Award No. 6733
Docket No. CL-6974

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

HOUSTON BELT & TERMINAL RAILWAY COMPANY

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

(a) The Carrier violated the Clerks' Agreement at Settegast Freight Station December 1 through 14, 1952, when it failed to fill Mr. Bailey's position during the time he was relieving Mr. Lansdell who was on vacation. Also

(b) Claim that Mrs. Hilda Cravey, Mr. L. B. Chambers and Mr. N. U. Onofrio be reimbursed the exact amount they would have earned had they been called to fill Mr. Bailey's position.

EMPLOYES' STATEMENT OF FACTS: During the period here involved Mr. Lansdell was the regularly assigned incumbent of Chief Bill Clerk position No. 373.

Mr. Bailey was the regularly assigned incumbent of Rate and Bill Clerk position No. 374.

Mr. Lansdell was on vacation December 1 through December 14, 1952 and during this period Mr. Bailey worked Mr. Lansdell's position of Chief Bill Clerk.

Mr. Bailey's position No. 374 was not filled during the two weeks he worked Mr. Lansdell's position.

POSITION OF EMPLOYES: Mr. R. A. Lansdell, Chief Bill Clerk at the Settegast Freight Station, was on vacation beginning December 1, 1952. He return from his vacation and resumed his position December 15, 1952.

During the time Mr. Lansdell was absent on his vacation his position of Chief Bill Clerk was filled by Mr. F. R. B. Bailey who is regularly assigned to position of Rate and Bill Clerk.

During this same period Mr. Bailey's position of Rate and Bill Clerk was blanked—that is, it was not filled.

Division Chairman Newbill filed this claim on January 12, 1953 as disclosed by Exhibit "A", directing attention to the official interpretation by Referee Morse.

more than pro-rata rate of Position 474, on the well established practice of your Board to restrict awards for time allowed but not worked to pro-rata.

(Exhibits not reproduced).

OPINION OF BOARD: The factual picture is clear and can be briefly detailed. Summarized the Claimants assert and the Carrier concedes the following facts.

Chief Bill Clerk Lansdell, Position 373, Settegast Freight Station was on vacation December 1 to 14, 1952. During this period of time Carrier permitted Clerk Bailey, regularly assigned occupant of Rate and Bill Clerk, Position 374 at the same point, to vacate his own position and fill Position 373 with instructions and full understanding that he could work overtime in order to keep up the immediate and necessary duties of both positions. Position 374 was blanked. During the interim, and in attempting to perform the work of both positions Bailey worked, and was paid for, 2 hours and 30 minutes overtime each day for ten days on Position 373. In addition he was paid the regular salary of such position.

Although it is agreed there were no qualified extra employes available at the time Bailey took over Position 373 the parties, as will be presently disclosed, assert and purport to entertain entirely different views on the question whether there were other employes holding regular assignments who were qualified and hence available to perform the involved work.

Resort to the record makes it appear that except for the Vacation Agreement the closest applicable rule having application is a Memorandum Agreement executed July 3, 1950, and now a part of the current Agreement which, so far as pertinent, reads:

"It is mutually agreed between the parties hereto that the following conditions will govern the filling of temporary vacancies in Seniority District No. 1.

"(a) All temporary vacancies caused by regularly assigned employes laying off will be filled by the rearrangement of the remaining regular assigned force in that office, with senior employes being given their choice.

"* * *

"(j) In the rearrangement of the regular force under the provisions of Paragraph (a) it is understood that such employes cannot be required to work temporary vacancies if they do not desire to do so."

Section "(j)", it is to be noted, is of less importance than Section "(a)". Nevertheless it indicates that, contrary to what has been suggested, the Memorandum applies to the regularly assigned forces as well as the extra list.

There is no need for extended discussion of the foregoing rule or the intricacies of arguments advanced by the parties in connection therewith. For our purposes all that is necessary to be said is that we find nothing therein, or elsewhere in the Rules Agreement, that can be construed as conflicting with Rule 6 of the Vacation Agreement, which we deem highly important to a decision on the merits. Such rule reads:

"6. The Carriers will provide vacation relief workers but the vacation system shall not be used as a device to make unnecessary jobs for other workers. Where a vacation relief worker is not needed in a given instance and if failure to provide a vacation relief worker does not burden those employes remaining on the job, or

burden the employe after his return from vacation, the Carrier shall not be required to provide such relief worker."

In the record preceding the Opinion of this Award, particularly in Claimants' ex parte submission, extended quotations from Interpretations by Referee Morse of the force and effect to be given Section 6 heretofore quoted of the Vacation Agreement are quoted at length. Excerpts from the Interpretations there referred to, which we recognize, are too lengthy for quotation and for that reason are made a part of this Opinion by reference.

We are not disposed to labor the Interpretations to which we have just referred, as they appear in the record and in the Vacation Agreement, or the Awards of this Division upholding them. Without more ado it suffices to say, that under the confronting facts and circumstances, which clearly disclose the involved work was not performed in accord with such Interpretations, we are convinced that Section 6 of the Vacation Agreement, as well as the Interpretations placed thereon by Referee Morse, also well reasoned Awards of this Division of the Board, compel the conclusion Carrier was required to furnish vacation relief in the instant case and could not avoid that obligation by assigning Bailey to Position 373 and blanking, as it did, Position 374.

In reaching the conclusion just announced we have not overlooked reasons relied on by Carrier in an effort to forestall it, even though regarded as lacking in merit. These should now be mentioned and briefly discussed.

First it is argued the Claimants have not cited or referred to any violation of the Agreement. This argument, as we have heretofore indicated, lacks merit because Section 6 of the Vacation Agreement is applicable and decisive.

Next it is urged that the three employes for whom the claim is filed were not qualified and therefore could have no valid claim. We recognize the rule that ordinarily questions respecting the fitness and ability of an employe to perform work is for decision by the Carrier and, once it is determined, is rarely disturbed except on the basis of unreasonableness, arbitrariness or capriciousness. Such rule, however, does not warrant this Division in shutting its eyes to the clear unvarnished truth. Here the record discloses that the Carrier and the two involved employes agreed to the procedure followed without apparent regard for requirements of the Vacation Agreement. Carrier's proof as to Claimants' qualifications is based on alleged statements, in the nature of hearsay, made to it by Lansdell and Bailey on that subject, without further inquiry. That does not overcome positive statements, which the Brotherhood produced, disclosing that Claimants had theretofore performed similar work and were qualified. But even if it be assumed Claimants' statements were controverted by evidence of probative value it cannot be denied the undisputed evidence is that they were qualified to perform some of the work incident to the positions of both Lansdell and Bailey. At the very least Carrier could have arranged the work in some manner, assigning them to perform the less technical portions of the work that was permitted to accumulate, as well as that Bailey performed throughout the days in question, and thus avoided the violation of the Agreement. Faced by such a situation we are constrained to hold Carrier's action in failing to assign Claimants the work on the ground they were not qualified to perform it, which it should be noted is likewise the reason assigned for denial of the claim on the property, was unreasonable and arbitrary.

Finally Carrier contends that even had Claimants been qualified they would have stood for no work at Settegast Freight Stations under any conditions in December 1952. The short and simple answer to this contention, is that there is no proof to sustain it.

Touching its liability on the claim, if—as we have held—the Agreement was violated, Carrier contends that since Claimants performed no work,

recovery under established Awards of this Division must be based on the pro rata rate of Position 374, not its punitive rate. With this we agree. See Award 6730, this day adopted, and the numerous Awards there cited.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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

That the Agreement was violated.

AWARD

Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 27th day of July, 1954.