



Award No. 16853
Docket No. CL-16509

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard E. Perelson, 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-6068) that:

(a) The Carrier violated the seniority provisions of the Agreement between the parties when it failed to call Mail Handler, Billy A. Holmes, to perform service Wednesday, September 29, 1965, his rest day, and;

(b) The Carrier pay Billy A. Holmes one day's pay at his rate of time and one-half to make him whole for Carriers' failure to call him for service.

EMPLOYEES' STATEMENT OF FACTS: Claimant in this case is a Mail Handler having a regular assigned position, hours 3:30 P. M. to 12:00 Midnight with Tuesday and Wednesday as his rest days. On the date of claim, Wednesday, September 29, 1965, one of claimant's rest days the Carrier was calling in employees to work rest days. Holmes with seniority date of May 23, 1959, had informed the Carrier he would stand for calls on his rest days. He was home and available on the claim date, but did not receive a call, but junior employees, namely, U. Gibson, seniority date April 2, 1964 and T. A. Sisson, seniority date of January 27, 1964, were called and worked.

Copies of the correspondence between the parties is attached as Employees' Exhibits Nos. 1, 2, 3, 4, 5 and 6. Conference was held with Mail Agent, V. F. Juel December 10, 1965, and with Manager of Personnel, U. B. Llewellyn, February 4, 1966.

There is an Agreement between the parties effective October 1, 1942, revised and reprinted as of June 1, 1961, copies of which have been furnished the Board. The Employees rely on the context of rules therein bearing on the establishment and exercise of seniority and particularly on the provisions of paragraph (d) of Article II of Appendix H, a Memorandum Agreement signed April 25, 1957, subsequently amended on several occasions.

Copy of Appendix H, as amended, is attached as Employees' Exhibit 7.

The dispute here presented has been handled timely on the property up to and including the highest carrier official appointed and there declined. The dispute thus created is submitted herewith ex parte by the Employees to the Third Division, National Railroad Adjustment Board, in accordance with the Railway Labor Act, amended, for consideration and Award.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: On September 23, 1965, Claimant B. A. Holmes was assessed discipline of 5 days' suspension from service for being absent from duty without proper authority. The five-day suspension was served from September 24 to 28, 1965, inclusive.

On the claim date, Wednesday, September 29, 1965, the Mail Handlers Extra List was exhausted and Mail Handlers were called on their rest days to fill temporary vacancies.

When the Mail Handler Extra List is exhausted and there are more vacancies to be filled, available Mail Handlers, regularly assigned on the tour where the vacancies occur are called in seniority order on their rest days to fill such vacancies.

On the claim date, Wednesday, September 29, 1965, the Extra List was exhausted and two regularly assigned Mail Handlers on the 3:30 P. M. to Midnight tour, junior to Claimant Holmes were called for service on their rest days.

The instant claim was thereafter presented and denied.

OPINION OF BOARD: The Claimant has a regular assigned position with the Carrier as a Mail Handler. His hours of duty was from 3:30 P. M. to 12:00 Midnight with rest days of Tuesday and Wednesday.

On Wednesday, September 29th, 1965, which was one of Claimant's rest days, the Carrier was calling Mail Handlers to fill temporary vacancies due to that fact that the Mail Handlers Extra List was exhausted.

The record discloses, and it is admitted by the Carrier, that the Claimant with a seniority date of May 23, 1959, had indicated to the Carrier a desire to be called for rest day work; that the Claimant was not called; that two employees, junior to the Claimant in seniority, were called and did work.

Claimant claims a violation by the Carrier of Article 11, paragraph (d) of the Agreement of April 25, 1957, as amended, which reads as follows:

"(d) In event short vacancies in the regular force are not filled from the extra board and short vacancies remain to be filled, regular force available employees on the tour where the vacancy occurs shall be called in seniority order on their rest days to fill such short vacancies, and shall be paid at the overtime rate of the position filled. Where work is required by the Carrier to be performed on a day which is not a part of any assignment, Rule 37(f) will apply."

Carrier in an attempt to excuse its failure to call the Claimant states that "Holmes was not called to perform service on his rest day, Sept. 29, 1965 due

to oversight on part of Call Board, claim is being denied as our records dating back to April 9, 1964 clearly indicated Holmes would not have worked had he been called." The excuse offered is an attempt to theorize, from conjecture, what the Claimant would or would not do if he had been called. There is no basis for nor any merit to the excuse offered by the Carrier.

The language of paragraph (d) of Article 11 is free from ambiguity. It required the Carrier to call a regular force employe, who is available, to fill the short vacancy if the short vacancy was not filled from the extra board list. Regardless of what happened in the past, it was incumbent on the Carrier to endeavor to ascertain from the Claimant, as to whether or not he was available, especially when the record discloses that the Claimant did indicate to the Carrier his desire to be called for rest day work. The question as to whether the Claimant would or would not be available was for the Claimant and not the Carrier to determine.

We hold, based on the record before us, that the Carrier did not comply with paragraph (d) of Article 11 of the Agreement of April 25, 1957, as amended, in that it failed and neglected to call the Claimant to fill the short vacancy and assigned the position to other employes junior to the Claimant in seniority.

We now determine the question as to whether or not the Claimant, as he requests, be made whole by requiring the Carrier to pay him one day's pay at his rate at time and one-half for the Carrier's failure to call him for service or as the Carrier claims that, if the Agreement was violated, that proper compensation be at straight time pay.

Both parties to this dispute have submitted several Awards of this Board to sustain their respective positions. These Awards are in conflict on this point. Each case must be decided based on the language of the rule or rules of the agreement that it is claimed have been violated. We note from many of the Awards submitted by the Carrier that the language of the rules held to be violated is different from the language of the rule before us.

The language of the rule before us, with which we are concerned, reads as follows: " * * * regular force available employes on the tour where the vacancy occurs shall be called in seniority order on their rest days to fill such short vacancies, AND SHALL BE PAID AT THE OVERTIME RATE OF THE POSITION FILLED." (Emphasis ours.)

The Carrier admits that the work involved in this dispute was work that the Claimant was entitled to perform under the Agreement, had the Carrier complied with the provisions of the Agreement. That is a contract right and the contract requires that pay shall be at the "overtime rate of the position filled." That is the rate of pay agreed to by the parties to the Agreement and this Board has no authority to change it.

Had the Claimant been properly dealt with under the Agreement, especially when the Carrier admits that the Claimant indicated a desire to be called for work on his rest day, he would have performed service on his rest day and would have received time and one-half rate for such service. Under the provisions of the Agreement he is entitled to be made whole.

We will sustain the claim.

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 Agreement was violated.

AWARD

Claim sustained.

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

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of December 1968.