NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20329
THIRD DIVISION Docket Number CL-20453

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Bangor and Aroostook Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7385) that:

1. Carrier violated the Agreement between the Parties, when on June 14, 15, 16 and 17, 1972, it required and permitted an employee of another craft to fill a vacancy in the second trick yard clerk's position at Northern Maine Junction, Maine.

2. Carrier shall be required to pay R. C. Small, yard clerk, three (3) days' pay at punitive rate for June 14, 15 and 16, 1972.

3. Carrier shall be required to pay F. H. Nickersoa, yard clerk, one (1) day's pay at punitive rate for June 17, 1972.

OPINION OF BOARD: The issue in this case is whether the Carrier may use a furloughed brakeman to fill a vacation vacancy in a clerks's position.

The facts are not in dispute. The incumbent of the second trick yard clerk position at Northern Maine Junction, Maine, commenced a two week vacation on June 13, 1972. Clerk L. F. Judkins was lined up to work vacation relief on the position, but, after working the position on June 13, he became ill, leaving the position vacant. The vacancy was offered to, and declined by, a furloughed clerk holding seniority in the involved seniority district. The only other furloughed clerk within the seniority district was not available because he was in military service. The vacancy was then offered to furloughed brakeman Mr. D. K. Bragg, who worked the position on June 14, 15, 16, and 17, 1972; Mr. Bragg did not establish clerk seniority and subsequently returned to the furloughed brakeman list. Thereafter, claims ware filed by the incumbents of the relief yard clerk position and the third trick position, on the theory that they should have been permitted to work the vacation vacancy at the overtime rate on the claim dates. The Carrier's defense is that there is no agreement prohibition against filling a vacation vacancy with persons from other than the clerks' craft where, as here, the vacancy is first offered to all available furloughed clerks holding seniority

where the vacancy occurs. The Carrier says, further, that since the person used to fill the vacancy worked only as a clerk during the dates in question, he was not an employee from another craft and class performing clerical work in addition to his other job.

While it is not necessary to quote the agreement provisions cited in the record, we note that the Employees refer to Rules 1 (b), Scope, and 3(b), Seniority; the Carrier refers to Articles 6 and 7 of the National Vacation Agreement of December 17, 1941. Both parties refer to Interpretations of the Vacation Agreement rendered by Referee Wayne L. Morse, as well as to prior Board Awards.

The Vacation Agreement expressly provides that a vacation absence is not a vacancy under the the agreement (Article 12(b))and that the Carrier is not required to assume greater expense than would be the case if an employee received pay in lieu of vacation (Art. 12 (a)). However, these provisions are subject to the horse doctrine that the filling of a vacation vacancy must not result in the crossing of craft lines and, thus, what constitutes such a crossing has been ruled on by this Board in a great number of Awards. Among the Awards cited by the parties in this dispute, there are three rulings that the use of a furloughed employee from another craft to fill a vacation vacancy does constitute such a crossing. Award Nos. 15056, 17053, and 18916. In Award No. 15056, the Telegraphers' Agreement was found to be violated by the use of a furloughed clerical employee to fill a telegrapher's vacation vacancy. The dispute in Award No. 17053 arose because a furloughed clerk was used to cover the vacation vacancy of au agent-telegrapher. There, this Board stated:

> " 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 displaced 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."

The Employees also prevailed in Award 18916, wherein the Carrier failed to establish that a telegrapher's employment as a telegrapher was terminated prior to his filling a clerk's vacation vacancy. The apparent rationale underlying these Awards is that neither the Vacation Agreement, nor the Morse Interpretations thereof, eliminate the force of the Scope rule in the context of a vacation vacancy dispute between a covered employee and a furloughed or displaced employee from another craft. We are aware that this rationale runs counter to the Vacation Agreement provision that Carrier is not required to assume greater expense than would be the case if the employee received pay in lieu of vacation. We are likewise aware that the rationale may produce see-mingly unsound results in remote areas where the only person available to perform occasional vacation relief work is likely to be someone with an existing employment connection with the Carrier, albeit of a tenuous nature. We conclude, nonetheless, that these Awards should apply to this dispute and the Carrier's Submission and its cited Awards do not persuade us to the contrary. Indeed, the Awards cited by the Carrier are distinguishable from this dispute. In Award No. 10371, after the Utility Clerk was used to fill the Yard Clerk's vacation vacancy, a furloughed telegrapher was used to fill the position of the

Utility Clerk; thus, in this Award, a vacation was not filled by a furloughed clerk from another craft. In Award No. 18954, the vacation vacancy existed on an excepted position; also, the furloughed trainman who filled the vacancy was working off the clerical extra board at the time he provided vacation relief. In Award No. 18112, there was no prohibition against au employee filling a telegrapher's vacation vacancy where the employee had co-exisiting seniority under the Telegraphers' Agreement and under the agreement of another craft, and where the Telegraphers' Agreement did not prohibit such dual seniority. We note finally that the statement quoted by the Carrier from Award No. 10959 appears to be dicta, as the facts there did not involve the filling of a vacation vacancy by a furloughed worker from another craft.

In view of the foregoing, and since we do not find Award Nos. 15056, 17053, and 18916 to be in palpable error, we shall adhere to these Awards and, based thereon, we shall sustain the claim.

FINDINGS: The Third Division of the Adjustment Baord, 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

The Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTBS: C.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of July, 1974.

CARRIER MEMBERS' DISSENT TO AWARD NO. 20329 -
DOCKET NO. CL-20453 - REFEREE BLACKWELL

Article 12(c) of the National Vacation Agreement reads as follows:

> "(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."

Under the above provisions, the Agreement provides vacation relief workers where needed and, in some instances, it may be necessary to hire temporary employes in order to allow regularly assigned employes to be away for the purpose of vacation.

Also, your attention is specifically called to the interpretation placed upon the word "hiring" in Article 10(b) covering Interpretations dated July 20, 1942, by the committee appointed under the provisions of the National Vacation Agreement. The question and answer read as follows:

> "ARTICLE 10(b):
>
> "Question 1: Does the word 'hiring' in Article 10(b) contemplate that the relief worker referred to must be a newly hired employee?
>
> "Answer: No. This word may be interpreted and should be applied as though it read 'providing' or 'furnishing' a relief worker. It does not require that a relief worker necessarily be a newly hired employee."
> (Emphasis added)

The Neutral in his Award stated:

> "* * * We are aware that this rationale runs counter to the Vacation Agreement provision that Carrier is not required to assume greater expense than would be the case if the employee received pay in lieu of vacation. * * *."

Despite this awareness and despite the fact that the individual (person) who filled the position was unemployed and, therefore, held no active status in any craft or class at the time the Carrier offered him an opportunity to work as a clerk, the instant claim was erroneously sustained by the Neutral alleging that the Carrier crossed craft lines.

We dissent.

H. F. M. Braidwood

P. C. Carter

W. B. Jones

G. L. Naylor

G. M. Youhn