

Award No. 11576
Docket No. CL-11660

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

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 Clerks' Agreement at Savanna, Illinois when, to avoid payment of overtime, it used a regularly assigned employe in Ice House Laborer Seniority District No. 138 to fill a temporary vacancy in Seniority District No. 48 in lieu of using an available employe in Seniority District No. 48.

2. Carrier shall now be required to compensate Employe B. Adams at the time and one-half rate of Perishable Freight Inspector Position F-269 for eight (8) hours for each of the following days: December 18, 19, 20 and 21, 1958.

EMPLOYEES' STATEMENT OF FACTS: The following positions were in effect in Seniority District No. 48 at Savanna, Illinois on December 18, 19, 20 and 21, 1958:

Title	Pos. No.	Occupant	Hours of Service	Rest Days	Rate of Pay	Relieved By
PFI	F-269	D. Bolton	7 P.M.-4 A.M.	Mon & Tues	\$18.92	B. Adams
IHI	61	J. Tucibat	7 P.M.-4 A.M.	Tues & Wed	\$17.44	M. Haring

Employe D. Bolton is the regularly assigned occupant of PFI Position F-269 at Savanna, Illinois in Seniority District No. 48. His hours of service are from 7 P.M. to 4 A.M. Wednesday through Sunday and his rest days are Monday and Tuesday.

Employe J. Tucibat is the regularly assigned occupant of IHI Position No. 61 at Savanna, Illinois in Seniority District No. 48. His hours of service

Claimant Adams the Carrier was in no way obligated to use him on said temporary vacancies nor is he entitled to any payment in connection therewith.

Although foregoing his right, and obligation, to request the temporary vacancies on PFI Position F-269 on December 18, 19, 20 and 21, 1958 Claimant Adams nevertheless subsequently submitted time claim for payment at the time and one-half rate of PFI Position F-269 for December 18, 19, 20 and 21, 1958 on the basis that Rule 9(g) was a nullity and that the Carrier was required to fill the temporary vacancies on an overtime basis and consequently was required to call him for same under the provisions of the overtime rule. Under the circumstances here present there is no schedule rule or provision which would require the Carrier to "call" and use Employee Adams, a regularly assigned employee with a position of his own, to fill the temporary vacancies on PFI Position F-269 on an overtime basis in lieu of using Employee Tucibat at the straight time rate of pay. There is no provision in the schedule agreement which requires the Carrier to fill temporary vacancies on an overtime basis. Many Board Awards have held that the Carrier is at no time required to have work performed on an overtime basis when same can be accomplished at the straight time rate.

Even if Employee Tucibat had not requested the temporary vacancies with which we are here concerned and assuming, purely for the sake of argument, that there were no furloughed employees available, then even under those circumstances there is no schedule rule or provision which would have prohibited the Carrier from employing someone to fill the temporary vacancies and we vigorously maintain that under those circumstances the Carrier would have been under no obligation to call Claimant Adams on the basis of overtime to fill PFI Position F-269 on December 18, 19, 20 and 21, 1958 in preference to hiring someone to fill the temporary vacancies for which there had been no request and for which there were no furloughed employees available. 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 Employee Tucibat made request for the temporary vacancies on PFI Position F-269 on December 18, 19, 20 and 21, 1958 it is the Carrier's position that the temporary vacancies were filled in accordance with the provisions of Rule 9(g) which is not only applicable but fully controlling in the instant case and there cannot possibly be any basis for the claim of Employee Adams.

There is no basis for this claim. There has been no violation of the rules. The Carrier respectfully requests that the claim be denied.

All data contained herein has been presented to the employees and made a part of the question here in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Employee Bolton, the regularly assigned occupant of Perishable Freight Inspector position F-269, Seniority District No. 48 was absent on account of illness, December 18, 19, 20 and 21, 1958, thereby creating a temporary vacancy for four days. As there were no available furloughed employees, J. Tucibat, occupant of the Icing and Heater Inspector Position No. 61, Seniority District No. 48, filled the PFI position temporarily vacated because of Bolton's illness. Employee Tucibat's IHI position was filled temporarily by G. Graham, Ice House Laborer, from Seniority District No. 138, who held no seniority rights in District No. 48. Claimant Adams was the senior employee in Seniority District No. 48 qualified to perform the work on the temporarily vacant position of Bolton's, which was in Seniority District No. 48.

It is seriously contended by the Carrier that there is a fatal variance between the substantive part of the Statement of Claim listed in paragraph No. 1 and the prayer for damages or the monetary part of the Claim designated as paragraph 2. In as much as the issues present by this claim can be determined and the matter disposed of for another reason it will be unnecessary to evaluate Carrier's contention in that respect.

In the Agreement, effective September 1, 1949, we find the following:

"RULE 9 (g)

"New positions or vacancies of thirty (30) days or less duration shall be considered as temporary and may be filled by an employee without bulletining; if filled, the senior qualified employee requesting same will be assigned thereto."

This rule indicates how temporary vacancies may be filled and provides, specifically, that if the position is to be filled, it will be filled by the senior qualified employee requesting the same.

That Claimant Adams, though the senior qualified employee, did not request the PFI position temporarily vacated is undisputed. There is no indication in the Record that the Claimant wished to work the position in any manner except at the overtime rate and in addition to his then regularly assigned position. This, then, brings the problem presented in the current matter squarely in line with the problem presented in Award 10299, involving the same Agreement between the same parties. This was a denial award and has established a precedent which is controlling in the instant case. See also Award 11049 wherein the facts are similar to those involved here.

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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June 1963.