

Award No. 17053
Docket No. TE-16250

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Morris L. Myers, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
CAROLINA AND NORTHWESTERN RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Carolina and Northwestern Railway, that:

1. Carrier violated the terms of the Agreement when on July 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31, 1964 (a total of 15 days), it required, permitted or caused N. G. Gates, a cutoff clerk — not an employee of the Agreement, to fill a vacancy and work the position of agent-telegrapher, Maiden, North Carolina.

2. Carrier shall compensate R. T. Wise, agent-telegrapher, Maiden, North Carolina by paying him eight hours per day for each of the above dates at the straight time and one-half rate of pay in addition to the eight hours vacation pay allowed at the straight time rate.

EMPLOYEES' STATEMENT OF FACTS: Mr. R. T. Wise is regular occupant of the position of agent-telegrapher, Maiden, North Carolina, assigned to work Monday through Friday, with Saturday and Sunday rest days. \$2.42 straight time hourly rate of pay.

Mr. Wise was provided an assigned vacation of fifteen days beginning Monday, July 13 and ending on Friday, July 31.

Beginning on July 13, the Carrier used N. G. Gates, a cutoff clerk who held no seniority under the Telegraphers' Agreement, to relieve him as agent as Maiden, North Carolina.

Claim was made because the Carrier failed to abide by the basic Agreement, as well as the Vacation Agreement, in using an employee not covered by the Agreement to perform the work during the vacation assigned. The claim was appealed to the highest officer and declined by him. Claim is now properly before your Board for final adjudication.

CARRIER'S STATEMENT OF FACTS: The Carolina and Northwestern Railway Company, hereinafter referred to as the C&NW, is a small railroad

granting a vacation than would be incurred if an employee were not granted a vacation and was paid in lieu thereof under the provision hereof. However, if a relief worker necessarily is put to substantial extra expense over and above that which the regular employee on vacation would incur if he had remained on the job, the relief worker shall be compensated in accordance with existing regular relief rules.

(b) As employees exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute 'vacancies' in their positions under any agreement. When the position of a vacationing employee is to be filled and regular relief employee is to not utilized, effort will be made to observe the principle of seniority.

(c) A person other than a regularly assigned relief employee temporarily hired solely for vacation relief purposes will not establish seniority rights unless so used more than 60 days in a calendar year. If a person so hired under the terms hereof acquires seniority rights, such rights will date from the day of original entry into service unless otherwise provided in existing agreements."

Article I, Section 4 of the August 21, 1954 Agreement provides the following:

"Section 4. Effective January 1, 1955, Article 5 of the Vacation Agreement of December 17, 1941 is hereby amended by adding the following:

Such employee shall be paid the time and one-half rate for work performed during his vacation period in addition to his regular vacation pay.

NOTE: This provision does not supersede provisions of the individual collective agreements that require payment of double time under specified conditions." (Emphasis ours.)

OPINION OF BOARD: The Claimant in this case, Mr. R. T. Wise, was an agent-telegrapher for the Carrier located in Maiden, North Carolina. When Mr. Wise was provided a fifteen day vacation beginning July 13, 1964, the Carrier used Mr. N. G. Gates, a furloughed clerk for the Carrier who held no seniority under the Telegraphers' Agreement, as vacation relief for Mr. Wise. The claim here is that the Carrier in using Mr. Gates as vacation relief violated the basic Agreement and the Vacation Agreement.

The Carrier contended that its action was proper because there was no extra agent with seniority available on the division, because Mr. Gates was a furloughed clerk, because Mr. Gates never subsequent to being vacation relief for Mr. Wise worked as a clerk for the Carrier and in fact eventually obtained a regular assignment as agent for the Carrier. (The Record does not document the contention that Mr. Gates did not work as a clerk for the Carrier after being vacation relief for Mr. Wise but does substantiate that Mr. Gates achieved seniority status as an agent on or about October 1, 1964.)

Referee Morse in his historic interpretation of the Vacation Agreement stated that the Agreement "cannot be applied in a manner which will cross craft or class lines." Numerous awards have followed this interpretation and it is undisputed that had Mr. Gates been actively working as a clerk for the Carrier when he acted as vacation relief agent, the Vacation Agreement would have been violated. However, contends the Carrier, since Mr. Gates was on furlough for the entire time that he acted as vacation relief, there was no crossing of craft lines.

We do not agree with the Carrier's contention. There is no question but that Mr. Gates had seniority status as a clerk when he acted as vacation relief as an agent. There is no difference in principle between using a furloughed clerk as vacation relief agent, and using an active clerk as vacation relief agent and replacing that clerk with a furloughed clerk. Since the latter situation would concededly violate the Vacation Agreement, so does the former. Furthermore, prior awards have held that it was violative of the Vacation Agreement to use a displace employe from one craft as vacation relief in another. (See Award Nos. 14435 and 15701.)

The Carrier laid emphasis on the fact that Mr. Gates later acquired seniority status as an agent and alleges that he never worked as a clerk after standing vacation relief for Mr. Wise. This might have been probative evidence in attempting to establish that Mr. Gates was hired in effect as a new employe when he became vacation relief agent for Mr. Wise. However, in order to be a "new employe," he would necessarily have had to give up his seniority status as a clerk before or at the time he worked as agent. There is no evidence that he did so or that he intended to do so. Had he announced that intent the result in this case might well be different.

Having found a violation of the Vacation Agreement, we come now to the question of remedy. Prior awards on this question show a degree of inconsistency. One award allowed one-half time additional pay to the claimant, who in this case is Mr. Wise, presumably on the basis that the claimant had received his vacation and vacation allowance and should not receive the same amount as he would have received had he not taken his vacation (vacation allowance plus time and one-half for working the "vacation period"). See Award No. 15701. Other awards allowed an additional pro-rata to the claimant. See, for example Award Nos. 14432, 14433, 14434, 14435, 10395, 10396, 10397 and 14260. We believe that it makes sense to provide the claimant as a remedy one-half of the additional amount that he would have received had he worked his "vacation schedule," which comes to a $\frac{3}{4}$ time additional pay and we so hold.

For the foregoing reasons, the claim, as modified in this Opinion regarding the remedy, will be sustained.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 26th day of March 1969.