Award No. 7034

Docket No. CL-6951

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

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (Eastern Lines)

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

(a) Carrier violated the provisions and intent of the Clerks' Agreement when employes were not permitted to work the full eight (8) hour assignment on Position No. 340 on days they were called to relieve the regular assigned employes; and,

(b) Clerks W. W. Wells and V. T. Highfill shall be paid on the basis of a full eight (8) hour day at rate of time and one-half of the respective positions for each of the days they relieved the regular occupant of Position No. 340, as per statement of facts.

EMPLOYES' STATEMENT OF FACTS: On the dates involved in the instant claim, Carrier employed and maintained the following clerical positions at Morris, Kansas:

Pos. No.	Title	Occupant	Assigned Hours	Rate	Rest Days
326	Cashier	J. J. Shermerhorn	8 am to 5 pm	12.72	Sun. & Mon.
328	Clerk	V. T. Highfill	7 am to 4 pm	11.88	Sat. & Sun.
340	Clerk	R. L. Nisely	3 pm to 12	11.88	Tues. & Wed.
*342	Relief Clerk	W. W. Wells	Midnight		Thur. & Fri.

* The Relief Clerk protects Position No. 326 each Monday, Position No. 340 each Tuesday and Wednesday and Position No. 328 each Saturday and Sunday.

Mr. R. L. Nisely, the regular occupant of Clerk Position No. 340 at Morris, Kansas, was absent from duty on a number of different dates between August 12, 1950 and February 18, 1951, account training with an Air Force Reserve Unit, of which he was a member, preparatory to a call to full time active military duty. On some of the days that Mr. Nisely was absent from duty during this period for training purposes, Carrier called either Clerk W. W. Wells or Clerk V. T. Highfill to fill the temporary vacancy thus created

eight hour assignments on each of the days they were assigned to work and on which they were also used on an overtime basis to protect the essential duties of Nisely's assignment. There was no suspension of work during regular hours to absorb overtime on those days. In so far as concerns the rest days on which claimant Highfill was used on an overtime basis to protect the essential duties of Mr. Nisely's assignment, it will, of course, be apparent that he (Mr. Highfill) did not have any regular assigned hours on those days and could not possibly have been required to suspend work during regular hours, within the meaning of the rule.

The fallacy of the Employes' citation of Article VII, Section 6, the so-called "Absorption of Overtime Rule" of the Agreement is further emphasized by the conclusions expressed in the following excerpt from Third Division Award 5331.

> "There are innumerable Awards of this Board interpreting and applying the 'absorption of overtime rule.' It would serve no purpose to review them all in this Opinion. Without attempting in any way to limit the applicability of the aforementioned rule, we observe that generally the situation with which the Board was confronted in the dockets upon which those Awards were based involved either (1) the Carrier requiring an employe to discontinue work on his regular position and fill a vacancy on another position when otherwise the Carrier would have had to pay overtime to fill the vacancy; or (2) requiring an employe to suspend work on his assignment and perform work of other positions which work would otherwise have had to be performed on an overtime basis. In such situations the Awards of this Board have been quite consistent in holding that the 'absorption of overtime' rule was violated. In both situations the work involved was not assigned to the positions of the claimants."

If this pronouncement is considered a criterion, and it has been so regarded by the Carrier, then the Employes' contention that Section 6 is in violation is without merit.

In conclusion the Carrier respectfully asserts that the claim of the Employes in the instant dispute is entirely without merit or support under the Agreement rules and should, for the reasons expressed herein be denied in its entirety.

All that is contained herein is either known or available to the Employes or their representatives.

OPINION OF BOARD: The record shows that R. L. Nisely was regularly assigned to Clerical Position No. 340 at Morris, Kansas. He was absent several days between August 12, 1950 and February 18, 1951 for training with an Air Force Reserve Unit. Claimants Wells and Highfill also held regular clerical assignments at this point. Claimants Wells and Highfill were used on Nisely's position during his absence, there being no other employes available having prior rights to the work. On the eleven days here in dispute, Claimants were not permitted to work eight hours each day. The Carrier contends that these eleven days were blanked and that Claimants were used on an overtime basis for the time required. Claimants are demanding eight hours pay at the overtime rate on each of the eleven days they were used, less the amount paid them by the Carrier.

The applicable rule is Article III, Section 10(a), which provides in part:

> "Vacancies of fifteen (15) calendar days or less duration shall be considered temporary and, if to be filled, shall be filled (1) by recalling the senior qualified and available off-in-force-reduction employe not then protecting some other vacancy (such off-in-force-reduction employe not thereby to have any claim to work more than 40 straight time hours in a work week); (2) if there is no such

off-in-force-reduction employe available, by advancing a qualified employe in service at the point who makes application therefor. If neither of these alternatives produces an occupant for the vacancy, it may be filled without regard to these rules, * * *."

It is not disputed by the parties that the Carrier had the option of filling or not filling these temporary vacancies. It is not disputed also that there were no employes available under alternatives (1) and (2) contained in Article III, Section 10(a), and that the provision "it may be filled without regard to these rules" became applicable. The latter provision does not mean that the positions could be filled without regard to any of the rules of the Agreement. It means that the positions could be filled without regard to the rules which specify the manner of filling temporary vacancies. Awards 4962, 4970, 4990, 5050.

Carrier asserts that the temporary vacancies were blanked and that it could properly use Claimants on an overtime basis to perform the necessary work of Nisely's position. It is true that the assignments of Claimants to work overtime specifically provided that the temporary vacancies of Nisely's position were blanked. The assignments then provided for Claimants to work as long as needed or as long as needed with an hourly limitation. This is in fact a filling of the temporary vacancy and not a blanking. A temporary vacancy may be blanked or filled under Article II, Section 10(a). If it is blanked, no one works it; if it is filled, it is worked under the conditions that Nisely would work it, which would include his eight hour assignment. It seems clear to us that the temporary vacancies were in fact filled by doubling over the Claimants and that they are entitled to a full eight hours' pay for each day they were so used.

Carrier further contends that Claimants had no right to the work because they did not apply for these short vacancies. The rule contemplates that if an employe desires to work a short vacancy, during which time he must leave his regular position, he must apply for it. But where one does not desire the temporary vacancy in preference to his own position and he is directed by the Carrier to work it, he is entitled to the benefit of all the rules relative to filling temporary vacancies, the overtime rules, hours of service, and all other conditions applicable to the position to be temporarily filled. An affirmative Award is required.

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 here; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of June, 1955.