

Award No. 7328
Docket No. CL-7082

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY**

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

Carrier violated the rules of the Clerks' Agreement when it sought the services of a Car Department Employee, Eugene A. Stotz, holding seniority rights under another Agreement and on July 10, 1951 assigned him to the regular relief position covered by the Clerks' Agreement at Mitchell, S. D.

Employee M. J. Shevlin shall be compensated at the time and one-half rate of his regular ticket clerk position for July 15th, 16th, 22nd and 23rd.

Employee C. E. Davis shall be compensated at the time and one-half rate of her regular position for July 11th, 17th, 18th and 24th.

Employee A. C. Matthews shall be compensated at the time and one-half rate of his regular position for July 12th and 19th.

EMPLOYEES' STATEMENT OF FACTS: Among the positions in effect at Mitchell, S. D. on July 8, 1951 were the following:

Post No.	Title	Rate of Pay	Assigned Hours	Assigned Rest Days	Occupant
117	Ticket Clerk	12.076 per day	6 A. M.-2 P. M.	Sun-Mon.	M. J. Shevlin
700	Ticket Clerk	12.776 "	1 P. M.-9 P. M. (11:30 A. M. to 8:30 P. M.)	Tues-Wed.	C. E. Davis
785	Baggageman	12.74 "		Thurs-Fri.	A. C. Matthews
-	Relief Mail & Bagg handler	(rate of posi- tion relieved)	various	Fri-Sat.	L. R. Hosking
-	Relief Yd clerk	"	"	Thurs-Fri.	B. J. Kirby
930	Mail and Bagg Handler	12.74 per day	12 N-8 P. M.	Sat-Sun.	W. Storla

Fri.	13	"
Sat.	14	—
Sun.	15	—
Mon.	16	Laid Off
Tues.	17	787
Wed.	18	"
Thurs.	19	"
Fri.	20	"
Sat.	21	—
Sun.	22	—
Mon.	23	787
Tues.	24	"
Wed.	25	"
Thurs.	26	"
Fri.	27	"
Sat.	28	—
Sun.	29	—
Mon.	30	787
Tues.	31	"

It will be noted that the claimant requested the Carrier to pay employe Matthews at the time and one-half rate of his regular position on July 12th when he was absent and on July 19th when he worked his regular position.

It will be noted that claimants C. E. Davis and M. J. Shevlin worked full time. As we have previously stated, neither of the claimants requested the temporary vacancy caused by employe Hosking's absence and the Carrier maintains in view thereof they had no right to work the rest day relief position only on certain days of the week, i. e., the days on which the relief clerk was scheduled to perform rest day relief work on their own position.

The employes have alleged there was one or more qualified furloughed employes available who should have been called for this temporary vacancy. The Carrier submits, however, that of the several employes who were then furloughed there were none who were qualified and available to perform this work. Inasmuch as the employes have made an assertion to the contrary, it is the Carrier's position that they should submit proof thereof which has not been forthcoming.

Regardless of their contention about there being a qualified furloughed employe available, the fact remains, there existed a temporary vacancy and if any employe then regularly assigned wished to fill that temporary vacancy, it was his obligation to make request for same in accordance with the provisions of Rule 9 (g) and having failed to do so, he cannot then properly assert rightful claim to payment for work on a position which he did not perform and for which he made no request.

The Carrier respectfully requests that claim be denied.

All data contained herein has been presented to the employes.

(Exhibits not reproduced)

OPINION OF BOARD: Employes allege Carrier violated the Agreement when it used a furloughed employe from the Car Department to fill a temporary vacancy in a regular relief position. Whether one of named Claimants, who was not relieved, is a rightful claimant proves immaterial in view of the findings and award hereinafter entered.

It is pertinent, however, that claim is not made on behalf of a furloughed employe or employes under the Agreement, but this is true only for purposes of resolving a disputed question of fact. Carrier is on record that no qualified furloughed employe was available. If claim had been made on behalf of those persons whom the Employes now contend were first

entitled to the service, it would have served to narrow the argument and overcome the inference, based upon a valid presumption, that none was available.

We have searched the record in vain for a rule that makes it obligatory on Carrier to fill a regular relief position by any other process than the one for filling other positions. The nearest thing we have found is Rule 27 (g) (7) which provides:

"The least desirable solution of the problem would be to work some regular employes on the sixth or seventh days at overtime rates and thus withhold work from additional relief men."

Those are words that do more to proclaim principle than fix rights. At most they are permissive and not mandatory. In a real sense the work belongs to relief forces and regular employes are entitled to enjoy the fruits of a five (5) day work-week with assigned rest days. It is permissible, but costly to work regular employes on the sixth or seventh days, as punitive rates must be paid for the same service contracted at pro rata rates if performed according to schedule.

Carrier complies with the spirit and intent of the five (5) day work-week when it puts on another position for relief on the sixth and seventh days of other regular positions, and, those on other five (5) day positions have no more right to claim a day or days assigned a relief position than they would have to claim an assigned day or days of any other position.

In this docket the record shows Carrier chose to fill the first day of an indeterminate vacancy by using a regular employe at the punitive rate. Thereafter, it enlisted and utilized the services of a qualified employe, who, sometime prior thereto, had been furloughed and thereby relieved from active service under another Agreement. He worked the position for only so long as the rules for that position did not operate to displace him.

Carrier, by avoidance of punitive rates in this case is almost, but not quite, guilty of evasion. In the record is a communication, addressed to no one in particular, marked Employees Exhibit "B", which, when taken at its face value, proves only an abortive attempt on the part of two persons to set aside the force and effect of rules which must be observed, respected, and upheld whatever may be the assault by those who only presume to say how they shall operate.

We must concede that Carrier cannot make a captive of any person who enters its service, but it should not encourage persons to take employment under a Rules Schedule who entertain a mental reservation against assuming a full measure of responsibility thereunder. We do not condone what we find expressed in this record, but we cannot permit mental reservations, whether expressed or concealed to take precedence over rules that govern and control in disputes of this kind.

Whatever mental reservations the chosen employe may have had when he hired out under another Agreement, that Agreement alone fixes the rights, duties, and obligations of all persons who perform service thereunder. Seniority of the one hired begins at the time his pay starts in the seniority district and on the roster to which assigned. That rule was not suspended by any mental reservation. The chosen employe worked the position as long as the rules permitted or required. The effect, if any, that the new employment had on the chosen employes furloughed status under another Agreement is not before us.

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 before us was not violated.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 14th day of May, 1956.