Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27671
THIRD DIVISION Docket No. CL-27603
89-3-87-3-268

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10165) that:

1. The Southern Pacific Transportation Company violated the current Clerk's Agreement when on July 2, 1986, it improperly used Ms. D. Buchanan regularly assigned to Position 93, Crew Dispatcher, by shoving her to Position 92 in violation of Rule 34(f).

2. The Southern Pacific Transportation Company violated the current Clerk's Agreement on July 2, 1986, when it failed or refused to call and use Mr. E. Stevens, Jr., Clerk, Sparks, Nevada, for eight (8) hours overtime work on Position No. 92, and instead shoved Ms. Buchanan to Position 92 from her regular assignment Position 93, Crew Dispatcher.

The Southern Pacific Transportation Company shall now be required to compensate Ms. D. Buchanan an additional eight (8) hours at the straight time rate of Crew Dispatcher, Position 92, for July 2, 1986 and; will also be required to compensate Mr. E. Stevens, Jr. eight (8) hours at the overtime rate of Crew Dispatcher, Position No. 92, on July 2, 1986."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 were given due notice of hearing thereon.

On July 2, 1986, a Crew Dispatcher, occupant of Position No. 92, laid off owing to illness. The Carrier did not call in another employee to fill the vacancy. There is, however, another Crew Dispatcher Position No. 93, occupied by D. Buchanan, one of the Claimants herein. According to the Organization, Claimant Buchanan was ordered by the Trainmaster to "perform all of the work normally assigned to Position No. 92," as well as her regularly assigned work on Position No. 93.

Relevant to this occurrence is Rule 34(f), which reads in pertinent part as follows:

> "When a vacancy exists on an assigned work day of an established position or a new position, it will be filled as follows, when the Carrier elects to fill the vacancy:
>
> 1. Senior, qualified, available Guaranteed Extra Board employe on a straight-time basis in accordance with the provisions of this Rule 34.
>
> 2. In the absence of a qualified Guaranteed Extra Board employe on a straight-time basis, by the senior, qualified, available assigned or Guaranteed Extra Board employe on an overtime basis, or where applicable under the provisions of Section (c) of this rule. In the case of a vacancy on a relief assignment, by the incumbent of the position to be relieved on that date, then by the senior, qualified, available, assigned or Guaranteed Extra Board employe. Calling will be from the volunteer overtime list, where maintained.
>
> 3. In the event the vacancy cannot be filled under Items 1 and 2, then the Carrier may instruct an employe, scheduled to work the same hours as the vacant position, to vacate his regular assignment and fill the vacancy. An employe so removed will be paid the rate of his regular assignment, the rate of the assignment worked, or his protective rate whichever is higher. However, if it is found the Carrier could have filled the vacancy under Items 1 or 2, and failed and/or neglected to call employes referred to in Items 1 and 2, then the Carrier will pay the employe removed from his assignment eight hours' pay at the straight-time rate of his regular assignment, or eight hours straight-time pay at his protective rate if such rate is being paid for service on his regular assignment and, in addition, will be allowed eight hours straight-time pay at the rate of the position worked. . . ."

Claimant Buchanan seeks eight hours' pay under Subsection 3 of Rule 34(f). Another Claimant, E. Stevens, an incumbent on Position No. 92 on another shift, seeks eight hours' pay at the overtime rate because of the failure of the Carrier to call him for duty under Subsection 2 of the Rule.

It must first be noted that Rule 34(f) became effective in 1979, so that cited instances involving similar situations occurring prior to such date are not necessarily instructive here.

The Rule is clear and requires no gloss. The Rule gives the Carrier discretion as to whether or not to fill a "vacancy . . . on an assigned work day of an established position." It is the Carrier's contention that the vacancy in Position No. 92 was not filled, although the Carrier does not deny that at least some of the work of the position was assigned to and performed by Claimant Buchanan.

During the claims handling procedure, Claimant Buchanan alleged that she had performed all the work of Position No. 92, giving a detailed description of such work. The Carrier cites a few Position No. 92 duties performed by the Claimant, stating that such could not have consumed more than an hour. The Carrier, however, does not allege that any Position No. 92 duties were left unperformed or were assigned to employees other than Claimant Buchanan.

The record shows that while both Position No. 92 and Position No. 93 are Crew Dispatcher positions, each has individual responsibilities as to the class of employees involved.

Upon review of the record, the Board must conclude that neither Claimant Buchanan nor any other employee was formally designated to fill Position No. 92 instead of performing other work. The same effect resulted, however, by the undisputed direction to Claimant Buchanan to complete the duties assigned to Position No. 93. The Carrier simply did not dispute that this occurred, although alleging the work load was light on the shift in question. The Board concurs with the Organization that the Carrier cannot allege that it has elected not to fill a position and simultaneously assign the work to an employee.

In support of its position, the Carrier submitted 16 supervisory statements as to the Carrier's practice under existing Rules when a position is vacant. Of these statements, four indicated the Carrier's right to blank the position with no performance of the position's work (not in dispute here) or to fill the position from an Extra Board. The remaining 12 statements all referred to dividing some or all of the work among other employees. None of these cited examples address the specific facts here before the Board. The record shows that the duties of Position No. 93 were performed by a single employee, and there was no showing that work was left unperformed or was divided among "other employees." For the purposes of Rule 34(f), the position in this instance was filled.

The situation here is in contrast to that reviewed in Third Division Award 27206. In that instance, one RFO Clerk was not scheduled to work on a holiday, while a second RFO Clerk was on duty. In that situation, it was demonstrated that the positions were both bulletined identically as RFO Clerks and that the work performed was "encompassed in either RFO position." Here, the differing responsibilities between Position No. 92 and Position No. 93 was established.

Similarly, the Carrier's reliance on the September 15, 1971 "TOPS" Employment Stabilization Agreement is inappropriate. Clearly, the temporary assignment of duties on a single shift does not fall under the significant "changes" of Article I of that Agreement.

There was no dispute that Claimant Stevens was in line for the position, had an employee been called in for the work. Under the circumstances and based on the predominant view in such matters on this Division, the claim for pay at the overtime rate is appropriate. Likewise, the claim by Claimant Buchanan is appropriate under Rule 34(f), Subsection 3.

This leads to the result of requiring the Carrier to pay twice for its Rule violation as to a single vacancy. Nevertheless, Claimant Stevens' legitimate claim to the "filled" position was established. As to Claimant Buchanan, in Rule 34(f), Paragraph 3, the parties agreed to a specific remedy which cannot be modified by the Board.

This resolution is supported by Special Board of Arbitration Award dated November 24, 1982 (Lieberman), involving the same parties and interpreting the same Rule. In refuting the Carrier's Argument, that Award stated:

> "It is apparent that there was damage done to Mr. Hudman by depriving him of the work opportunity for Sunday, July 15. A second improper action was the assignment of Claimant Magruder to the position in question. The only change which the amendment to Rule 34 apparently made with respect to this process appeared to be setting forth a particular penalty for the circumstances which affected Claimant Magruder. Nothing in that language or in any evidence presented would seem to indicate that prior practice with respect to contract violations has been suspended in view of the new language. In the instant circumstance, it is quite apparent that the admitted contract violation affected two employees. In view of the clear damage done to both employees, the rectification can only be that both employees be made whole for the violation affecting them. It is apparent that by paying Claimant Magruder, Carrier has not satisfied the damage done by the same act with respect to Claimant Hudman. Thus, it is apparent that nothing in the Agreement as amended in 1979, abridges Claimant Hudman's right to be made whole for deprivation of an assignment which was properly his."

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of January 1989.

CARRIER MEMBERS' DISSENT
TO
AWARD 27671, DOCKET CL-27603
(Referee Marx)

The Majority finds that the "Rule is clear and requires no gloss." To that extent, the Majority is absolutely correct. It is unfortunate that in rendering its decision, it interpreted the Rule contrary to its clear terms.

The Majority finds that inasmuch as all the duties of the vacant position were performed by Claimant Buchanan the vacation position "was filled," in accordance with Rule 34(f). The problem with such conclusion, however, is that it is contrary to the express language of Rule 34(f), which precisely defines how a position is "filled." Thus Rule 34(f)3 provides, in pertinent part:

> "3. In the event the vacancy cannot be filled under Items 1 and 2, then the Carrier may instruct an employe, scheduled to work the same hours as the vacant position, to vacate his regular assignment and fill the vacancy. An employee so removed.... However, if it is found the Carrier could have filled the vacancy under Items 1 and 2..., then the Carrier will pay the employe removed from his assignment...."

The parties to the Agreement made it perfectly clear that the Carrier is to be considered as "filling" a position only when it requires another employee "to vacate his regular assignment and fill the vacancy." In this dispute, there is no disagreement that Claimant Buchanan performed the normal duties of his regular assignment and, in addition, was assigned the duties of the vacant position as an accretion to his regular assignment.

The Majority, contrary to the specific language of the Agreement which "is clear and requires no gloss," interpreted the Rule as equating performing the work of a position with filling the position. In the absence of clear language to the contrary, that is certainly one possible interpretation, although it should be pointed out that the evidence of past practice completely supported the Carrier's position. It is unfortunate that the Majority dismisses the evidence of past practice on the basis that the Rule "is clear and requires no gloss," and then proceeds to ignore the clear language.

We dissent.

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

P. V. Varga

J. E. Yost