

Award No. 10898

Docket No. CL-10517

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jerome A. Levinson, Referee

PARTIES TO DISPUTE:

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

THE NORTHERN PACIFIC TERMINAL COMPANY OF OREGON

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

(1) Carrier violated the rules of the Clerks' Agreement when it failed to fill position of Information Will Call Clerk Job No. 129, September 20 through September 24, 1957, during the absence of the regular occupant, Walter Ruse, who was on vacation.

(2) Clerks M. E. Spellman, C. C. Jones, E. G. Bishop and A. H. Hilands shall each be compensated a day's pay at the respective rates of their regularly assigned positions for the days they were available to work Job No. 129 during the period September 20 through September 24, 1957, as follows:

M. E. Spellman	—	September 20, 1957
C. C. Jones	—	September 21, 1957
E. G. Bishop	—	September 22 and 23, 1957
A. H. Hilands	—	September 24, 1957

EMPLOYEES' STATEMENT OF FACTS: Walter Ruse, the regular occupant of Information Will Call Clerk Job No. 129, went on vacation for ten days beginning September 20, 1957.

On September 12, 1957, Carrier issued the following bulletin advertising a temporary vacancy on Information Will Call Clerk Job No. 129 in the ticket office September 20 through October 3, 1957, because of Walter Ruse going on vacation:

Article 6 states in part . . . "Where a vacation relief worker is not needed in a given instance and if failure to provide a vacation relief worker does not burden those employees remaining on the job, or burden the employe after his return from vacation, the Carrier shall not be required to provide such relief worker." The Carrier submits that the employees on the job were not overburdened by the absence of Mr. Knoche September 20 through 24th, 1957. Nor was Mr. Ruse "burdened" when he returned October 5 from his vacation, as a result of blanking Job 129 September 20 to 24, inclusive, 1957.

4. The Carrier has herein shown that this claim is not supported by rules of the National Vacation Agreement or the current working agreement, by past practice, or by Adjustment Board Awards. Accordingly, same is without merit and should be denied.

It is hereby affirmatively stated that all data herein has been presented to, or is known by, the Clerks.

(Exhibits not reproduced.)

OPINION OF BOARD: On September 12, 1957 Carrier bulletined and Elwood F. Knoche, an extra clerk, bid on temporary vacancy September 20 through October 3 "or longer" created by 10-day vacation of Walter Ruse, regular occupant of Information Will Call Clerk Job 129 at Portland, Oregon. On September 16, Carrier by bulletin assigned the vacation vacancy to Knoche. In the meanwhile, according to Knoche's statement, on September 13 he consulted with Carrier's physician who informed him he should enter the hospital on September 16 for an operation. On the latter date he advised Carrier he was entering the hospital that day and probably would be out in "4 or 5 days". He was operated upon for hernia, and he did not return to work until November 18.

According to Carrier, this vacancy was advertised in conformity with the parties' 1949 understanding to bulletin vacation vacancies of 5 or more consecutive days for seniority choice, as "temporary vacancies". Employees stated that in accordance with this understanding Carrier bulletined only those positions which it was necessary to fill under the provisions of the National Vacation Agreement of December 17, 1941 incorporated into the Agreement between the parties by Rule 47 thereof.

Carrier blanked the position the first 5 days of Ruse's vacation period, September 20 through 24. On Monday, September 23, it bulletined vacancy on Job No. 129 "created by illness of E. Knoche", and by bulletin on September 26 it assigned the position to another extra clerk who worked it for the remaining 5 days. The latter clerk filled another vacation assignment in the ticket office September 20 through 24, and no other qualified extra clerks were available. Claimants all were regularly assigned Clerks in the ticket office, one of them (Hilands) was Chief Clerk there, and they were available to fill the temporary vacancy on their rest days.

Employees maintained Job No. 129 should have been filled the first 5 days as a vacation vacancy, arguing that the fact that Knoche's illness prevented him from doing so did not alter the fact that the position was vacant because Ruse was on vacation. Employees asserted further that the duties of the position were of the type that could not be put aside

and employees on other positions had to perform the work. Accordingly, they maintained, in the absence of other qualified extra clerks then available or senior employees who made application for the work, Claimants as senior qualified employees were entitled to perform the work on their respective rest days pursuant to Rule 11(b) 5 of the Agreement between the parties. The relevant portions of this rule were as follows:

“(b) New positions or vacancies of thirty (30) calendar days’ or less duration, shall be filled, whenever possible, by the senior qualified unassigned employee who is available. If a qualified, unassigned employee is not available, position will be filled by the senior assigned employee who makes written application therefor and is qualified for such vacancy and when assigned, shall take all of the conditions of the position. If a qualified, unassigned employee thereafter becomes available, he may not displace the regular employee filling the temporary vacancy unless he is senior to such regular employee.

“5. When it is impossible to fill vacancies as provided above, and it then becomes necessary to use employees at punitive rate to fill said vacancies, the senior qualified regular employee in the department where vacancy exists will be used when there is no overlap of the hours of the shifts involved. This includes employees on rest days and off shift. If this does not take care of the situation and more employees are still needed, then the extra men on a time-and-one-half basis will be used in seniority order, consistent with change-of-shift conditions.”

Carrier maintained that when Knoche bid on Job No. 129 it had no further obligation on the basis of a vacation vacancy; that a subsequent vacancy arose, due to Knoche’s illness; and that it could properly blank the position during the first 5 days, pursuant to Rule 43(d) of the Agreement, the relevant portions of which were as follows:

“(a) Employees who on January 1st of each year have been in service one year or more will be allowed Sick Leave with pay as follows:

“(d) In the application of this rule, it is understood that where there is no necessity for a position to be kept up daily, it may be blanked, or the duties assigned to the remaining employees in the department. No overtime, Sunday, or holiday work will be required of the remaining employees by reason of the granting of the sick leave.”

The application of the pertinent rules, carried to their ultimate conclusion, sustains Employees’ position. Carrier initially bulletined Job No. 129, by agreement and not by determining whether the National Vacation Agreement itself might require the filling of Ruse’s job during his absence on vacation. Accordingly, it is unnecessary to consider whether the record fails to demonstrate, as Carrier urged, that the use of a relief worker was essential for compliance with Article 6 or 10(b).

In effect, Carrier attempted to fill the vacancy, but fell short thereof when Knoche became unavailable four days before the vacancy actually commenced. At this point, it would seem inconsistent to conclude that **prospectively** the position should be filled conformably with the applicable standards, but that **retrospectively** the position could now be blanked because of the fortuitous circumstance of Knoche's illness and not because of disappearance of the reasons impelling the filling of the vacancy in the first place. Observance of Rule 11(b) of the Agreement between the parties as the vehicle for filling the temporary vacancy indicates Claimants as the appropriate workers, on their rest days. In this connection, the Board believes that the circumstance that Claimants did not apply in writing would not preclude the requirement to use them under subparagraph 5.

Upon application of Rule 48(d), Employees also would prevail. Here again, Carrier bulletined the vacancy for the second 5 days, describing the duties in exactly the same terms as in the first bulletin. This meant that, at least now, Carrier did consider it necessary for the position to be kept up daily — and it must be noted that a bulletin as to a vacancy created by illness was not one pursuant to the 1949 understanding, for the latter applied to vacation vacancies alone. The standard of "daily necessity" under which a position may be blanked under Rule 48(d) is not couched in the same terms and is less explicit than the standard under which a relief worker may be required under the National Vacation Agreement. However, here it would be highly illogical to conclude that a proper situation for blanking under Rule 48(d) existed the first 5 days when concededly it did not exist the second 5 days, in the absence of a showing to the contrary. Here too, then, Rule 11(b) would point to Claimants as the proper workers, on their rest days.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of November 1962.