

Award No. 15009
Docket No. CL-15271

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5664) that:

(1) Carrier violated the Clerks' Rules Agreement when it permitted employe holding a bulletined subject-to-return position to voluntarily release himself therefrom and immediately return onto his regularly owned position.

(2) Carrier shall now be required to compensate employe, Mr. M. H. McHale, Yard Clerk, New Hampshire District, Boston Division, who was prematurely displaced, in the amount of \$40.2766 representing two days' wages lost at daily rate of \$20.1384 on Saturday, October 19 and Sunday, October 20, 1963.

EMPLOYEES' STATEMENT OF FACTS: Mr. M. A. Lemay, seniority 5-12-46, permanent owner of second trick Yard Clerk's position at Nashua, New Hampshire, had been off under indefinite leave of absence account illness.

This position had assigned work days, Monday through Friday, inclusive, 1:30 P. M. to 10 P. M. (½ hour lunch) with rest days on Saturday and Sunday, rate \$20.1384 daily.

Under date of September 11, 1963, by its bulletin Vacancy No. 8 (Temporary) Carrier posted this position subject to return of Mr. M. A. Lemay.

The position was awarded to Mr. R. B. Landry, seniority 9-26-52.

Under date of September 18, 1963, Carrier bulletined the position vacated by Mr. R. B. Landry as follows:

"Vacancy No. 9 (Temporary)

Manchester, N.H.—Relief Yard Clerk
Hours: Saturday 5:00 A. M. - 1:00 P. M.—Rate \$2.5713
Hours: Sunday thru Wednesday 9:00 P. M. - 5:00 A. M.—Rate \$2.5173
Rest Days: Thursday and Friday
(Subject to return of R. B. Landry)"

nesday, April 7th; and 8 hours on Thursday, April 8th; making a total of 40 hours and 8 hours on Friday, April 9th for full total of 48 hours in that work week. The last two days worked did not form part of any assignment."

Claimant is and always was in a spare category in that he was never the owner of a regular position, in fact he had been going from vacancy to vacancy at the direction of Carrier under Rule 10(d). As he was not moving from one assignment to another as distinguished from a vacancy, the restriction in Rule 17(b) is not applicable and he is entitled to punitive rate for all time worked over 40 hours.

CL-30 has no bearing and as it is clear the situation was created by Carrier, payment should be made. Please see CL-5494 and CL-5495 in support thereof."

After the claim had been discussed on the property, Mr. R. W. Pickard, the then Vice President-Personnel, answered Mr. Connor in letter dated October 26, 1962, the pertinent portion reading:

"Claim 5 (your Claim 2)—The contention here is that Mr. Landry having worked the second-trick assignment Monday to Friday was entitled to time and one-half under Rule 17(b) or (c) for work on the first-trick assignment on Saturday, March 10 and the third-trick assignment on March 11, Rule 19(h) being cited.

Mr. Donovan was not an "extra or furloughed" man. Rule 19(h) is not applicable. He was properly paid straight-time rates for the two days claimed under the exception to Rule 17(b) and (c) cited above. While covering Mr. Omand's assignment, his work week started on Monday. However, when he reverted to his own assignment on Saturday, March 10 he also reverted to his own work week which started on Saturday." (Exhibits not reproduced).

OPINION OF BOARD: The essential facts are not in dispute:

Mr. M. A. Lemay, permanent owner of second trick Yard Clerk's position at Nashua, New Hampshire, had been off on indefinite leave of absence on account of illness.

This position had assigned workdays of Monday through Friday, 1:30 P. M. to 10:00 P. M., rest days Saturday and Sunday. The position had been awarded to Mr. R. B. Landry, subject to the return of Mr. Lemay.

Carrier bulletined the position vacated by Mr. Landry which was as a relief Yard Clerk with hours Saturday 5:00 A. M. to 1:00 P. M., and Sunday through Wednesday, 9:00 P. M. to 5:00 A. M., rest days Thursday and Friday. Claimant was awarded the assignment, subject to the return of R. B. Landry.

The position regularly occupied by Claimant was that of a regular relief Yard Clerk's position as follows:

Monday—6 A. M. - 2 P. M. Concord, N. H.
Tuesday—2 P. M. - 10 P. M. Concord, N. H.
Wednesday—2 P. M. - 10 P. M. Concord, N. H.

Thursday—9 P. M. - 5 A. M. Manchester, N. H.

Friday—10 P. M. - 6 A. M. Concord, N. H.

Some time on Friday, October 18, 1963, Mr. Lemay notified Carrier that he would return from sick leave to his permanently owned second trick Yard Clerk position, then held by Mr. Landry, on the following Monday, October 21, the first working day of the assignment at 1:30 P. M. At the end of bulletined tour of duty at 10 P. M. on Friday, October 18th, Carrier released Mr. Landry from Mr. Lemay's position and permitted him to return to his regularly owned position at Manchester, New Hampshire, on Saturday at 5:00 A. M., October 19th, without awaiting the actual return of Mr. Lemay. Claimant was thereby displaced on Saturday, October 19 and caused to lose two days pay, namely, Saturday and Sunday, October 19 and 20, because his regular assignment did not begin until Monday at 6:00 A. M. Claimant contended that such premature release of Landry by the Carrier was a violation of Rule 5(e) which reads as follows:

"(e) Employees returning from leave of absence, during which period they were entitled under the Rules to continue their re-employment and seniority relationship with the Carrier, may return to their former position, (unless former position has been abolished during their absence, or the position is held by a senior employee as a result of a displacement made under the Rules of the Agreement) or said employee returning from leave of absence may within seven (7) calendar days after resuming duty exercise displacement rights to any position bulletined during such absence.

"If upon returning from leave of absence an employee's position has been abolished, or is held by a senior employee who has made a displacement on it (as distinguished from being assigned to it as a subject-to-return vacancy) the employee returning from leave has a right only to exercise displacement over junior employees within twelve (12) calendar days after the expiration of the leave.

"Where the employee returning from leave of absence is entitled to return to his former position under the foregoing provisions of this Section of the Rule, and does so, employees affected by his return to his former position shall have the right to return only to their former position (unless former position has been abolished during their absence, or the position is held by a senior employee as a result of a displacement made under the Rules of the Agreement).

"If the former position of such employees has in the interim been abolished, or is held by a senior employee who has made a displacement on it (as distinguished from being assigned to it as a subject-to-return vacancy) employees so affected will have a right to exercise displacement over junior employees within twelve (12) calendar days after being displaced as a result of the employee returning from leave. (Emphasis ours.)

"An employee assigned to a vacancy resulting from another employee going on leave of absence and who upon being displaced as a result of the employee on leave returning and who has no former position to return to may exercise displacement over junior employees within twelve (12) calendar days after being displaced as a result of the employee on leave returning."

Under a supplemental agreement the parties stipulated that leave of absence referred to in Section 5(e) included leave of absence due to sickness.

Petitioner contends that Rule 5(e) specifically outlines the rights of employees after the employee on leave returns to service. This fact, it asserts, is emphasized by the use of the phrase "and does so".

The issue is when did the temporary appointment which Mr. Landry filled, end? Was it when Carrier released him or when the regular occupant actually returned?

It is clear that when an employee accepts a temporary assignment subject to the return of the regular incumbent the assignment terminates when the incumbent returns. The question posed is whether Rule 5(e) restricts the right of the regular occupant to return. A careful reading of 5(e) discloses that its purpose is to arrange the alternatives which a returning employee may elect, between his former job and any other job which might have been available to him while he was on leave. The employee on leave of absence is given the right to go back to his old job or to exercise displacement rights to any position bulletined during his absence, whereas the temporary employee who fills his position during his absence has the right to return only to his regular position without displacement rights to any position bulletined while he was on temporary assignment. The reference to the return of the regular employee by the use of the words "and does so" refers to the choice made by the regular incumbent to return to the job. It refers to his exercise of the right to return to his former position rather than electing to go to some other job.

While Rule 5(e) seems to focus on the rights of the returning employee, it also affects the displaced employee. By releasing Mr. Landry on Friday at 10 P. M., Carrier, in effect, returned him to his former job at that time. If so, Claimant was simultaneously displaced and entitled to return to his regular job. No position can be held by two persons at the same time. Carrier may not say that Mr. Landry returned to his job when he finished his tour of duty on Mr. Lemay's position and not say, at the same time, that Claimant did not finish his assignment on Mr. Landry's position at that very moment. Like a house of cards, when one falls, the rest fall in rapid succession.

There is nothing in the Rules which prohibits Carrier from interpreting the return to one's regular position as occurring at the end of a temporary assignment, but it may not choose different interpretations for different employees. Claimant was entitled to return to his regular assignment on Friday at 10 P. M. If he had been allowed to do so he would have worked 8 hours more than he actually did that week. He is entitled to be compensated for that loss at straight time rates.

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 Carrier violated the Agreement.

AWARD

Claim sustained to the extent indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 6th day of December 1966.