Award No. 14080
Docket No. CL-15047

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5631) that:

(a) The Carrier violated the Clerks' Agreement, particularly Rule 40 and the established practice of filling short vacancies in higher rated positions in the Baggage and Mail Department when on August 28 and 29, 1963, it required Mail Handlers E. A. Hoole and Lawrence Herl, respectively, to leave their regular positions on the 3:30 P. M. to 12:00 midnight shift to fill short vacancies in the position of Machine Dispatcher (Coder) on the 7:00 P. M. to 3:30 A. M. shift and failed to call Norman E. Vaughn to fill the vacancies; and

(b) The Carrier pay E. A. Hoole and Lawrence Herl one day's pay each at pro rata rate of Mail Handler for August 28 and 29, 1963, respectively; and

(c) The Carrier pay Norman E. Vaughn two day's pay August 28 and 29, 1963, at the time and one-half rate of Machine Dispatcher (Coder) rate account violation of the Agreement.

EMPLOYES' STATEMENT OF FACTS: The basic fact out of which this dispute arose is that M. F. Spencer, incumbent of Machine Dispatcher (Coder) position 569B, assigned hours 7:00 P. M. to 3:30 A. M., rest days Sunday and Monday, was on vacation and there was the need of filling the position on such days. Regular vacation relief positions for employes other than Mail Handlers were not established and Coder vacation vacancies were filled on a day to day basis as short vacancies. The claim dates are Wednesday and Thursday, August 28 and 29, 1963.

Claimant Vaughn was the incumbent of Machine Dispatcher (Coder) position 574B, assigned hours 4:00 P. M. to 12:00 midnight, rest days Wednesday and Thursday. He was available for work on his rest days August 28 and 29, 1963, the dates of the violation alleged and the claim filed for him.

1. The monetary penalty sought in paragraph (c) in favor of N. E. Vaughn — a double penalty, pay at time and one-half rate for time not worked.

The holdings of the Third Division have established a solid jurisprudence based upon a great majority of Awards allowing reparation at the pro rata rate of pay as the measure of damage for the employe suffering a breach of contract in circumstances where that employe **did not perform** the work made the subject of his claim.

The claim of Hoole and Vaughn for August 28, 1963 should be dismissed as it is premised on incorrect evidence.

We submit, however, that this claim is entirely without merit and should be decided without the necessity of considering the above point No. 1.

(Exhibits not reproduced.)

OPINION OF BOARD: Petitioner, in its Rebuttal Brief in Answer to Carrier's Ex Parte Submission amended the Claim as follows:

> "The Carrier disputes the fact that claimant Hoole worked as Coder for Spencer August 28, 1963. The claims as presented originally were based on information supplied by claimant Vaughn and were not questioned on the property. However, a joint check of Carrier's records was made subsequent to exchange of ex parte submission and it was determined that Hoole did not fill the Spencer Coder vacancy August 28. Herl worked it both days. Hoole had worked it August 27, 1963. Under these circumstances the Employes will withdraw and cancel the claims for Hoole and Vaughn for October 28, 1963. The claim as amended will remain for one day at pro rata mail handler rate for Herl for August 29, 1963, and one day at time and one-half Coder rate for Vaughn for August 29, 1963."

FACTS

Claimant Vaughn was regularly assigned to the position of Machine Dispatcher with hours from 4:00 P. M. to midnight, Wednesday and Thursday rest days.

Claimant Herl was regularly assigned to the position of Mail Handler with hours from 3:30 P. M. to midnight, Friday and Saturday rest days. He was a qualified Machine Dispatcher.

A Machine Dispatcher position is higher rated than Mail Handler.

On Thursday, August 29, 1963, there was a vacancy of a Machine Dispatcher position, hours 7:00 P. M. to 3:00 A. M., caused by the regular incumbent being on vacation. This was on a rest day of Claimant Vaughn and a day on which Claimant Herl was regularly assigned to work as a Mail Handler from 3:30 P. M. to 12 midnight. Claimant Herl, before the beginning of his regular assignment, was called and accepted the opportunity to fill the vacancy of the higher rated position. His regular assignment was filled from the extra board.

PETITIONER'S CONTENTIONS

Petitioner contends that: (1) Claimant Vaughn should have been called to fill the vacancy and since it occurred on his rest day he should be compensated at the overtime rate; (2) the failure to call Vaughn was in violation of:

"RULE 40.

ABSORBING OVERTIME

Employes will not be required to suspend work during regular hours to absorb overtime."

and, (3) past practice establishes that Vaughn should have been called.

CARRIER'S CONTENTIONS

Carrier contends that: (1) Claimant Herl was called in compliance with Appendix H. Article II(b) of the Agreement which reads:

"Mail and Baggage Handlers in the regular force may not exercise seniority to short vacancies occurring in the regular force. However, the incumbents may exercise seniority rights to short vacancies on a daily basis occurring in all higher rated positions and positions of Railroad Mail Handler, Mail and Baggage Handlers promoting to short vacancies in higher rated positions and Railroad Mail Handler short vacancies shall retain their own rest days and shall exercise their seniority to such short vacancies daily at least 15 minutes before the starting time of the shift on which the short vacancy occurs."

(2) Rule 40 is not applicable; and, (3) Petitioner could not and did not prove its alleged past practice averment.

RESOLUTION

In cases interpreting rules prohibiting absorbing overtime we have consistently held "that to find a violation of the rule the record must contain credible evidence showing . . . carrier suspended an employe . . . during his regularly assigned hours to equalize or absorb overtime," Award No. 13218; and, in Award No. 13192 we held:

"Employes must show that a Claimant has been required to suspend work on his assignment and to perform the work of another position which, otherwise, would have been performed on an overtime basis by the incumbent of the latter position. Awards 7167, 5331."

Petitioner has failed to satisfy either of these tests. Therefore, we find that Carrier did not violate Rule 40.

The evidence in the record as to past practice is conflicting. The burden of proving the alleged practice by a preponderance of evidence of probative value is Petitioner's. It failed to satisfy the burden.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 12th day of January 1966.