# 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 F. L. McKamey, furloughed clerk, for pay at the regular rate per day for Tuesday, May 21, 1935, account of not being called to fill temporary vacancy during the absence of Mr. J. M. Brown, who was the regular assigned incumbent of report clerk's position in the Chattanooga Freight Agency."

STATEMENT OF FACTS.—

"F. L. McKamey was the senior qualified furloughed clerk subject to call to fill either temporary or permanent vacancies in clerical positions. J. M. Brown, regularly assigned report clerk, was off duty, without pay, on May 21, 1935.

"Mr. McKamey was available for the vacancy in question and was not called by the Company to fill the vacancy."

POSITION OF EMPLOYES.—The employes contend that F. L. McKamey was a senior qualified furloughed clerk, subject to call to fill either temporary or permanent vacancies in clerical positions; that J. M. Brown was a regularly assigned report clerk and on the day in question was off duty without pay; that F. L. McKamey should have been used on the position regularly occupied by Mr. Brown, while Mr. Brown was off duty; that the management violated the intent, purpose, and plain provisions of paragraph G, rule 20, in not assigning Mr. McKamey to fill the temporary vacancy of May 21, 1935, during the absence of Clerk Brown 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.

"(b) Preference in promotion or retention in the service on the respective Seniority Districts shall be given to the employees who have been longest in the service provided they are, in the judgment of the proper officers of the Company, equal in merit, capacity and qualifications to others in the same service.

"'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 analogous 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 "employees" 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 manner 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 assignments, this can only be to positions, out of which it plainly states they shall be assigned to 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, F. L. McKamey, was entitled to be called to fill the vacancy created by the temporary absence of J. M. Brown. 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.

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 1926 to support the claim of the employes that Mr. McKamey, furloughed clerk, is entitled to pay at the regular rate per day for Tuesday, May 21, 1935, account of not being called to fill temporary vacancy during the absence of Mr. J. M. Brown, who was the regular assigned incumbent of report clerk's position in the Chattanooga Freight Agency.

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.