Award No. 13619
Docket No. CL-14272

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

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

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5419) that:

(1) Carrier violated the Clerks' Agreement when it failed to call Clerk L. J. Day for position of Train Clerk, 11:00 P. M. to 7:00 A. M., rate $19.86 per day, on October 2, 1962, and doubled a junior employe to protect the position on a regular assigned rest day of Claimant's position.

(2) Claimant L. J. Day shall now be allowed compensation at the punitive rate of pay of position of Train Clerk for October 2, 1962.

EMPLOYES' STATEMENT OF FACTS: Prior to October 2, 1962 it had been the policy of the Carrier to call employes who were absent on their rest days for each vacancy that arose on the three shifts: 7:00 A. M. to 3:00 P. M., 3:00 P. M. to 11:00 P. M. and 11:00 P. M. to 7:00 A. M. In this case the carrier called Claimant for a 6:00 P. M. to a 2:00 A. M. vacancy and in view of the fact he did not desire to work this particular vacancy, it was decided to pass him up for the 11:00 P. M. to 7:00 A. M. train clerk vacancy although on the preceding day he had been called for the first listed vacancy, had declined to work it, and had been called for and worked this same train clerk position.

Under date of October 3, 1962 claim was presented to Carrier's Assistant Agent, Mr. T. Cellini, and word was passed around that the Local Chairman had concurred with this abrupt change in established policy and this created sufficient alarm among the employes that they addressed a written notice to him protesting this change and thereafter Mr. Cellini declined the claim. Copies as Employes' Exhibits 1(a), 1(b), 1(c) and 1(d).

Case was appealed to Mr. J. A. Duvall, Superintendent of Terminal under date of December 4 and after conference thereon was declined by him on January 2, 1963. Copies as Employes' Exhibits 2(a) and 2(b).

Your attention is directed to Third Division Award No. 8346.

We hold that the claimant was not available to protect the 11:00 P. M. to 7:00 A. M. train clerk position at Yard Center, Illinois on October 2, 1962. Neither did he have a contractual right to perform the work in question. Accordingly, the claim is void of any merit and, therefore, should be denied.

OPINION OF BOARD: This dispute arose out of an incident occurring on October 2, 1962, at Yard Center, Illinois, when the regularly assigned incumbent of the 11:00 P. M. to 7:00 A. M. train clerk position was off sick and unable to work to protect her assignment. She had been ill for approximately two weeks, and the temporary vacancy had not been filled by the Carrier.

The Claimant, the regularly assigned incumbent of the 11:00 P. M. to 7:00 A. M. rate clerk position at the Yard Center, was on Tuesday, October 2, 1962, observing one of his rest days. On this day in question, the Claimant was called to protect a 6:00 P. M. to 2:00 A. M. vacancy. Claimant declined to accept the assignment. Carrier "doubled over" a junior employe on the 11:00 P. M. to 7:00 A. M. vacancy.

Petitioner claims that the Carrier violated the Clerks' Agreement when it failed to call Claimant on October 2, 1962 to fill the vacancy of the 11:00 P. M. to 7:00 A. M. trick, being senior in time. That prior to October 2, 1962, it had been the policy of the Carrier to call employes who were absent on their rest days for each vacancy that arose on the three tricks. Further, that Claimant was called for the 6:00 P. M. to 2:00 A. M. vacancy the day in question and did not desire to work this particular vacancy. That Carrier did not call him for the 11:00 P. M. to 7:00 A. M. vacancy this same day and was obligated to do so, as Claimant was available and senior in time on his rest day. That on the preceding day, Claimant's rest day, he had refused the 6:00 P. M. to 2:00 A. M. vacancy, had been called by Carrier for the 11:00 P. M. to 7:00 A. M. vacancy and had accepted and worked this assignment. The Organization cites Rule 2, Seniority Datum; Rule 4, Promotion, Assignments and Displacements; Rule 8, Exercising Seniority; Rule 53, Overtime; Rule 1 (b) and (c) covering "Exceptions", which does not list the position of Train Clerk and, accordingly, the position is covered by all rules of the Agreement, and Rule 6, Declining Promotion.

In support of the Organization's position they cite Awards 507, 1257, 1397, 2436, 3338, 4349, 6600, 6787, 5024, 5167, 8538, 10087, 4104, 5747 and 11835. These awards deal with policies and practices of the carrier, holding that policies and practices before and after the agreement are now existing practices which are not abrogated or changed by their terms, and such practices are enforceable to the same extent as the provisions of the contract itself. Awards 11464, 11520, and 11333 emphasize employes' position that Carrier is obligated to call a senior employe when available and must use diligence in so doing. Awards 6687, 7293, 9196, 11032, 2341, 3193, 11039, 8897, 10809, and 10982 relate that senior must be called for overtime work when available on their rest days and must necessarily receive compensation at time and one-half.

Carrier's position is that Claimant was called to protect the 6:00 P. M. to 2:00 A. M. vacancy on October 2, 1962, but he declined to protect this vacancy. He had protected this vacancy of 6:00 P. M. to 2:00 A. M. in the past on his rest days. Since Claimant declined the 6:00 P. M. to 2:00 A. M.

on the day in question, he was not called for the 11:00 P. M. to 7:00 A. M. vacancy, as he was therefore unavailable. Further, Carrier is obligated only to the extent of the Contract terms and cannot be compelled to continue any policy not specified in the Agreement. Provision of the Agreement pertinent hereto is Rule 12, Short Vacancies.

Carrier supports its position by Awards 9087, 10388, 9316, 9317, 12464, 11467, 13207, 12963, 13241, 12928, 12419, 10924, which held that the Carrier is obligated only to contract terms and cannot be compelled to continue company policy not specified in the agreement. Also Awards 8346, 13321, 19903, 10299, 11049, 11576, 10518, and 13566 as to filling vacancies, bulletining positions and managerial prerogatives.

In the instant case this alleged violation of the Agreement has been before this Board on numerous occasions. The question now, as before: Can the Carrier cancel a well-established policy, not incorporated in the agreement, notwithstanding the established use of senior employes, as a proper exercise of the prerogative of management? The Board believes the Carrier has this right. Many awards are cited by both parties as well as several provisions of the Agreement pertaining to the instant case.

"RULE 12. SHORT VACANCIES

(a) New positions or vacancies of less than thirty (30) calendar days' duration shall be considered short vacancies, and may be filled without bulletining. However, when there is reasonable evidence that such vacancies will extend beyond thirty (30) calendar days, they shall be bulletined immediately, showing, if practicable, the probable or expected duration.

(b) Employes at the point where vacancies occur who have filed written request for assignment to short vacancies or vacancies pending assignment by bulletin will be selected in accordance with the provisions of Rules 4 and 19."

The Carrier relies strongly on Rule 12, stating that the incumbent had been ill for approximately two weeks and this vacancy had not been filled by the Carrier; that it was a short vacancy within the rule; that the Claimant did not file a written request under this Agreement to fill this short vacancy; that under this provision, Claimant would have been forced to give up his regular assignment which would render him unavailable for other vacancies. The Board notes that such allegations are not denied by the Organization nor is it in the Record that such a written request was made by the Claimant to fill the regularly assigned vacancy as required under the Agreement.

The Employes recite Rule 2, Rule 4 and Rule 8 (a) as being applicable as the seniority provisions of the parties' agreement requiring the use of the claimant as senior employe.

"RULE 4.

PROMOTION, ASSIGNMENTS AND DISPLACEMENTS

Employes covered by these rules shall be in line for promotion. Promotion, assignments, and displacements shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail, except, however, that this provision shall not apply to

positions listed under Rule 1 (b) and positions listed under Rule 1 (c) followed by the letters P. A. D.

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

"RULE 8. EXERCISING SENIORITY

(a) Seniority rights of employes covered by these rules may be exercised only in cases of vacancies, new positions or reductions in force, except as otherwise provided in this agreement.

(b) The exercise of seniority in the reduction or restoration of forces or displacement of junior employes is subject to the provisions of Rule 4."

Rule 2 does provide for the establishment of seniority; however, it is not disputed by the Carrier that the Claimant is senior to the "doubled over" employe.

The Board concurs with the Carrier that Rule 4 and Rule 8 are inapplicable as both are dealt with in a precedent Award 8346. This award presenting the same facts and rules to this Board, in which the Carrier's position was sustained.

AWARD 8346 (Daugherty)

"* * * * *

Turning now to the above-quoted provisions relied on mainly by the Employes, we are forced to conclude that neither one prohibits the Carrier from acting as it did in the instant case. Article 3 (k) does say that 'vacancies' may be filled by the exercise of seniority; and vacancies presumably include temporary ones. But Article 5 (d) deals more specifically with temporary vacancies. Nevertheless, as in Article 5 (d), the parties were dealing in 3 (k) with the filling of vacancies. The Riggins' vacancy was not filled in the sense contemplated by the parties.

The same general sort of objection holds as to the applicability of Article 4. . . . In our opinion the working of overtime hours in another man's position does not constitute an assignment. An employe is not assigned to more than one position. Neither Moorehead nor the Claimant were removed from their regular positions while Riggins was off sick.

The Carrier's action must be ruled proper . . . 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. . . . Riggins' temporary vacancy was not filled, but its work was done by employes 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."

The vacancy before us was not filled as contemplated by the parties under Rule 8 and is not applicable. Reliance by the organization that seniority in itself entitles the Claimant to the vacancy because of established policies in filling a short vacancy is not supported in the Agreement. There is *nothing in the Agreement that entitles the Claimant to this vacancy*, ". . . Nor does the agreement prohibit the use of such overtime work for getting the duties of a temporarily vacant position performed." Strict compliance to Rule 12 (b) by Claimant in filing a written request for this short vacancy would have **entitled** him, pending assignment by bulletin to be selected in accordance with the provisions of Rule 4 and 19. This the Claimant did not do.

Further support of the Board's position are Awards 10924 (Hall):

"We cannot substitute our judgment for that of the Carrier's. One of the most basic and fundamental principles recognized by this Board is that the assignment of work is the prerogative of the Carrier unless such right has been limited by contract."

Also Award 10299 (Bonebrake):

". . . The request therefor, in this case must be for the vacancy, and not for the vacancy at overtime or for the vacancy in addition to working their regular assignments. . . . the request for the vacancy, although it need not be in any specific form, must be unqualified."

Also Award 11049 (Dolnick):

". . . Unless a senior qualified available regularly assigned employe has made written application for extra work, he is not entitled to be assigned to such extra work or to be paid for same. . . .

. . . It is not sufficient evidence to comply with the terms of the Agreement to say that 'Claimant was available and qualified and made verbal request to work the extra position.' "

The Record is clear. Claimant had not filed a written request for the short vacancy. The Record does show that Claimant was called to fill a prior vacancy on the day in question but he did not "desire" to work that particular trick, but had protected this vacancy on his rest days in the past. No facts are presented to this Board that Claimant made it known to the Carrier that he was available for call on the subsequent trick; therefore, the Carrier believed that the Claimant was not available for the subsequent trick.

"RULE 6. DECLINING PROMOTION

Employes declining promotion or declining to bid for a bulletined position shall not lose their seniority."

Rule 6 is not applicable in this case as relied upon by the Petitioner as this was not a bulletined position, being a vacancy of less than thirty (30) calendar days, and could be filled without bulletining; therefore, no bid was necessary by the Claimant. Also, it is not an issue in this case that the Claim-

ant lost his seniority by declining the prior vacancy call. His seniority is, to the best of the Board's facts, still assured and in effect at the present time.

Petitioner also cited Rule 53, specifically, paragraphs (e) and (f):

"(e) Service on Rest Days.

Service rendered by an employe on his assigned rest day or days shall be paid for under the call rule, number 54, unless relieving an employe assigned to work eight (8) hours on such day. If the carrier has not been forced to call the employe to relieve an employe assigned to such day by reason of seniority, then the rate to be applied will be the regular rate of the employe or the rate of the position, whichever is higher.

(f) Work on Unassigned Days.

Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employe."

Paragraph (e) and (f) are not applicable since the work is to be performed on a day which is part of an assignment, said work being assigned to the incumbent temporarily off sick, and this vacancy was not filled by the Carrier as contemplated by the parties.

The Board sustains the Carrier's position by holding the Carrier can cancel a well established policy, not incorporated within the Agreement, notwithstanding the established use of senior employes on their rest days, as a proper exercise of management prerogative. This case is in line with the problem presented in Award 8346, supported and followed by the other quoted awards, thereby Award 8346 establishes a precedent which is controlling in the instant case.

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 Employes involved in this dispute are respectively Carrier and Employes 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 May 1965.

LABOR MEMBER'S DISSENT TO AWARD 13619, DOCKET CL-14272

Award 13619, as did Award 8346, which was relied on most heavily by the Referee, completely ignored the principle of seniority.

Carrier had overtime work to offer and it should have been offered on the basis of the employes' relative seniority.

What has been permitted here is tantamount to permitting the Carrier to "punish" Claimant without any hint or suggestion of a fair and impartial hearing or notice of intent. The claim should have been sustained.

The "practice" relied on was not merely an alleged practice, but one acknowledged as such by both the Carrier and the Employes.

Such an abrupt and unannounced change in the "practice" should not have been permitted, as it clearly was used as retaliation towards Claimant. Furthermore, even if the "practice" had been discontinued altogether, the principle of seniority still required that Claimant should have been offered the overtime work in preference to an employe with less seniority.

I, therefore, dissent to this Award.

D. E. Watkins

Labor Member
6/25/65