Award No. 6831
Docket No. CL-6847

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred W. Messmore—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 Hnadlers, Express and Station Employes:

1. That the Carrier violated the rules of the Agreement of January 1, 1950 between the parties when it failed to notify Mail and Baggage Handlers Robert C. Vaughn and Ben F. Woods to perform emergency work on Thursday, March 26, 1953, and;

2. That said Robert C. Vaughn and Ben F. Woods be paid one day's pay at time and one-half rate for March 26, 1953.

EMPLOYES' STATEMENT OF FACTS: The employes affected by this claim have regular assigned positions as Mail and Baggage Handlers. Mr. Vaughn's days of rest are Thursday and Friday, and Mr. Woods' days of rest are Wednesday and Thursday.

On Thursday, March 26, due to an increase in the volume of mail which was moving through the St. Louis Gateway, it was determined by the General Baggage Agent that it would be necessary to have additional help to augment the regular crews on the P. M. tour. A number of employes who were on their days of rest were notified to report for duty on this date. However, the Carrier failed to notify Messrs. Vauhn and Woods. Among the employes notified to work were Harvey Edwards, Charles Kellerman, and Clyde Sherrod. The respective seniority standing of these three employes and that of Messrs. Vaughn and Woods is as follows:

Robert C. Vaughn	9- 3-49
Harvey Edwards	7-25-50
Ben F. Woods	10- 8-50
Clyde Sherrod	12-13-50
Charles L. Kellerman	3- 7-52

Upon their return to work, Vaughan and Woods made written claims for a day's pay at punitive rate upon the General Baggage Agent. The claim was denied on the grounds that neither of them had a telephone listed where they could be reached.

All employes needed who had complied with the requirement to make themselves available by furnishing a means of notification were called.

There is no valid basis for the claim and it should be denied. However, should it be sustained it should be a the pro rata rate as it has been well established that that is the proper rate for time not worked. See Awards 5117, 5240, 5444, 5548, 5607 and 5721 of this tribunal.

All data submitted in support of Carrier's position has been presented to the duly authorized representative of the Employes and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are not in substantial dispute. The record discloses that claimants Robert C. Vaughn and Ben F. Woods, hold regular assigned positions as Mail and Baggage Handlers. Vaughn's days of rest are Thursday and Friday, and Wood's days of rest are Wednesday and Thursday. Late in the afternoon of March 26, 1953 (Thursday), the Carrier was experiencing difficulty in the operation of a new facility for handling United States mail. The General Baggage Agent deemed it necessary to procure additional help to augment the regular crews on duty. Among those notified to work were Harvey Edwards, junior in seniority to claimant Vaughn, Clyde Sherrod and Charles L. Kellerman, each junior employes to the claimants Vaughn and Woods. Vaughn and Woods were not called or contacted to go to work on this date. No effort was made to call, notify, or contact them regardless of whether a means of communication was listed or not. Both claimants had a means of communication which had been used previously by their supervisor to contact them.

The Employes rely on Rule 7 of the Agreement. This Rule provides:

> "Employes covered by these rules shall be in line for promotion. Promotions, assignments, and displacements under these rules shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail."

The contention of the Employes is that the Carrier was obligated to notify the claimants of the assignments available to them on their days of rest.

The Carrier's position is that there are no call systems in effect in any department on the property, and there are no restrictions on employes as to where they may reside.

The telephone is the accepted means of notifying employes to report to work, fully recognized by the Organization in Memorandum Agreement No. 12. The same requirement was contained in Memorandum Agreement No. 24, covering the use of regularly assigned employes on their rest days when extra or furloughed employes were not available. In the instant case no extra or furloughed employes were available to perform the work in question on March 26, 1953.

There is no occasion to set forth or discuss Memorandum Agreement No. 12, for the reason that it applies only to furloughed or extra employes and not to regularly assigned employes such as are involved here.

Memorandum Agreement No. 24 was in effect on March 26, 1953. It was cancelled by Mediation Agreement as of August 1, 1953.

Memorandum Agreement No. 24 provides in part as follows:

> "Employes off duty on their assigned days of rest will be used when the company chooses to fill temporary vacancies that cannot be taken care of at pro rata rates by rearrangement of regular forces

or the use of furloughed or extra men. They will be used in seniority order, subject to fitness and ability as defined in Rule 7, and the conditions outlined below: * * *

"(2) Employes desiring to participate in this work will file written notice to that effect with their supervisor and the local chairman. Such notices must indicate whether or not they are going to protect all vacancies or just those occurring on their own shift. They may be cancelled or terminated in the same manner on ten days' notice. The Supervisor will keep record of all calls made, which will include the man's name, job involved and time called, and the record will be available to the local chairman at any time.

"(3) Employes participating in the work must list a telephone where they will be available on call. Failure to answer the phone or to accept call will automatically remove the employe's name from the available list unless they are excused in advance for work on certain rest days or an emergency arises which makes them unavailable, in which event they will phone their supervisor at the earliest possible moment. Such instances will not be charged as failure to respond. Employes whose names are removed from the list may reinstate themselves after ten (10) days by again filing written notice as outlined in Paragraph (2). When an employe is removed from the available list, he will be notified by the supervisor, with copy to Local Chairman."

It will be observed by (2) above, employes desiring to participate in this work will file written notice to that effect with their supervisor or local chairman, but none of the employes in the Mail or Baggage Room ever so filed their names with the supervisor.

We find no rules or agreements in effect on this property which require regular employes must have telephones listed. All (3) above indicates is that employes participating in the work must list a telephone where they will be available on call. We believe, under the circumstances as pointed out above, where there is no effort made by the Carrier to contact, notify, or call a regular employe to perform work under the conditions that prevailed in the instant case, that provisions (2) and (3) are not applicable.

We make reference to Award 5926 which dealt with Memorandum Agreement No. 24, involving the same parties and the same Rules Agreement, which we deem applicable to the instant case and which contains a rather conclusive analysis of the Agreement and the Rules. It reads in part:

"In directing attention to the instruments heretofore mentioned it must be kept in mind there is actually no cause for construing the seniority rules of the current January 1, 1950, working Agreement since it is conceded that unless they have been superseded by Memorandum No. 24 application of their terms to the existing facts and circumstances entitled Claimant to a sustaining Award. Therefore, without more ado, we turn to such Memorandum Agreement the first paragraph of which reads:

> 'Employes off duty on their assigned days of rest will be used when the company chooses to fill temporary vacancies that cannot be taken care of at pro rata rates by rearrangement of regular forces or the use of furloughed or extra men. They will be used in seniority order, subject to fitness and ability as defined in Rule 7, and the conditions outlined below;'

"It is true, as the Carrier suggests, that following the portion of the Memorandum just quoted, there is a paragraph providing that 'employes desiring to participate in the work will file written

notice to the effect,' also another paragraph stating what the employes who have filed such a notice must do to preserve their rights under that Agreement, Nevertheless, when that instrument is read in its entirety and everything that is to be found therein carefully analyzed, we fail to find anything: (1) Providing what is to be done respecting seniority when—as here—employes have failed to file written notices under its terms; (2) stating that theretofore existing seniority rules of the current Agreement are to be disregarded and short vacancies filled at the discretion of the Carrier without regard thereto; or (3) specifying, as the current Agreement did when executed (see Rule 2), that the Memorandum Agreement superseded and was a substitute for all theretofore existing agreements, practices, and working conditions in conflict therewith. Moreover, we note the quoted paragraph of the Memorandum itself expressly provides that employes off duty and used on their assigned days of rest will be used in seniority order, also that Rule 7 of the January 1, 1950, Agreement providing that promotions, assignments, and displacements under these rules shall be based on seniority, fitness, and ability, with seniority prevailing where fitness and ability is sufficient, is still in full force and effect. In view of the foregoing conditions and circumstances we are constrained to hold that Memorandum Agreement No. 24 is to be construed as applying only to situations where notices have been filed in conformity with its terms and that in the absence of action bringing employes within the scope thereof the Carrier cannot ignore seniority but is required to fill short or temporary vacancies in accord with and in the manner contemplated by the seniority rules of the current Agreement. To so hold gives force and effect to all agreements in existence between the parties. To hold otherwise, as the Carrier would have us do, would result in our reading something into Memorandum Agreement No. 24 that is not there and completely disregard the seniority rules of the current Agreement to which we have just referred."

In a great number of Awards this Board has given recognition to seniority as evidenced by the following:

"* * * The difficulty with the position of the Carrier as above stated is that nowhere does it show that it made any attempt whatsoever to contact any of these employes whether they had listed a means of communication with it or not. If effort had been made to contact any of the claimants and they were found unavailable or unwilling to work, there would appear to be good reason for denying a claim for such employes. * * *" (See Award 4467.)

"One of the paramount purposes of collective agreements in railroad service is the establishment and protection of seniority rights.* * *" (See Award 2341.)

The Carrier asserts that in the event the claim should be sustained, it should be at the pro rata rate. As stated in Award 5926 above cited:

"* * * However, this is penalty payment, no compensation for time actually worked. Therefore, the rate should be that which the incumbent of the position would have received if he had performed the work. See Awards 4467, 5117, 5240, 5444, 5548, 5607, and 5721 of this Division. That, under the facts of record, would have been the **pro rata, not the punitive, rate.**"

From the whole record we conclude the Carrier violated the Agreement and the claim is sustained with the exception above noted with reference to that part of the claim No. 2.

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

Claim (1) sustained. Claim (2) sustained at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. I. Tummon
Secretary

Dated at Chicago, Illinois this 3rd day of December, 1954.