

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
PARTIES TO DISPUTE: (
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL 10008) that:

1. Carrier violated the Clerks' Rules Agreement when it **failed** to offer vacancy on Job No. 241, Assistant to Supervisor Payables, rate \$102.97 **per** day, to Claimant R. M. Habermehl on dates of December 8 and 9, 1983, under the provisions of Rule 9 **(b)**, however, physically moved Claimant Dorothy Laramie, junior clerk, under provisions of Rule 9 **(e)** to fill the vacancy.

2. Carrier's action is in violation of Rules 9 **(b)** and 9 **(e)** of the Agreement of the parties.

3. Carrier shall now be required to compensate Claimant Habermehl for the difference between her regular position of Job No. 242, Accounts Payable Specialist, rated \$101.67 per day, and that of punitive rate of Job No. 241, Assistant to Supervisor Payables, rated \$102.97, a total of \$52.79 for two (2) dates, December 8 and 9, 1983.

Carrier shall also be required to compensate Claimant Laramie for the **difference** in straight time paid on position of Job No. 241, Assistant to Supervisor Payables, and the punitive rate of this position for dates of December 8 and 9, 19133, total \$51.49."

FINDINGS:

The Third Division of the Adjustment Board up" the whole record and all the evidence, finds that:

The carrier or carriers and the **employe** or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The claim protests the manner in which the Carrier handled the duties of the position of Assistant to Supervisor Payables (referred to as Position No. 24 in the Carrier's Submission) during the incumbent's (employee Joyce **Frisella**) two-day absence on December 8 and 9, 1983. The Organization contends (1) that under Rule 9(e) Claimant Habermehl was entitled to fill Frisella's vacancy instead of Claimant Laramie and (2) that regardless of Habermehl's **entitlement**, Laramie was moved to the position (No. 241) from her position (No. 210) and under 9 (e) is entitled to time and one-half.

Rule 9 (e) states:

"(e) If the vacancy is not filled pursuant to Paragraph (b) above, Carrier may **move** an assigned employee from his regular position. Such move shall be confined to the seniority district in which the temporary vacancy exists. The vacancy will be offered, in seniority order, to qualified employees working at the same office **or** location, whose hours are substantially the same as those of the vacant position. If the vacancy is not filled in this manner, the junior qualified employee at that office or location, or the nearest practicable office **or** location, will be required to protect the vacancy. A" employee used under this Paragraph (e) will be returned to his regular assignment as **soon** as qualified extra or furloughed employees become available. An employee moved from his regular assignment under this Paragraph (e) will be paid at the time and one-half rate of the position worked, or at the time and one-half rate of his regular assignment, whichever is greater."

The Carrier offers separate defenses for each claim. With respect to employee Habermehl's claim, it contends she would not have been eligible to **move** to Frisella's position because Carrier would have been unable to fill the **resulting** vacancy. It noted on the property without challenge, that "if Mrs. Habermehl had been utilized on position 241, as you allege, the Carrier would have been forced to perform overtime and, therefore, would have been in violation of Rule 25J of the Clerks Agreement." They also asserted that **Habermehl** was not moved because she "was also meeting a deadline and closing date and her work and duties were not **current**." There was also a reference made to the fact that there was a lack of qualified employees to perform her work under these conditions.

It is the conclusion of the Board that under these facts and circumstances, the Carrier was not obligated to move Claimant Habermehl. Third Division Award 21684 established that the Organization has a responsibility to prove that the Claimant in such situations is available to fill the vacant **position**. Based on the relevant factors set forth in Third **Division** Award 21684, we must conclude that Claimant was not available. Therefore, she has no entitlement to the position under Rule 9(e).

This leaves the portion of the claim for employee Laramie. In this regard, the Carrier offers an affirmative defense that it did not fill Frisella's vacancy, but instead distributed her work to other employees. It claims it has the right to distribute work in this manner and its only obligation is to pay any employee assigned such work pursuant to Rates of Pay Rule 31, Paragraph 9(c) which reads as follows:

"(c) **Employees** temporarily or permanently assigned to higher rated positions or work shall receive the higher rates for the full day while occupying such position or performing such work; **employees** temporarily assigned to lower rates positions or work shall not have their rates reduced."

Further, it notes that in some instances work may be deferred.

The Board is not convinced on the basis of this record by the Carrier's defense. While this defense might be dispositive in theory, the Board cannot make the necessary factual finding in this case to back up **its** interpretation of the contract. This is because, to put it plainly, the Carrier makes so many contradictory assertions in the record that it is impossible to conclude affirmatively that the duties of Frisella's position were merely distributed to other positions as opposed to having employee Laramie fill the position.

For instance, in the original declination it was indicated that employee Laramie was moved "... on to position '#241' to 'assist'." At the second level of appeal, the Carrier asserted another clerk (employee House) was also performing duties of Frisella, but identified her job as Position No. 240 not 241. The declination at the highest level dated May 16, 1984, was consistent with the first two declinations contending that ****some**" of the duties of Position No. "241" were given to Laramie.

In its October 19, 1984, confirmation of the conference on the claim the Carrier then referred to Frisella's **as** Position "**no.** 240." It stated that employee House, who occupied Position No. 241, "assumed the duties of position no. 240" and Laramie "assumed the duties" of Position No. 241. Of course, this contradicts its earlier position that Laramie assumed "some" of the duties of Position "241." On December 18, 1984, the **Carrier confirmed** another conference stating the "facts and our position were correctly stated in our letter to you dated October 19, 1984."

Next, the waters are muddled even more in the Carrier's Submission. Now it states the occupant of Position "241" (presumably Frisella) was absent and that "the duties of the vacant position were assigned to Laramie (not to employee House as indicated in its October 19, 1984, letter). On p. 12 and 13 of its Submission it states that Frisella was absent from Position No. 240; and that House occupied Position No. 241; that House was assigned the duties of No. 240 and Laramie was "assigned" the duties of No. 241 and that her Position No. 210 "was blanked."

On page 13 of its Submission, it refers to its May 16, 1984, declaration stating that some of the duties of Job No. 241 were given to Clerk Laramie, occupant of General Clerk Job No. 240. Clerk Laramie occupied her regular assignment on claim dates and also performed the duties of her own assignment on claim dates. This is contradiction to at least its assertion on p. 12 and p. 13 of its Submission.

Who's on first? Given the confusion in the Carrier's handling of the **claim**, the Board must conclude that the Carrier has failed to successfully rebut the Organization's factual assertions. These assertions were that not only did the Carrier elect to fill **Frisella's** vacancy--as opposed to distributing the duties--but did so by assigning Laramie to the position. Thus, given these facts, employee Laramie is entitled to time and one-half compensation under Rule 9(e).

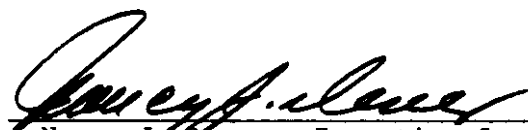
The claim for Claimant Habermehl is denied. The claim for employee Laramie is sustained.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division


Attest:



Nancy J. Dever - Executive Secretary


Dated at Chicago, Illinois, this 30th day of March 1988.

CARRIER MEMBERS' DISSENT
TO
AWARD 26947, DOCKET CL-26442
(Referee Vernon)

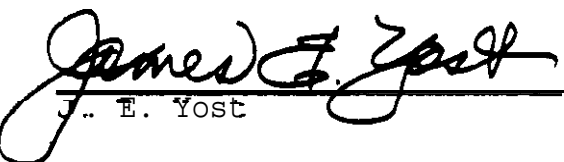
The Majority decision poses the query "Who's on first?" With all due respect, an error must be charged against the Majority in the fielding of this aspect of the case. The appropriate question should have been "Who's up first?" In this dispute, the Organization alleged that Claimant Laramie had been transferred to Job No. 241 on the dates in question. The Carrier denied that such transfer had taken place. The Majority concluded that the Carrier's denial was an "affirmative defense" and the burden of proof was upon the Carrier to prove its position. We submit that the Carrier's denial was not an affirmative defense but simply a **fastball** straight down the middle which the Organization was required to hit if it was ever to reach first base. The record clearly shows that the Organization never came close to satisfying its burden of proof and was left struck out at home. In summary, had the Majority kept its eyes on the ball, its decision would have been "Strike Three - you're out," denying the Claim.


M. W. Fingerhut


R. L. Hicks


M. C. Lesnik


P. V. Varga


J. E. Yost

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBER'S DISSENT
TO
AWARD 26947, DOCKET CL-26442

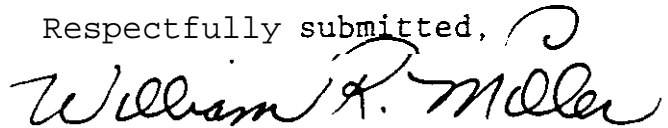
After reading the Carrier Member's Dissent to Award 26947, I believe it is apropos to quote from E. L. Thayer's famous poem "Casey At Bat":

"The sneer is gone from Casey's lips, his teeth are clenched in hate, He pounds with cruel vengeance his bat upon the plate; And now the pitcher holds the ball, and now he lets it go, And now the air is shattered by the force of Casey's blow.

"Oh, somewhere in this favored land the sun is shining bright, The band is playing **somewhere**, and somewhere hearts are light; And somewhere men are laughing, and somewhere children shout, But there is no joy in Mudville-Mighty Casey (Missouri Pacific) has struck out."
(Underlined portion our addition)

Although there may be no happiness in Mudville tonight, the Carrier's Dissent does not detract from Award 26947.

Respectfully submitted,



William R. Miller, Labor Member