Award No. 15459
Docket No. CL-15077

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Thomas J. Kenan, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY
(Pacific Lines)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5579) that:

(a) The Southern Pacific Company violated the Clerks' Agreement at West Oakland, California, when on May 14, 1962, it failed and refused to accept application made by Mr. Virgil S. Harding to fill a short vacancy but, instead, got the work thereof done by on-duty employes; and,

(b) The Southern Pacific Company shall now be required to allow Mr. Virgil S. Harding eight (8) hours' additional compensation at the rate of Yard Clerk Position No. 34 each date May 15, 16, 17 and 18, 1962.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement bearing effective date October 1, 1940, reprinted May 2, 1955, including revisions, (hereinafter referred to as the Agreement) between the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) and its employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter referred to as the Employes) which Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

At the time of this dispute Mr. Virgil S. Harding, hereinafter referred to as the Claimant, was the regular assigned incumbent of Train Clerk Position No. 21, West Oakland Yard, rest days Tuesday and Wednesday.

Position No. 3, Assistant Chief Clerk, Bay Street, was vacant May 14 through May 18 account incumbent F. Voetsch on vacation. Absent of an eligible unassigned employe, Mr. Bailey Thompson, incumbent of Yard Clerk Position No. 34, West Oakland Yard, rest days Saturday and Sunday, made application therefore and was assigned thereto. No eligible unassigned employe was available for Position No. 34; therefore, Claimant made application to be

From Monday, May 14, through Friday, May 18, 1962, F. W. Voetsch, incumbent of Position No. 3, Assistant Chief Yard Clerk, took his vacation and in the absence of an available unassigned employe, B. Thompson, incumbent of Position No. 34, Yard Clerk, moved up under provisions of Rule 34(c) of the current agreement and was paid rate of Voetsch's Position No. 3, Assistant Chief Yard Clerk, during the vacation period.

Also, on May 14, 1962, the Claimant, Virgil Harding, incumbent of Position No. 21, Train Clerk, filed application under Rule 34(c) of the current agreement to assume Thompson's vacancy on Position No. 34, Yard Clerk, effective May 15, 1962 (Carrier's Exhibit A). Claimant's unsolicited application was denied, inasmuch as the work load at the yard office was not sufficient to warrant furnishing relief on Thompson's resultant vacancy on Position No. 34, Yard Clerk, during the vacation period, May 14 through 18, 1962, that Thompson was relieving Voetsch on the Assistant Chief Yard Clerk position.

3. By letter dated June 6, 1962 (Carrier's Exhibit B), Petitioner's Division Chairman submitted on appeal claim to Carrier's Division Superintendent in behalf of Virgil S. Harding for ". . . eight (8) hours' compensation . . ." each date, May 15, 16, 17, and 18, 1962, ". . . in addition to any other earnings or compensation which was paid to him for these same days," contending that ". . . claimant was ready and willing to fill vacancy on Position No. 34 Yard Clerk from Tuesday May 15 to Friday, May 18, 1962 . . . accordingly his application should have been accepted and he should have been permitted to fill the position."

By letter dated July 25, 1962 (Carrier's Exhibit C), the Division Superintendent denied the claim, stating in part ". . . it is our position that a resultant vacancy from a 34 (c) application on a vacation relief need not be filled . . ."

4. By letter dated August 23, 1962 (Carrier's Exhibit D), Petitioner's General Chairman appealed the claim, with the Division Chairman's claim embodied therein, to Carrier's Assistant Manager of Personnel, and by letter dated October 24, 1963 (Carrier's Exhibit E), the latter denied the claim, stating that no provision of the current agreement requires position of yard clerk be filled while regular incumbent thereof performs relief on another position under Rule 34(c) and that claimant's request to fill said position under Rule 34(c) was inapplicable.

(Exhibits not reproduced.)

OPINION OF BOARD: The Board must initially consider Carrier's contention that Employes' claim, as presented to the Board, varies from the claim processed on the property. If this is so, the claim must be dismissed, for it would not properly be before the Board.

The claim was first filed with Carrier by Division Chairman Larson in his letter of June 6, 1962, addressed to Superintendent A. S. McCann.

Division Chairman Larson stated:

> "Facts are that Chief Clerk Voetsch was scheduled for and commenced his vacation on Monday, May 14, 1962 which was concluded on Friday, May 18, 1962.

There being no unassigned employes available, Bailey Thompson assigned to Position No. 34 Yard Clerk submitted an application for the vacancy under Rule 34 paragraph (c) of the Clerks' Agreement which was accepted and he was placed on the assignment and filled this vacancy during the absence of incumbent Voetsch.

Claimant Harding in turn submitted an application **under the same rule** to fill the vacancy left open by Yard Clerk Bailey Thompson, however, Chief Clerk Barkow would not accept this application but ordered a notation in the turn over book to the fact that Position No. 34 Yard Clerk was to be left vacant.

It is our position that claimant was ready and willing to fill vacancy on Position No. 34 Yard Clerk . . . and that accordingly his application should have been accepted and he should have been permitted to fill the position." (Emphasis ours.)

The basis of the claim was clearly stated to be an alleged violation by Carrier of Rule 34(c) of the parties' Agreement governing hours of service and working conditions (hereinafter callled the Clerks' Agreement).

Superintendent McCann's reply letter, dated July 25, 1962, stated with respect to the vacant Position No. 34 Yard Clerk:

"[It] was not filled due to a sufficient number of yard clerks working on this same shift who could cover the duties.

As you were informed, it is our position that a resultant vacancy from a 34(c) application on a vacation relief need not be filled, and Mr. Harding's application . . . was therefore denied, in view of which your claim is declined."

Carrier thus gave two reasons in support of its position: (1) there was a "sufficient number of yard clerks working on this same shift who could cover the duties," and (2) "a resultant vacancy from a 34(c) application on a vacation relief need not be filled." The Board notes that the second reason does not rely upon Rule 34 or any other specific provision of the Clerks' Agreement.

The Employes' appeal of the claim, made by letter of August 23 addressed to Assistant Manager of Personnel Sloan, incorporated Division Chairman Larson's June 6 letter. The denial of the appeal was by Assistant Manager of Personnel Sloan's letter of October 24 and stated:

"As stated to you in conference, **no provision** of the Clerks' Agreement requires that the position of yard clerk be filled while the regular incumbent thereof performs vacation relief on another position under Rule 34(c), in view of which the claimant's request to fill said position under Rule 34(c) was inapplicable.

Claim is not supported by Rule 34(c) **or any other provision** of the Clerks' Agreement and is denied." (Emphasis ours.)

Carrier, on appeal, based its decision upon its belief that nothing in the Clerks' Agreement — not just Rule 34 — required it to fill the vacancy in question.

Employes' submission to this Board stated the claim to be Carrier's failure and refusal "to accept application made by Mr. Virgil S. Harding to fill a **short vacancy** but, instead, got the work thereof done by on-duty employes." Since Rule 34 of the Clerks' Agreement is entitled "Short Vacancies," and since the written argument of Employes expressly relies upon Rule 34 as requiring the filling of the vacancy in question, the Board sees no change in the position of Employes from their original claim embodied in Division Chairman Larson's letter of June 6, 1962.

As for Employes' also relying on the assertion that the work in question was done by on-duty employes, Carrier itself in Superintendent McCann's denial letter of July 25, supported its denial of the claim by pointing out that the vacancy in question was not filled "due to a sufficient number of yard clerks working on this same shift who could cover the duties." The grievance procedure in effect between the parties requires Carrier to support with reasons its denial of any claim. Such reasons for denying a claim, once advanced by Carrier, are properly a part of a grievance proceeding and subject to attack by Employes. In the proceedings now before the Board, from the time the issue was joined on the property, Carrier's use of yard clerks on duty to cover the duties in question has been a part of this proceeding.

The Board therefore finds no substantial variance in Employes' claim now before this Board and the claim as originally perfected and processed on the property. The claim will be considered on its merits.

This dispute concerns a vacation problem: Assistant Chief Clerk "A" goes on vacation. Yard Clerk "B" moves up and takes "A's" position. Train Clerk "C" applies for the yard clerk position vacated by "B". Carrier rejects the application and utilizes other working yard clerks "to cover" the yard clerk duties of "B's" position.

Employes contend that Rule 34(c) of the Clerks' Agreement requires the routine filling of "B's" position by "C" once "C's" application is filed. Rule 34, in pertinent part, provides:

"RULE 34. SHORT VACANCIES

(a) New positions and/or vacancies of thirty (30) calendar days or less duration, may be filled without being advertised, at the option of the employing officer. . . ."

* * * * *

NOTE: Subject to (b) and (c) of this rule.

(b) New positions or vacancies of thirty (30) calendar days or less duration, shall be filled, whenever possible, by the senior qualified unassigned employe who is available and who has not performed eight (8) hours' work on a calendar day. . . ."

(c) If a qualified unassigned employe is not available, position will be filled by the senior assigned employe who makes written application therefore and is qualified for such vacancy, and when assigned shall take all of the conditions of the position . . ."

Employes contend this A-B-C vacation problem is governed by Rule 34(c), insofar as "C's" application for "B's" vacant position is concerned. Carrier contends this matter involves an interpretation of the Vacation Agreement of December 17, 1941. (This case was referred to the National Disputes Committee, established under the provisions of Article 14 of the Vacation Agreement of December 17, 1941. Such Committee failed to dispose of this controversy, making it properly before this Board today).

A proper disposition of this controversy requires reference to both the Clerks' Agreement an the Vacation Agreement, as well as the interpretations of the Vacation Agreement made by Referee Wayne L. Morse in his award of November 12, 1942 (which interpretations are still in effect and binding between the parties, as evidenced by Section 5 of the parties' Supplemental Agreement of February 23, 1945 and by Article 1, Section 6 of the August 21, 1954 Agreement between Participating Eastern, Western and Southeastern Carriers and Employes Represented by the Fifteen Cooperating Railway Labor Organizations Signatory Thereto).

Referee Morse's award contained several interpretations of Article 6 of the Vacation Agreement, which article provides:

> "The Carriers will provide vacation relief workers but the vacation system shall not be used as a device to make unnecessary jobs for other workers. Where a vacation relief worker is not needed in a given instance and if failure to provide a vacation relief worker does not burden those employes remaining on the job, or burden the employe after his return from vacation, the Carrier shall not be required to provide such relief workers."

In one of Referee Morse's interpretations of Article 6, he addressed himself to a hypothetical situation posed by the Carriers, which situation together with the Carriers' contention were as follows:

> "In an office, clerical employe 'A' goes on vacation. Clerical employe 'B' is moved up and paid 'A' 's rate during such absence. Clerical employe 'C' is moved into 'B' 's position and paid 'B' 's rate. It is unnecessary that 'C' 's position be filled. The Carriers contend that it is permissible to blank 'C' 's position."

Referee Morse's comments were as follows:

> "The referee believes that the rules agreements as they presently exist would not permit the Carriers to blank C's position. He is frank to say that he feels that an adjustment of the rules ought to be made to permit the blanking of C's position under such circumstances, but the referee is without jurisdiction or authority to make such an adjustment in the rules for the parties. It seems to the referee that if, under the illustration, it is proper for the Carriers to let A's job go unfilled, and the employes admit that such action would be proper, then there is no really good reason for not allowing them to blank C's job if B is moved up to A's job and C is moved up to B's job and C's job does not need to be filled. The only reason advanced by the employes for their position is that existing working rules prohibit the blanking of C's job. However, the referee cannot escape the conclusion that the application of such a rule to the illustration amounts in fact to a 'make-work' proposition, and is therefore contrary to

the spirit and intent of Article 6 of the vacation agreement. However, in the absence of a definite adjustment, in accordance with Article 13 of the agreement, of the working rules on blanking jobs, such understanding that the vacation agreement must be administered in a manner consistent with the existing working rules agreements."

Thus, the only reason why, in 1942, the position of "C" could not be blanked was that the working rules then in existence prohibited it. Today, we must look to the working rules in force in May 1962 to see if they prohibited the Carrier from blanking Yard Clerk 34's position.

It is immediately important to note that Rule 34 of the Clerks' Agreement, as relied upon by Employes, was not in existence when Referee Morse wrote the before-mentioned comments. The present Rule 34 was first effective on June 16, 1952 (see page 67 of the pocket size, 1955 reprint of the Clerks' Agreement). Whatever might have been the working rules in 1942 that prevented the blanking of positions, they did not include Rule 34, the rule relied upon by Employes.

It is next important to note that Rule 34 is one of twenty rules that comprise Article VIII of the Clerks' Agreement, which article is entitled "Seniority." These twenty articles essentially address themselves, each in its own way, to the overall problem of rights and privileges as among employes, and not to the problems of employes' rights that can be exerted against the Carrier, as is attempted to be done in this proceeding. Certainly, any intention to create employe rights against the Carrier in the seniority section of the Clerks' Agreement should affirmatively appear, and such intention does not clearly appear in Rule 34.

Rule 34 must be read together with all provisions of the Clerks' Agreement and the Vacation Agreement. This includes Article 6 of the Vacation Agreement, which provides that "the vacation system will not be used as a device to make unnecessary jobs for other workers." If Rule 34 inexorably requires the filling of "B's" position when "B" takes vacationing "A's" position, and then "C's" position when "C" applies for "B's" position, there is no end to the matter and there is a total disregard for the positive requirement of Article 6.

The Board holds that Rule 34 of the Clerks' Agreement, despite its use of language such as "shall be filled" and "will be filled" was never intended by the parties to automatically require the filling of the vacant position presented in this case, a vacancy created by the vacation system in effect between the parties.

The Board must finally consider the effect of Carrier's having utilized on-duty yard clerks "to cover the duties" of the vacant yard clerk position. It is one thing to state that Rule 34 does not prohibit the blanking of positions. It is another thing to state that the duties of the blanked position may nevertheless be transferred to on-duty employes to be performed by them.

The Vacation Agreement, in Article 6, does not require that a vacation relief worker be provided if one is not needed and if the failure to provide one does not burden the employes remaining on the job or burden the vacationing employe after his return from vacation. Thus, some of the vacationing employes' duties can be assigned to other employes, and if they are not

burdened by this then no vacation relief worker need be provided. It is a fact question in every case. Article 10(b) of the Vacation Agreement also addresses itself to this situation.

This Board can find nothing in the Vacation Agreement or the Clerks' Agreement which could permit it to apply the same regime to vacant positions created by a regular employe's moving from his job to occupy a vacationing employe's position. The Referee regrets this, believing that the "burden test" of Article 6 and the "25 percent of the workload test" of Article 10(b) contribute to the economical utilization of a Carrier's forces at no disadvantage to its employes. Nevertheless, the tests of Articles 6 and 10(b) can be extended to the present situation not by this Board but only by agreement between the parties.

Rule 34, while not preventing the true blanking of the vacant position in question in this proceeding, does provide the means for filling that vacant position if its duties are actually to be performed. Carrier explained that there were "a sufficient number of yard clerks working on this same shift who could cover the duties." The Board feels this amounts to an admission that Yard Clerk 34's duties were actually performed by others. Carrier was obligated to follow the provisions of Rule 34 in this respect, failed to do so, and thereby violated the Clerks' Agreement. This holding is consistent with those of related Awards 7330 (Referee Coffey), 11604 (Referee Coburn), 14622 (Referee Engelstein), and 14841 (Referee Wolf).

Th Board is unable to find, in any of the agreements between the parties, any provision governing how compensation should be made to the claimant in this proceeding. Accordingly, the Board adopts the "make-whole" concept of damages and awards the claimant the difference between what he would have earned in Yard Clerk Position No. 34 for eight hours on each date, May 15 through 18, 1962, and what he actually earned those days working his regular Train Clerk Position No. 21.

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 was violated.

AWARD

Claim sustained to the extent set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1967.

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