

Award No. 18609

Docket No. CL-18997

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Thomas Rimer, Jr., Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6826) that:

1. The Carrier violated the rules of the Agreement extant between the parties when it failed to call clerk K. M. Shamp to fill a short vacancy which existed on Bill Interchange Yard Clerk position at Oakland Yard on dates of April 3 and 4, 1969.
2. Mr. K. M. Shamp shall be allowed payment at overtime rate for eight (8) hours on April 3, 1969 and eight (8) hours on April 4, 1969.

EMPLOYEES' STATEMENT OF FACTS: On dates of April 3 and 4, 1969, Mr. K. M. Shamp was a regularly assigned clerk holding position of Bill Interchange Yard Clerk at Oakland, California, hours 4:00 P. M. to 12 mid. with rest days of Monday and Tuesday. The Bill Interchange Yard Clerk position, 8:00 A. M. to 5:00 P. M. was unfilled due to the absence of Mrs. Betty Hales who had laid-off sick. These vacancies occurred April 3 and 4. Various duties of the position were performed by Assistant Agent Grant Nilson. As a result a claim was filed with the Carrier on Form #139 Rev. for a days pay at time and one-half for each day. (Employee's Exhibit No. 1.) A letter of declination dated April 16, 1969 was forwarded to clerk Shamp under file A-515. (Employee's Exhibit No. 2.) An appeal was then made to Superintendent J. C. Lusar on May 29, 1969 which appeal was declined on July 8, 1969, file A LC 1050-1969-TRAC. (Employee's Exhibit 2A, 3 and 4.) Subsequently the General Chairman appealed the claim to Mr. W. A. Tussey, Manager of Personnel, the highest officer of the Carrier authorized to handle such cases on the property, on September 3, 1969. (Employee's Exhibit No. 5.) Conference was held on October 14, 1969, with the result that the claim was declined on November 24, 1969. (Employee's Exhibit No. 6.)

(Exhibits Not Reproduced.)

CARRIER'S STATEMENT OF FACTS: At Oakland, California, Carrier maintains the following regular positions in its yard office:

(c) Employees may be required to furnish satisfactory proof of illness, including a statement from a reputable medical doctor setting forth the reasons why the employee was and/or is unable to perform services.

(d) No allowance shall be granted under this rule if an absence is the result of an employee's attempted suicide; misconduct or violation of criminal law; alcoholism, drug or narcotic addiction or any illness occurring or resulting therefrom; pregnancy and conditions arising therefrom; and mental disorders.

(e) This rule shall not apply upon termination of employment relationship or retirement."
(Exhibits Not Reproduced.)

OPINION OF BOARD: On April 3 and 4, 1969, the regularly assigned Bill-Interchange Yard Clerk was absent from work on an authorized leave. The resulting vacancy was not filled by the Carrier. The claim alleges that all or part of the absent employee's work was performed by another employee on duty, the Assistant Agent, in violation of the Agreement and that the Claimant should have been assigned the work, in addition to his regular shift worked on these dates.

The Organization invokes the Scope Rule, Rule 31 (f), and Rule 29 in making its assertion of contract violation. The record shows that both the Assistant Agent and the Bill-Interchange Yard Clerk are covered by the Scope Rule, the former, however, being excepted from Rule 29, Promotion, Assignment and Displacement. Rules 31 (f) and 29 read:

"Rule 31 (f) — NOTICE OF NEW POSITION OR VACANCY
(Rev. 9-16-65) —

Employees will be selected to fill positions pending assignment by bulletin and all short vacancies in accordance with Rule 40(d) or Rule 29.

Rule 29 — PROMOTIONS, ASSIGNMENTS, AND DISPLACEMENTS —

Employees covered by these rules shall be in line for promotion. Promotion, assignments, and displacements under these rules shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail. When an employee junior to other applicants is assigned to a bulletined position, the senior employees making application will be advised the reason for their non-assignment if they request such information in writing and file it within 15 days from date of assignment.

Note: The word 'sufficient' is intended more clearly to establish the right of the senior employee to bid in a new position or vacancy where two or more employees have adequate fitness and ability."

In pursuing its claim, the Organization does not argue that the Carrier does not have the right to "blank" a vacant position, i.e. leave the work unassigned, but that it erred in directing or permitting the Assistant Agent to perform some of the duties of the absent employee. It is contended that some

of the work performed on the days in question was exclusively that of the absent employee and that in such case the Carrier was obligated under the Agreement to fill the temporary vacancy. Copies of certain documents were submitted as having been handled by the Assistant Agent with the assertion that they constituted "proof" of his performance of all, or part of the work of the absent employee.

The Carrier refutes the allegation that the documents submitted constitute proof that the work identified was exclusively that of the absent employee. It is stated that they were merely copies of lists and waybills carrying the dates of April 3 and 4, 1969 and do not indicate by whom the work was performed. The receiving and filing of documents is normally performed, not only by the Assistant Agent, but also by other employees covered by the Clerks' Agreement in the Oakland Yard Office, including the absent employee. In further answer to the charge, the Carrier submitted a letter from the Assistant Agent expressly denying that the handwriting on one of the documents alleged to have been prepared by him was his own.

The Carrier states that the work of the absent employee was deferrable and that, since it was known that the absence would be limited to two days, considered it unnecessary to fill the job for this period, which was a decision reserved to management. In the first answer to the claim the Agent explained, in part, " * * the only work performed by my Assistant Agent was the opening of the U. S. and Co. mail. Other than that, we answered our own phones and the work piled up for Mrs. Hale to perform when she returned * * "

An examination of the language of the Agreement cited by the Organization as having been violated does not support the claim. First, there is no substance to the charge that the Scope Rule was violated in any way. Both positions involved are within the scope of the Agreement, and work may be properly assigned or reassigned to any position within its scope, even as here, where the Assistant Agent is excepted from some of the terms of the Agreement. Such a conclusion by this Board is amply supported by prior awards. (See Awards 3563, 3866, 13963, and others cited by the Carrier.)

Rule 31 (f) and Rule 29 set forth a procedure for the filling of vacancies by promotion, assignment or displacement. They do not establish nor define the circumstances under which a vacancy is declared to exist, and the rules made operative. The Organization has not shown otherwise in its argument nor in the awards cited for support.

In a somewhat similar fact situation, involving a temporary vacancy, the Petitioner relies heavily on Award 14841 (Referee Wolf) which held for the claimant. However, there is one significant difference between that case and the one before us. There, the Board found: "that the work performed was the work of the position. The Superintendent admitted it. We are not dealing with work which was simultaneously and interchangeably performed by two or more employees, but work which was conceded to be the work of the position." In the instant case there is no such admission by the Carrier, but rather, a strong denial. Further, it is the opinion of the Board that the Organization has failed to offer proof of evidentiary value to support that facts which it alleges on this point.

The Board can find nothing in the record before it to form the basis for a charge of contract violation when the Carrier left vacant the position of Bill-

Interchange Yard Clerk on April 3 and 4, 1969. No rule or award cited requires that such vacancy should have been filled by the Claimant.

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 not violated.

AWARD

Claim denied.

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

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1971.