employes had assented to any such practice. No extra list is maintained in the seniority district here involved.

As to the penalty, the many Awards of the Division holding that under circumstances like those in the present case claims should be sustained only at pro rata rates require the same ruling here.

The Carrier having violated the Agreement by using an employe without seniority to relieve on days that were parts of regular assignments, the claim must be sustained, but at the straight time rate. Both as to the violation and the penalty, Awards 5240, 5717 and 5921 reached the same result under factual situations and rules substantially the same as here.

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 respectfully 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 Agreement was violated.

AWARD

Claim sustained at straight time rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 24th day of March, 1954.

DISSENT TO AWARD 6521, DOCKET CL-6429

The Opinion in this case states:

> " * * * the only provision for extra employes without seniority having preference over those holding seniority is in Rule 57(f) when the day worked is not part of any assignment."

In other words, the Referee admits that it would have been proper to use Mrs. Austin on the days in question if those days were not part of any **assignment.**

He then proceeds to hold that the days in question were part of an assignment and that, consequently, Rule 57 (f) did not authorize the use of Mrs. Austin. In reaching this conclusion, the Referee confuses "bulletin" with "assignment" and regards the two as synonymous.

As the Referee points out, the Carrier "bulletined" or advertised a **regular relief job** with two days of work as crew caller and three days as PBX operator. No employe with seniority bid on this job, and Mrs. Austin, an extra employe, bid for it. Since she was not qualified as a crew caller, the Carrier was unable to award her the job. She was permitted to qualify on her own time, and, after she had done so, the Carrier awarded her the job on March 9, 1951.

In the meantime, the Carrier used Mrs. Austin—as an extra, unassigned employe—as a PBX operator on certain of the rest days of the Claimants. As set forth above, the Referee recognizes that if these days were not part of any assignment within the meaning of Rule 57(f), Mrs. Austin was properly used as an extra employe. How does he arrive at the conclusion that these days were part of an "assignment" when it is clear that no one was assigned to work on those days? The Referee makes it clear that no one was assigned as relief operator and that the bulletin issued by the Carrier had not produced a qualified applicant. He says:

> " * * * the relief position in this case was not **filled** until March 9 when Mrs. Austin was assigned to it. What happened on the days in question was that she was used only to temporarily relieve the Claimants on their rest days. She could not fill the bulletined position because this included two days of crew calling for which she was unqualified and was still learning on her own time. Plainly the Carrier did not assign her to **fill** the bulletined position until March 9." (Emphasis Referee's.)

The Referee states that the days in question were not unassigned days because a **bulletin** had been issued advertising the relief job. He thus confuses the **bulletining** of a job with the **assignment** of a successful applicant to it. Thus, he says:

> "The four days were part of the regular relief assignment which was bulletined * * *."

The bulletining or advertising of a job does not mean that the work days covered by the bulletin are "assigned days." They remain days which are not a part of any assignment until some individual has been **assigned** to the job. Suppose a Carrier were to bulletin a particular job and no one applied for it and the Carrier was unable to find an applicant. Would this Referee hold that since it had been **bulletined** it had also been **assigned?** Presumably so—even though no one ever actually occupied or worked on the job. Under these circumstances he would also presumably hold—as he does in the present case—that extra employes could not be used pending award of a bulletined job.

To hold that once a job has been bulletined it has been assigned—even though it has never been awarded to an individual and no one is occupying the job or working on it—is patent nonsense.

The days in question in this case are clearly days "which are not a part of any assignment" within the meaning of Rule 57(f). This Rule requires the use of an extra employe such as Mrs. Austin under these circumstances. The award is erroneous, and we dissent.

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ J. E. Kemp