

Award No. 14129
Docket No. CL-15456

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert Schmertz, Referee

PARTIES TO DISPUTE:

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

FORT WORTH AND DENVER RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5717) that:

(1) Carrier violated the Agreement at Wichita Falls, Texas on November 6 and 7, 1963, when it failed to call the senior employe to work a short vacancy at overtime rate of pay.

(2) Carrier shall now be required to pay Mr. D. P. Premeaux, the senior available employe, a day's pay at the rate of time and one-half for each of the days in question, namely, Wednesday, November 6, 1963 and Thursday, November 7, 1963.

EMPLOYES' STATEMENT OF FACTS: On Wednesday and Thursday, November 6 and 7, 1963, Mr. J. R. Armstrong, the assigned occupant of the position of Night Yard Clerk at Wichita Falls, Texas laid off sick.

There were no extra or furloughed employes available and Carrier held Index Clerk T. C. Turkett, with a Group 1 seniority date of October 16, 1957, for thirty minutes on November 6 and one hour forty-five minutes on November 7 to perform part of the work of the Night Clerk's position.

Mr. Premeaux, whose Group 1 seniority date on the same roster is January 17, 1952, was off on his rest days on these dates and was available for service.

Mr. Armstrong was not paid sick leave allowance for November 6 and 7, 1963.

This claim was handled with the Assistant to General Manager (Labor Relations), Fort Worth and Denver Railway Company, as shown in Employes' Exhibits Nos. 1 through 8.

POSITION OF EMPLOYES: The Carrier violated rules of the Agreement between the parties, effective September 1, 1947, except as amended and

These awards, and others, including Third Division Awards 5589, 6691, 7256, 7591, 10244 and 12099, apply with equal force and effect to the claim here under discussion. For the same reasons stated in those awards, the instant claim must be denied.

As stated previously, there is no restriction in the effective agreement here involved on Carrier's right to blank a position such as the one in this case when the regular incumbent is absent of his own volition. The Union has been unable, during the handling of the claim on the property, to cite any rule to prohibit the Carrier from doing what it did in this case, despite the fact that the Carrier requested the Union on numerous occasions to advise what rule contains such prohibitions.

Neither is there any rule in the agreement, and as previously pointed out, the organization does not cite one, that provides that Carrier must use the senior available employee on his rest day to fill a temporary vacancy. Certainly there is nothing to preclude the Carrier from having hired a new employee for this temporary vacancy in the absence of any rule had it been necessary for the temporary vacancy to be filled as is being claimed by the organization.

Ample evidence has been produced above to show that this claim is not valid and without receding from that position in the slightest, the Carrier points out that even if for some reason this claim would be sustained, the demand for punitive rate cannot be supported. This Board has consistently held that pay for time lost can only be made at the pro rata rate. This principle is so well established that citation of authority should no longer be necessary.

This claim must be denied in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute concerns certain work performed on November 6 and 7, 1963 by an employee named Tommy C. Turkett. On the dates in question the regularly assigned Night Clerk — Mr. J. R. Armstrong did not work due to illness. The Organization contends that Mr. Turkett worked on Mr. Armstrong's job for thirty minutes on November 6 and for one hour forty-five minutes on November 7. This assignment of Mr. Turkett according to the Organization violated Rules 4, 6, 42, 43 and 47 of the agreement in that the Carrier was required to assign the work to the most senior available employee who in this situation was the grievant Mr. D. P. Premeaux.

The Carrier takes the position first that job in question was "blanked" and that therefore no one was assigned and secondly that if there is a finding that Mr. Turkett was assigned it was done so within the rights reserved to the Carrier under the agreement.

The issues, therefore are:

1. Did the Carrier assign or use Mr. Turkett to perform the work normally performed by Mr. Armstrong?
2. If such assignment or use of Mr. Turkett were made, did it violate the agreement in that the assignment should have gone to Mr. Premeaux?

and

3. If the agreement was so violated, what should the remedy be?

The facts of this case are not entirely clear or undisputed.

The Carrier has contended that the position was truly "blanked" and that no one worked Mr. Armstrong's position on the dates and times in question.

The Organization on the other hand in initiating the case by letter dated December 24, 1963 from Mr. R. W. McCarty to Mr. K. P. Lucas took the position that Mr. Armstrong's "job was blanked and no one was assigned that position." In subsequent correspondence between the parties and in its Submission the Organization contended that Mr. Turkett was assigned to Mr. Armstrong's job and that this assignment of a less senior employe violated the agreement.

There is no dispute that Mr. Turkett worked overtime on the times and dates in question. What is disputed is whether it was in his own position or in the absent Mr. Armstrong's.

It is well settled that the party asserting a claim bears the evidentiary burden of sustaining that claim. Mr. Moberly's letter of September 9, 1964 to Mr. Hall states "Our investigation indicates that Index Clerk Turkett performed work on Mr. Armstrong's position on both November 6 and 7, 1963, in which case Mr. Armstrong's position would not have been blanked."

In addition to this assertion and its continuance into their Submission and Rebuttal the Organization cited a letter dated June 22, 1965 from Mr. Turkett to Mr. McCarty in which Mr. Turkett states "Since he [Mr. Armstrong] did not work I was held over to perform the duties of his position for the times indicated."

Mr. Turkett also enclosed with that letter his overtime slips for the times and dates in question.

This letter and the overtime slips are attached as Exhibits No. 9, 10, and 11 of the Organization's Rebuttal Brief. The Carrier has argued that they should be excluded from the Board's consideration as untimely.

In support of this position the Carrier cited Circular No. 1 which states ". . . all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, . . ." and ". . . all supporting data bearing upon the dispute . . ." must be submitted in the original submission.

The Organization contends that the Exhibits are properly before the Board because they are a documentation of the position taken in the Rebuttal Brief.

Prior Board awards are clear that evidence submitted subsequent to the initial Submission may not be considered by the Board. To do so would foreclose the other party from having an opportunity to respond. Considering the procedures of this Board, this is a sound rule.

In this particular case it is clear that the Exhibits in question should not be considered. Exhibit 9 is in effect ex parte written testimony given not only well after this matter arose but indeed well after it was deadlocked on the property.

The other two Exhibits even if they were considered, standing alone, really do not shed any light on the issue of what job Mr. Turkett performed. If they do indicate that he performed Mr. Armstrong's job they should have

been submitted at a time when the Carrier could have had the opportunity to answer.

The Board therefore concludes that it must exclude from its consideration Exhibits 9, 10 and 11 of the Organization's Rebuttal Brief.

The Organization also argued that if a true "blanking" had taken place Mr. Armstrong would have been paid for the two days. They contend that the Carrier's failure to deny not paying Mr. Armstrong for the two days establishes that true "blanking" did not occur and that this constitutes sufficient evidence to substantiate their claim of non-blanking.

After a careful review of the record it is the Board's conclusion that the Organization has failed to establish the basis for its claim i.e. that Mr. Turkett worked Mr. Armstrong's job. Indeed the Organization's own position presents some unresolved conflict on this point in that they initially took the position that the "blanking" of the position created an abolished job while later contending a failure to truly "blank" the job. The Carrier has contended that the job was blanked.

The contention that the failure to pay Mr. Armstrong yields the conclusion that the job was not "blanked" must be rejected. Even assuming Mr. Armstrong were not paid, it would require speculation by the Board to determine why. It may well be that Mr. Armstrong has a valid claim for two days' pay but this is not a matter before this Board. What is before this Board is whether or not Mr. Turkett worked Mr. Armstrong's job. Non-payment of Mr. Armstrong standing alone does not establish this.

In the light of these conflicts, therefore, the Board has no basis upon which to make a finding that Mr. Turkett worked Mr. Armstrong's job on the dates and times in question.

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 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 4th day of February, 1966.