

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY

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

(a) The Carrier violated the Clerks' Agreement when on October 13 and 14, 1952, an employe junior to claimant, H. Lange was used to fill temporary vacancy position, Relief Clerk No. 2, Second Night Chief Clerk, Vancouver Yard Office.

(b) Claimant, H. Lange, be compensated for the two days' wage loss at overtime rate.

EMPLOYES' STATEMENT OF FACTS: The regular assignee to position of Car Distributor, Job No. 15, in the Vancouver Yard Office was absent on vacation from Monday, October 13, to Friday, October 17, 1952. Five days.

As of this date—Monday, October 13, 1952—there were two employes assigned to Relief Clerk Job, viz:

Dale Osborne to Relief Clerk Job No. 2:

Friday assigned to Relief Job	No. 21
Saturday	No. 15
Sunday	No. 12
Monday	No. 11
Tuesday	No. 11
Wednesday	Rest day
Thursday	Rest day

L. A. Wolken to Relief Clerk Job No. 4:

Thursday assigned to Relief Job	No. 21
Friday	No. 14
Saturday	No. 14
Sunday	No. 19
Monday	No. 19
Tuesday	Rest day
Wednesday	Rest day

assigned employee assigned to such vacancy in these circumstances "will take the rest days of the position relieved." Rest days of the position relieved R-2) were Wednesday and Thursday (October 15 and 16). By assuming the rest days of the position relieved, Claimant Lange would necessarily have relinquished the assigned rest days of his regular position, while filling the temporary vacancy, and thus would not be entitled to be paid at the punitive overtime rate for service performed on the rest days so relinquished.

In conclusion the Carrier contends that Claimant Lange in any event cannot be entitled to compensation at punitive overtime rate for October 13 and 14 when he did not, in fact, work those dates. Authority for this contention is contained in numerous awards of this Division, including Awards 4244, 4728, 4815, 4817, 5177 and 6358. In Award 6358, Referee McMahon, sitting with the Board, held:

"Had the employees worked the position they claim, their proper rate would have been at one and one-half times the pro rata rate. his Board has on numerous occasions held that where the work has been performed, as is not the case here, the proper rate is one and one-half times the pro rata rate. But where the employee is entitled to a sustaining award without performing the actual work, the proper rate is what the employee would earn at the straight time or pro rata rate. Since the work claimed in this case was not performed, we must reaffirm the many cases on this subject, and hold that claimants should be entitled to the pro rata rate of pay."

All data in support of Carrier's position have been submitted to the Organization and made a part of this particular question in dispute. The right to answer any data not previously submitted to the Carrier by the Organization is reserved by the Carrier.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier maintained four positions under the Clerks' Agreement in its yard office, Vancouver, Washington, as follows: No. 15, G. W. Osborn, Monday through Friday; No. 2, Dale Osborn, Friday through Tuesday; No. 4, L. A. Wolken, Thursday through Monday; and No. 11, H. Lange, Wednesday through Sunday. The occupant of No. 15 position was off on vacation, Monday through Friday, October 13 through 17, 1952. The occupant of No. 2 position filled the No. 15 position during this period, thus creating a temporary vacancy on Position No. 2, a relief clerk position. The occupant of No. 4, a relief clerk position, was used on Monday and Tuesday to work the No. 2 position, Tuesday being one of his rest days. After working Monday and Tuesday on the No. 2 position, he reverted to his No. 4 position on Wednesday, the second rest day of that position. The Claimant, H. Lange, occupied the No. 11 position and was senior to Wolken. The occupant of the No. 2 position relieved on the No. 11 position on Mondays and Tuesdays but had been assigned to No. 15 on Monday as noted. Monday and Tuesday, October 13 and 14, 1952, were regular rest days of the No. 11 position. Claimant Lange, being senior to Wolken, claimed the work on his two rest days. Claimant Lange made no written request to perform the work. This appears to have been the basis for the denial of the claim. It is not disputed that there were no qualified extra employees available. The controlling rule is:

"Positions or vacancies of thirty (30) days' or less duration shall be considered temporary and will be filled under the provisions of Rule 26 (b), except that senior qualified employees in the immediate office or station will be given preference thereto, unless an available qualified extra employee is senior to such regular employee. At smaller line stations where facilities are combined and all clerical employees are under the jurisdiction of a single supervisor or officer, each such point shall be considered a single immediate station. At all other points, the term 'immediate office or station' shall be defined by agreement between the management and the General Chairman.

"Employees filling such positions or vacancies shall return to their former positions at the expiration of such short term work." Rule 13, current Agreement.

It appears that difficulties arose between the Organization and the Carrier as to the proper application of Rule 13 which resulted in a Letter Agreement dated July 24, 1951. The pertinent part of the Letter Agreement provided:

"3. Where a vacancy exists for more than one day and not more than 30 days and a qualified extra employe is not available, the regularly assigned employe, assigned to fill such vacancy under Rule 72, will be paid under the provisions of Rule 72 and while so assigned, will take the rest days of the position relieved, except where employe continues to work his regular assignment, he will not be considered as assigned under Rule 72 and will be paid time and one-half rates for second shifts worked in a 24-hour period and on assigned rest days of his regular position.

"It was further understood that hereafter employes exercising their preference under Rule 13 will confirm such election in writing."

It appears to us under the rule and letter agreement, where a vacancy exists for one day and not more than 30 days and a qualified extra employe is not available, the senior qualified employe who elected in writing to claim the work is entitled to perform it. Claimant made no election in writing. Consequently he obtained no right to the work under this provision.

It is urged by the Organization that Wolken made no valid election to work the temporary vacancy. We agree with this contention. Wolken did elect in writing to work Monday and Tuesday, October 13 and 14. But he did not elect in writing to fill the five day vacancy as the rule requires. He worked two days and returned to his regular assignment. This was not a compliance with the Agreement and the letter provision. There being no employe who elected in writing to fill the temporary vacancy, it should have been filled on a seniority basis. Claimant being senior to Wolken was entitled to the work on his rest days. The penalty for work lost, other than on holidays, is the pro rata rate. We therefore sustain the claim at the pro rata rate.

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 Employees involved in this dispute are respectively Carrier and Employees 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 the pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 4th day of February, 1955.