

Award No. 6564

Docket No. CL-6635

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**

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees:

(1) That Carrier violated rules of our agreement in calculating wage earnings due Harry Schulman, regular assigned Ticket Seller at St. Louis Union Station, for services performed relieving the Day Ticket Agent, who was absent on vacation on Washington's Birthday, Friday, February 22, 1952.

(2) That Schulman be paid the difference due him representing that paid at the pro rata rate, namely \$19.44, and the amount properly due him at the overtime rate, namely \$29.16, a difference of \$9.72.

EMPLOYEES' STATEMENT OF FACTS: The claimant Mr. Schulman is regularly assigned to position of Ticket Seller at the St. Louis Station.

Mr. Schulman was assigned by Carrier to fill the position of Day Ticket Agent, Mr. Toenges, during the latter's absence on vacation from February 18 to March 2, 1952. This assignment required the performance of service by him on Friday, a National Holiday—Washington's Birthday, February 22, 1952, for which service he was compensated at the pro rata rate of the position worked, whereas, he should have been compensated for the services performed at the overtime rate.

Formal claim was filed by Claimant on March 3, 1952 with his employing officer, Mr. F. S. Donnelly, G. P. & T. A. Mr. Donnelly denied claim contending payment made Mr. Schulman was in accordance with Article 10 of the National Vacation Agreement. Employees' Exhibit 1-A and 1-B.

The claim was thereafter appealed to Traffic Manager, Mr. Henry Schmittgens, Jr., and thence to the Director of Personnel, Mr. John A. Wicks, both of whom sustained Mr. Donnelly's declination of Mr. Schulman's claim. Mr. Wicks, however, in his final declination of the claim added:

"Mr. Schulman was paid the same salary for the time he worked Mr. Toenges' position that Mr. Toenges would have received had he remained in service. He is not entitled to more." (Employees' Exhibit 2)

that went with the position filled, including compensation and as he was so paid he is not entitled to the additional compensation claimed.

The claim should be denied.

All data submitted in support of our respective positions has been presented to the other party and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The essential facts in this case are not in dispute. Claimant is a regularly assigned Ticket Seller, his daily rate of pay being \$15.99. At the request of the Carrier and with his consent he worked temporarily in place of the Day Ticket Agent who was on vacation from February 18 to March 2, 1952. This Ticket Agent's position is partially excepted from the Agreement between the parties, and pays a monthly rate of \$423.50. It is agreed that this was properly converted to a daily rate of \$19.44 which claimant was paid each day that he worked the Ticket Agent's position. The claim is that he should have been paid an additional \$9.72 for working on Washington's Birthday because Rule 44 (b) provides pay at the rate of time and one-half for work performed on this and other specified legal holidays.

In a letter to the Carrier's Director of Personnel, dated February 27, 1953, the General Chairman seemed to imply that claimant did not get the higher rate of pay provided by Rule 48 when an employee is temporarily assigned to a higher rated position. But the Ticket Agent did not receive over-time pay for working on legal holidays, so the claimant was not paid less than the higher rate of the position to which he was temporarily assigned.

The Employees also state that they do not contend claimant was "forced" to work the Ticket Agent's position. They say: "The claim is solely on the basis of the amount of pay (claimant) should have received for working the position on Washington's Birthday." They rely on a consistent line of decisions, cited in the record, in which this Division has held that an employee covered by an agreement does not become excepted when he is temporarily used to work a position excepted from the Agreement.

The Carrier does not question those decisions; but it contends that they are not applicable to the instant case because: (1) they all involved Train Dispatchers' agreements which were not the same as the Clerks' here; (2) in the present case the Ticket Agent's position is only partially excepted from the Agreement whereas in the Train Dispatchers' cases the positions temporarily occupied by employees covered by agreements were wholly excepted; (3) there is a special Memorandum Agreement between the parties here which provides what shall be done when "the company chooses to fill temporary vacancies" of less than 30 days and qualified employees "elect" such assignments. The Carrier contends, therefore, that claimant was properly paid under the Agreement here involved, as well as the Memorandum Agreement dated October 31, 1950.

A reading of the Train Dispatchers' cases shows that they all involved wholly excepted positions, and in each case the Award was based on the fact that only one Chief Train dispatcher was excepted and the Board found that the Carrier was without authority to add to the number of excepted positions. The rulings were, therefore, that the employees who temporarily worked the excepted positions were only Acting Chiefs and continued to be covered by the agreements because only the Chief could hold an assignment on the excepted position.

In the instant case, however, the Ticket Agent's position is covered by Rule 1, the Scope Rule of the Agreement, and paragraph (d) of this rule provides: "In filling any of the positions listed (as excepted), consideration

shall be given to employees coming under the provisions of this agreement." The position is covered also by Rule 4 (d), which stipulates that employees promoted to excepted positions shall retain and continue to accumulate seniority, and by Rule 14 which protects their seniority status "when relieved from temporary assignment or official (excepted) position." In addition, Rules 24 and 25 are applicable to the excepted position "in the event of complete separation from the service." These two rules deal with "Appeals and Further Hearings, and with Representation" at investigations conducted by the Carrier.

The pertinent provisions of the Memorandum Agreement reads as follows:

"Employees electing to fill temporary vacancies under the foregoing provisions (4 paragraphs) will assume the duties, rest days, rate of pay, starting time, and all other conditions of the position filled, and moves in connection therewith will be governed by the same rules applying to moves made in filling bulletinable vacancies."

Although it might be inferred from the Awards in the Train Dispatchers' cases that what was said about the wholly excepted positions would also apply to partially excepted positions, we think the Carrier's contention is correct that those cases are not controlling in the present case because the Ticket Agent's position is covered by the Clerks' Agreement to the extent indicated above. And while the Memorandum Agreement merely implements Rule 10 which is not directly applicable to the Agent's position, paragraph (d) of Rule 1 does obligate the Carrier to give consideration to employees covered by the Agreement in filling the Agent's position, thus making it indirectly applicable.

Moreover, the Employees contend and the Carrier admits that it was obligated by the Agreement to use senior qualified ticket seller to fill the temporarily vacant Agent's position. It first offered the short vacancy to "senior employee Albert Acker" but he declined it, as was his right under the Agreement. Thereafter the Carrier offered it to claimant who was the next available senior employee, and he elected to accept.

Under these circumstances and on the provisions of the Agreement in this case we think claimant assumed all the conditions of the Agent's position as provided by the Memorandum Agreement. He was, therefore, properly paid, and the claim for overtime pay is not valid.

(Page references relate to original document.)

FINDINGS: The Third Division of the Adjustment, 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 Employees 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 claim is not valid.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois this 26th day of April, 1954.