

Award No. 13042
Docket No. CL-13217

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Lee R. West, Referee

PARTIES TO DISPUTE:

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

ERIE-LACKAWANNA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5155) that:

1. Carrier violated the rules of the Clerks' Agreement at the Agent's Office at Buffalo, N. Y., when on November 20, December 11, 16, 17, 18 and 24, 1959, and January 6 and 7, 1960, junior regularly-assigned employees not available for the entire eight-hour tour were utilized to perform duties on an existing vacancy in preference to available senior qualified employees;

2. Carrier shall now compensate S. R. Prescott, senior regularly-assigned relief clerk eight (8) hours' pay at time and one-half rate for November 20, December 11, 16, 17, 18 and 24, 1959 and January 6 and 7, 1960, dates on which he was available and willing to work assignments on position of General Clerk No. 2. (Claim No. 1272.)

EMPLOYEES' STATEMENT OF FACTS: Mrs. Elizabeth Horning, a regularly-assigned employe on the General Clerk position No. 2, working in the Agent's Office, Buffalo, N. Y., hours 1 P. M. to 9:30 P. M., Monday through Friday, was off account illness on dates for which claim is presented resulting in a vacancy existing on her position.

On November 20th and December 11, 1959 Miss Evelyn Williams, a regularly-assigned employe working 8 A. M. to 5 P. M. was utilized to perform duties on the vacancy existing on Mrs. Horning's position. Miss Williams worked her own position of Stenographer-Typist from 8 A. M. to 5 P. M. Carrier then had her work beyond her regular hours 5 P. M. to 9:30 P. M., to perform duties on Mrs. Horning's position. For services rendered, 5 P. M. to 9:30 P. M., she was paid time and one-half.

On December 16, 1959, Miss Evelyn Williams was again utilized to perform the duties on the vacancy existing on Mrs. Horning's position. Miss Williams worked her own assignment from 8 A. M. to 4:30 P. M., suspending work on her own assignment from 4:30 P. M. to 5 P. M. performing duties

It has oftentimes been held by the various Divisions of the National Railroad Adjustment Board that Carrier has an obligation to its stockholders and the general public to operate its business as efficiently and economically as possible as long as it does not violate agreement rules. Third Division Awards 6856 (Erie), 5467, 5803, 8692 and 9047 which are only a few of many. Carrier submits that its action in the instant case was strictly in conformity with these pronouncements of this Board and that no rule of agreement or otherwise has been violated in the instant dispute.

In Award 8346 (Daugherty) this Board under comparable circumstances, which are quoted below from the "Opinion of Board",

"From January 15 to 26, 1955, Clerk Riggins, regularly assigned to Position No. 2 Saturday through Wednesday, 3:00 P.M. to 11:00 P.M., with rest days Thursday-Friday, was off sick. During this period there was no qualified furloughed employee available for work on Riggins' position, nor did any qualified employee make written application to fill the temporary vacancy. Regularly assigned employees, among them Claimant, were worked overtime as needed to get Riggins' work done."

decided that:

"The Carrier's action must be ruled proper not because of the applicability of Article 5 (d) but because there is no rule in the Agreement that restricts or prohibits its right to act as it did. Article 3 (k) says that seniority is to be exercised only in case of (the filling of) vacancies, new positions, reduction of forces, or as otherwise provided in the Agreement. As previously stated, Riggins' temporary vacancy was not filled but its work was done by employees regularly assigned to other positions. Nothing is 'otherwise provided in the Agreement' that requires the Carrier to use the senior man for such overtime work. Nor does the Agreement prohibit the use of such overtime work for getting the duties of a temporarily vacant position performed.

This claim cannot be sustained."

Carrier submits that a like decision as that rendered by the Board in Award 8346 is in order in the instant dispute.

Without detracting from or prejudice to the foregoing facts, Carrier submits that even if this claim had merit, which it does not, there can be no legitimate claim for time and one half on behalf of the claimant. There are so many hundreds of Awards on this subject, that Carrier will not burden this submission by the citation thereof.

Based upon the foregoing facts and authorities cited, Carrier submits that this claim is totally without merit and should be denied.

OPINION OF BOARD: Mrs. E. L. Horning, a regularly assigned clerk at Buffalo, N. Y., hours 1:00 P. M. to 9:30 P. M., Monday through Friday, was off work on the dates of this claim by reason of illness. On each day that she was off work prior to December 28, 1959, she would call in before 1:00 P. M. and report that she was ill. Carrier would then use other office employees to perform work necessary on account of Mrs. Horning's absence. Such other office employees worked overtime on the days involved in this claim and were compensated at the overtime rate. On December 28, 1959, Mrs. Horning

was granted a leave of absence and her position was bulletined as a temporary vacancy. On January 7, 1960 the position was awarded to the senior applicant. On January 17, 1960 the Claimant herein, S. R. Prescott, filed claim for compensation for the dates involved, which were the rest days of his regularly assigned position. He contends that he was available and willing to work on his rest days but that Carrier wrongfully assigned employees who were junior to him, and who were not available for the entire 8 hour tour of Mrs. Horning's position, to fill the vacancy. It is undenied that Claimant had seniority over the persons used on the dates involved. It is also undenied that their regular assignments in the office "overlapped" with the regular assignment of Mrs. Horning.

Claimant contends that several rules of the agreements require the Carrier to "fill" this position and that "seniority" governs in such filling. He cites Rule 6 and Rule 7 (e), (f), and (g) in support of his claim. These rules read as follows:

"RULE 6. PROMOTIONS

(a) Employees covered by these rules shall be in line for promotion. Promotion under these rules shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.

NOTE: The word 'sufficient' is intended to more clearly establish the right of the senior employee to bid in a new position or vacancy where two or more employees have adequate fitness and ability.

RULE 7. BULLETIN

(e) New positions or vacancies of thirty (30) calendar days or less duration shall be considered short vacancies and may be filled without bulletining. When there is reasonable evidence that such new positions or vacancies will extend beyond the thirty (30) day limit, they shall then be bulletined, showing probable duration.

(f) Temporary vacancies, bulletined as such, shall, when the vacancy becomes regular or permanent, be bulletined as a regular or permanent vacancy.

(g) When filling temporary vacancies, extra qualified employees will be given preference in filling vacancies of three (3) days or less duration. Senior qualified employees making application for temporary vacancies in excess of three (3) days and less than thirty (30) days will be given preference."

Claimant interprets 7 (e) to the effect that short vacancies may be filled without bulletining but argues that this does not mean that seniority may be disregarded. He then cites several awards, including Awards 1058 and 5255 to the effect that Rule 7 (e) does not permit vacancies to be filled without regard to seniority rights.

Carrier contends that the Claimant's position is fallacious because the position was not "filled." It points out that Rule 7 (e) provided that short vacancies may be filled without bulletining, but does not require that they be filled. It contends that this position was not filled until bulletined on December 28, 1959 and filled on January 7, 1960. Carrier cites Award 8346 wherein an absent clerk's work was performed by regularly assigned em-

ployes in the same office who worked overtime as needed. In deciding whether the temporary vacancy was "filled", the Board stated:

"Was Riggins' temporary vacancy 'filled' in the sense meant by the Parties when they wrote the language of Article 5 (d)? We think not. Said language must have contemplated placing an existing employee or one newly hired in the vacancy; and if an existing non-furloughed employee, one who would temporarily vacate his own position. This the Carrier did not do. It did not 'appoint' any existing or new employee to Riggins' temporary vacancy. On the contrary the Carrier kept Fulkerson and Moorehead on their existing positions and used them overtime to get the work of Riggins' position done."

Carrier further contends that it retained the prerogative to so blank or fill the position unless the agreement restricts it, (citing Award 12419—Coburn). It distinguishes Awards 5255 and 1058 from the present case in that these positions or vacancies were for 2 weeks or more and were "filled" by a full time employee.

We have carefully examined the position of both parties and the rules and awards cited in support thereof. We are of the opinion that the Carrier did not violate the agreement by allowing the regular office employees to perform Mrs. Horning's work on the days when she called to report off on account of illness, even if overtime was required. No rule or award cited would seem to require that the one day vacancy should be filled. On the contrary Award 8346 held that acts identical to those involved herein did not and need not be considered as "filling a position". Certainly Carrier should not be required to pay Claimant for his rest days at time and one-half, and for which claim was not made until after the ultimate vacancy was bulletined and filled, absent a clear violation of the agreement. Inasmuch as no violation appears, the claim must be denied.

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 9th day of November 1964.