NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

John P. Devaney, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM.—

"Claim of C. W. Brown, furloughed clerk, Greensboro, North Carolina, for pay at the regular rate per day for December 12 to 24, 1934, inclusive, account of not being called to fill temporary vacancy during the absence of Mr. B. G. Darr who was the regular assigned incumbent of receiving clerk's position in the Greensboro Freight Agency, Mr. Darr being assigned temporarily to the Warehouse foreman's position."

STATEMENT OF FACTS.—

"Mr. C. W. Brown was the senior qualified furloughed clerk subject to call to fill either temporary or permanent vacancies in clerical positions. Mr. B. G. Darr, regularly assigned receiving clerk, was filling another temporary vacancy, that of warehouse foreman, and the receiving clerk position was not filled on the days in question, December 12 to 24, 1934, inclusive."

POSITION OF EMPLOYES.—We contend that C. W. Brown, as is shown in the statement jointly certified by the parties, was the senior qualified furloughed clerk subject to call to fill either temporary or permanent vacancies in clerical positions; that B. G. Darr was a regularly assigned receiving clerk and during the period in question, was filling another temporary vacancy on the position of warehouse foreman; that Mr. Brown should have been used on the position regularly occupied by Mr. Darr while he (Darr) was temporarily filling the position of warehouse foreman; that the management violated the intent, purpose, and plain provisions of paragraph (g), Rule 20, also Rule 5, in not assigning Clerk Brown to fill the temporary vacancy on the position in question during the absence of Clerk Darr therefrom.

We contend that the following rules of our agreement with the carrier, bearing effective date of September 1, 1926, have been violated:

"RULE 1. *Scope.*—These rules shall govern the hours of service and working conditions of the following employees:

"(1) Clerks—

"(a) Clerical Workers, and

"(b) Machine Operators, as hereinafter defined in Rule 2;

"(2) Waybill and Ticket Assorters;

"(3) Other office and station employees, i. e., employees operating appliances or machines for perforating and addressing envelopes, numbering claims or other papers, adjusting dictaphone cylinders or work of a like nature, office boys, messengers, gatemen, and train and engine crew callers."

"RULE 5. *Promotion and vacancies.*—(a) In filling promotions, vacancies, or new positions not filled by seniority, qualifications being equal, preference shall be given employees in the service in the order of their service age, the appointing officer to be the judge, subject to appeal to the highest officer designated by the Company, to whom appeals may be made, whose decision shall be final.

ployee voluntarily laying off one day each week without pay, and that employees could choose whichever method they preferred, but that if the method of voluntarily laying off was chosen it would have to be adopted by all. The employees unanimously elected to voluntarily lay off without pay and each employee signed a statement in the following form:

"'In consideration of the Southern Railway System deferring for the present the justified general reduction in clerical forces in the General Freight Office at Cincinnati, Ohio, the undersigned voluntarily agrees that during the months of July, August, and September 1930, and in subsequent months as are necessary, he–she– will voluntarily lay off one working day per week (the day so taken to be the day most convenient to the management) without pay.'"

The carrier contends that the instances cited by the employes of settlements at Pinners Point and Spencer Transfer did not involve an analagous situation but was a protest of the employes against the use of extra clerks to an extent which they claimed was excessive and avoided the establishment of regular positions. With respect to the case at John Sevier Transfer, cited by the employes, carrier asserts that the claim arose in 1925 before the current agreement became effective and at a time when there was no six-day guarantee rule in the agreement, and that the claim arose because clerical positions, authorized by a "floating authority" for the purpose of establishing three positions of check clerk which the agent might work as, and when necessary, were bulletined by the agent definitely as six-day positions, and the successful applicants for the said positions bid on them, with the expectation that they would receive six days' work per week, and for that reason the claims were paid.

OPINION OF THE BOARD.—The guarantee provision of Rule 20 (g) had its genesis in the National Agreement between the United States Railroad Administration and the Brotherhood of Railway Clerks, effective January 1, 1920, in which Agreement the guarantee appeared in Rule 66. Prior to that time, practically all clerical employes, or positions, were compensated on a monthly or weekly basis, and Rule 66 had for its purpose the conversion of monthly and weekly rates into daily rates. The rule said, in part:

"To determine the daily rate for monthly rated employes, multiply the monthly rate by twelve (12) and divide by three hundred and six (306)."

Obviously, the intent of that rule was to determine the rates for positions, not employes, for other rules of the same agreement stated, in part:

"Positions (not employes) shall be rated * * * (71)."

"Employes temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions * * * (72)."

"The wages for new positions shall be in conformity * * * (74)."

National Agreement Rule No. 66 further provided:

"Nothing herein shall be construed to permit the reduction of days for employes covered by this rule (66) below six (6) per week, * * *."

This conclusion that the rule in dispute was intended to apply to positions is further strengthened by the interpretation placed on the word "employes" by carriers, the petitioners, and by this Division, in various rules of collective agreements.

Rule 1 of the agreement between the parties hereto provides in part:

"These rules shall govern the hours of service and working conditions of the following employes."

The rule lists the employes covered, which embraces Clerks, Clerical Workers, etc., with some exceptions. Surely, the language of this rule is intended to apply to positions, not employes, for employes are changing, entering and leaving the service from day to day, and it was intended that the agreement would cover the positions or work in a permanent way, until changed in the manner provided therein.

It was argued by a carrier in Docket CL–129, Award No. 180, that the foregoing language covered employes, not positions, and in answer thereto Referee Spencer said:

"This language, fairly construed, most certainly prohibits the carrier from removing positions from the operation of the agreement except in the man-

ner therein provided. If the language in question does not impose this restrictive obligation upon the carrier, then, indeed, the whole agreement is meaningless and illusory."

In another dispute before this Division, Docket CL–264, Award No. 336, the carrier contended that the word "employee," as used in the rule, did not mean positions, and in answer thereto Referee Corwin said:

> "While the rule speaks of employees, when it provides for their regular assignment, this can only be to positions, out of which it plainly states they shall be assigned one day off out of seven."

The current agreement uses the words "positions" and "employees" synonymously in other rules. As previously shown, it specifies "employees" only in Rule 1, which is the coverage rule, yet, in the "exceptions" to the rule, we find this language: "nor to other positions therein which may be agreed upon." In the last paragraph of "exceptions," we find: "or the inclusion therein of positions not heretofore covered." In the "Note," Rule 4, we find: "clerical positions covered by schedule." Rule 20 (c) says: "The transfer of rates from one position to another shall not be permitted."

We therefore believe that when positions, not employees, carry the rate of pay and the guarantees as to rates apply to positions, the assigned days' work per week—the six-day guarantee—likewise applies to positions; that as in other provisions of the agreement, the word "employees" as used in the rule in question is synonymous with the word "positions" used throughout the agreement.

However, despite the conclusion we have reached that the word "employes" as used in Rule 20, paragraph (g), was intended to be synonymous with the word "positions," in view of the provisions of Rule 5, paragraph (e), we find it impossible to conclude that the employee, C. W. Brown, was entitled to be called to fill the vacancy created by the temporary transfer of B. G. Darr. Rule 5, paragraph (e) provides:

> "Temporary vacancies of thirty (30) days or less, or temporary vacancies up to ninety (90) days when occasioned by the granting of leave of absence or absence on account of sickness, will be filled at the discretion of the officer in charge."

The rule clearly states that vacancies, such as the one involved here of thirty (30) days or less, will be filled at the discretion of the officer in charge. It is our opinion that this rule gives to the carrier a privilege of either filling such a vacancy or leaving it unfilled within its own sound discretion. It seems too clear for argument that the phrase "at the discretion of the officer in charge" gives the carrier such discretion and does not make it mandatory that the position be filled. It is unnecessary to cite authority in support of this conclusion. To hold otherwise would be to torture the phrase as it now stands and to give to the word "discretion" a meaning which is never given either by common usage or by regular definition or otherwise.

We therefore conclude that any and all rights that the employees acquired with respect to the filling of vacancies under Rule 20 (g) have been bargained away by virtue of the provisions of this rule, insofar as Rule 20 (g) has application to the facts of this case.

Although under our conclusion, employee C. W. Brown, on whose behalf the petition is here claimed, has no right in view of the conclusion that we have reached, it should perhaps be noted that the position in question was filled by one E. H. Sampson, on December 10th and 11th. Although the claim of C. W. Brown was only for the vacancy from December 12th to the 24th, inclusive, it appears in the record that the position was blanked from the 8th to the 24th excepting for December 10th and 11th, on which days E. H. Sampson was called and performed the duties thereof.

Rule 5 (f) provides:

> "In the filling of temporary vacancies by the extra clerks, they will work first in, first out, rotating regardless of their seniority standing. Clerks so obtaining extra service will remain thereon during the period of the vacancy."

In the latter part of Rule 5 (f) it is provided that clerks who are called for extra service, "will remain thereon during the period of the vacancy." It seems quite clear that this provision gives to the employee who is called to fill

a vacancy, a right to remain there in the position to which he is called, for the full period of the vacancy thereafter. There is nothing in Rule 5 (f) giving the carrier the right to retain such employee for a day or two and then remove him leaving the position again vacant. Rather the provision clearly requires that the carrier, if it calls an employee for extra service no matter if it is for one day after the vacancy has occurred, must keep that employee in that position from the day he is called until the day the position is restored to its former status and occupied by the regularly assigned employee. Thus, while there is no obligation on the carrier to fill such vacancy, once an employee is called, no matter for what period of time, Rule 5 (f) compels the carrier to retain such employee for the full period remaining of the so-called vacancy.

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 facts of record do not establish any violation of the agreement of September 1, 1926, to support Mr. Brown, furloughed clerk's claim that he should have been paid for the thirteen days, December 12 to 24th, 1934, inclusive, as he was not used to fill the temporary vacancy in the position of receiving clerk at Greensboro, N. C.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 22nd day of April, 1937.