

**Award No. 10518**  
**Docket No. CL-10078**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Wesley Miller, Referee**

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**PARTIES TO DISPUTE:**

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

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

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

1. Carrier violated the rules of the Clerks' Agreement at St. Paul, Minnesota when it failed to call Relief Perishable Freight Inspector, W. B. Kelly to fill P.F.I. Position R-15 on February 27, 1957 which was temporarily vacant on that date; and in lieu thereof called Ice House Laborer Steve Piech.

2. Carrier shall compensate employe W. B. Kelly for eight (8) hours at the penalty rate of P.F.I. Position R-15 for February 27, 1957.

**EMPLOYEES' STATEMENT OF FACTS:** Employe W. B. Kelly who has a seniority date in Seniority District No. 48 of May 26, 1954 is regularly assigned to Relief Perishable Freight Inspector Position No. R-17 at St. Paul, Minnesota.

Relief Position R-17 is assigned to relieve PFI Position R-14 from 7:00 A. M. to 3:00 P. M. on Saturday and Sunday, PFI Position R-15 from 3:00 P. M. to 11:00 P. M. on Monday and Tuesday and PFI Position R-16 from 11:59 P. M. to 7:59 A. M. on Wednesday, with Thursday and Fridays as rest days.

Employe S. W. Piech who has a seniority date of July 20, 1948 in Seniority District No. 144 is regularly assigned as Ice House Laborer in District No. 144 from 3:00 P. M. to 11:00 P. M. Sunday through Thursday with Friday and Saturday as rest days.

Employe Piech is also shown on the July 1956 Seniority Roster for District No. 48 as a Relief Perishable Freight Inspector with a seniority date of May 1, 1956 and on the January 1957 roster as "furloughed" with the same seniority date.

On Wednesday, February 27, 1957, the regular occupant of P.F.I. Position R-15, Clois Homsher, was absent account of sickness.

Piech who, as we have said, was working as Ice House Laborer in another seniority district.

However, assuming that in connection with this temporary vacancy in Seniority District 48, employe Piech was not available, and no employe had made request for the temporary vacancy, and there was no furloughed employe available, under those circumstances there is no provision which would have prohibited the Carrier from employing someone to fill the temporary vacancy and we vigorously maintain that under those circumstances the Carrier would have been under no obligation to call Claimant Kelly on the basis of overtime to fill Position R-15 (as well as his own PFI Position) on February 27, 1957 in preference to hiring someone to fill the temporary vacancy for which there had been no request. One of the inherent rights of the Carrier is to employ and there exists no provision by which the Carrier has contracted away that right. However, as employe Piech held seniority in District 48, or at least was an employe who, in effect, made request for Position R-15 by accepting employment on the temporary vacancy in Seniority District 48, it is the Carrier's position that the temporary vacancy was filled in accordance with the provisions of Rule 9 (g) and there cannot possibly be any basis for the claim of employe Kelly.

There is no provision which sets aside the Carrier's inherent right to bring employes into its service to augment its force in performing additional service or to fill positions which are temporarily vacant for which there is no request under the provisions of Rule 9 (g) from employes holding seniority or for which there are no available furloughed employes. Therefore, if the Carrier can use a new employe to augment its force or fill a temporary vacancy then it certainly must be said the Carrier is more than fair when, as in the instant case, it uses someone holding seniority to fill a temporary vacancy for which there is no request from senior employes. On the date involved herein employe S. W. Piech was assigned to work as an Ice House Laborer from 3:00 P.M. to 11:00 P.M., the same assigned hours as those of temporarily vacant Perishable Freight Inspector Position R-15. As there was no request to fill the temporary vacancy on Perishable Freight Inspector Position R-15 from any other employe, rather than hire a new employe the Carrier felt employe Piech was entitled to the promotion so he was used to fill said temporary vacancy during the same hours he would have worked as a lower rated Ice House Laborer, and in effect, therefore, he requested and filled the temporary vacancy.

There can be no question but what Claimant Kelly is not entitled to any payment in connection with the temporary vacancy on Perishable Freight Inspector Position R-15 on February 27, 1957. He filled his own assignment on that day. He made no request for the temporary vacancy under the provision of Rule 9 (g) and in the absence of same the Carrier was not obligated to use him nor is he entitled to payment therefor.

The Carrier respectfully requests the claim be denied.

All data contained herein has been presented to the employes.

(Exhibits not reproduced.)

**OPINION OF BOARD:** The question to be determined here is whether Claimant should have been used to fill the vacancy on an overtime basis, in addition to his working his regular assignment, in preference to using a lower rated employe from another seniority district, who had seniority on the other district, at straight time rate.

If Employee Piech was available and entitled to be called for extra work in Seniority District 48 (grievant's district), the claim of Employee Kelly must fail, as there is nothing in the Agreement of these Parties that requires Carrier to use an employe on an overtime basis when there are other available employes that can be used at the straight time rate.

The record before us shows that Employee Piech had established seniority on District 48 and that no protest had been made prior to date of claim in accordance with Rule 6 (c) of the Agreement, which provides that seniority dates shown on rosters shall stand as correct, unless protested within 60 days from date of posting. Consequently, we must hold that Employee Piech was a furloughed employe with an established seniority date on District 48. The record further shows that Piech had seniority on District 144, in accordance with Rule 3 (d) of the Agreement. A review of Rule 3 (d) shows that an employee's rights under such circumstances are subject to Rule 12 of the Agreement, which provides in pertinent part:

"(d) When forces are increased or vacancies occur, furloughed employes, when available, shall be recalled and returned to service in the order of their seniority and employes shall be required to return when so called. . . ."

In view of this, we hold that furloughed employee Piech was properly called.

It should be noted that the record does not show that Claimant herein made a request under Rule 9 (g) of the Agreement that he be assigned to fill the vacancy in question.

Rule 32 (f) and Memorandum of Agreement No. 9, Section 4, of the Agreement of the Parties, are not applicable to the issues arising from this Claim; for, under the circumstances revealed by the record, overtime work was not necessary to fill the particular temporary vacancy.

In consideration of all of the matters set forth above, this claim should not be sustained.

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

That the parties waived oral hearing;

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 not violated.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois this 13th day of April 1962.