Award No. 829
Docket No. CL-786

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

William H. Spencer, Referee

PARTIES TO DISPUTE:

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

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

"(1) The Carrier violated agreement rules when it failed and refused to promote and assign D. McConnell to vacancy on position of Store Helper, rate 56¢ per hour, St. Paul Store, due to absence of regular incumbent J. Pinger on January 31st, 1938, and that,

"(2) The Carrier shall be required to reimburse D. McConnell and E. Popelka for wage losses sustained as a result of said rules violation."

EMPLOYES' STATEMENT OF FACTS: "Mr. Pinger was on and before January 31st, 1938 the regularly assigned incumbent of position of Store Helper, rate 56¢ per hour at the St. Paul Store. On January 31st, 1938 Mr. Pinger was absent from duty. His position was not filled on that day.

"D. McConnell, Store Helper, rate 50¢ per hour, was the senior qualified and available employe entitled to be promoted and assigned to the said vacancy. E. Popelka, Laborer, rate 44¢ per hour, was the senior qualified and available employe entitled to be promoted and assigned to position of D. McConnell, if and when vacant.

"Claim has been duly filed and appealed to the highest designated officer as set forth above in statement of claim.

"Rules 3 - 4 - 6 - 12 - and 62 of current agreement dated and effective July 16th, 1926, read as follows:

RULE 3.

"Seniority begins at the time employe's pay starts on the seniority district and in the class to which assigned, except extra clerks will only be given seniority for the actual time worked.

"Extra clerks performing no work for a period of ninety consecutive days shall be considered out of the service."

RULE 4.

"Employes covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and

position be filled on date in question, it was not required to call D. McConnell to fill such position—there being no rule in the Schedule requiring that he be used; nor that E. Popelka, a laborer, be in turn called to fill the position that would have been vacated by D. McConnell, a store helper—there being no rule in the Schedule requiring that he be used; and we ask the Board to so find.

"Without prejudice to its position hereinbefore set out, the Carrier further submits:

(1) There is no rule in the Schedule requiring it to call an employe to fill a temporary vacancy or position, nor is it required if an employe is used to call a junior employe holding a regular assignment;

(2) There is no rule in the Schedule requiring it to call an employe to fill a temporary vacancy nor is it required if an employe is used to call a junior employe holding a regular assignment at a lower rate of pay;

(3) There is no rule in the Schedule requiring it to call an employe to fill a temporary vacancy nor is it required if an employe is used to call the senior extra or furloughed employe;

(4) There is no rule in the Schedule requiring it to call an employe to fill a temporary vacancy nor is it required if an employe is used to call an employe of another class who holds no rights in the class in which the temporary vacancy exists;

and we ask the Board to so find.

"A further denial of the instant claim is made by the Carrier based on the following facts:

E. Popelka is a laborer and is a **Class 3** man, and is so carried on Class 3 seniorty roster of Saint Paul Store; he holds no rights in **Class 2**, and under any theory would not be entitled to pay of a position which he did not fill.

"The Committee has cited Awards 413, 414, 415 and 416 of the National Railroad Adjustment Board, Third Division, as being applicable to the instant case. The Carrier wishes to deny this for the reason that the awards cited are not controlling nor applicable to the instant case, and wishes to point out that the rules cited in the cases covered by these awards are not comparable with the rules of the Schedule on this property, and are without point in the instant claim.

"For all the reasons set-out in the Carrier's position, we ask the Board to find with us and to deny the claim."

OPINION OF BOARD: This dispute presents two major issues: (1) whether the carrier, under the current Agreement between the parties, must fill temporary vacancies of thirty days or less; and (2) whether, if it is required to fill such temporary vacancies, it should have called claimant McConnell, in the circumstances of this dispute.

(1) The first issue has been before this Division in several prior disputes, but so far the Division has not been able to formulate a harmonious view with respect to it. In the dispute covered by Award No. 546, the petitioner, in support of its claim, relied primarily on a rule which provided that "employes laid off in reduction of force retain their seniority for a period of five years and will be returned to service in order of their seniority for temporary or permanent vacancies, provided they have the necessary qualifications." The Division, in sustaining the claim, said that the rule in question "is specific in its requirements" that the carrer shall call furloughed employes to fill temporary vacances of less than thirty days.

In Award No. 413—the first in a series of claims of the same kind, Awards Nos. 413 - 416—the petitioner rested its claim on a rule similar to, if not identical with the rule relied upon in the present dispute. In Award No. 413 the rule in question provided:

> "Nothing herein shall be construed to permit the reduction of days for regularly assigned clerical employes covered by this agreement below six days per week, excepting that this number may be reduced in a week in which holidays occur by the number of such holidays."

In this series of awards the Division announced the general principle that the rule, insofar as it is a guarantee rule, applies to positions and not to employes. "We, therefore, believe" said the Division, "that when positions, not employes 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 'employes' as used in the rule in question is synonymous with the word 'positions' used throughout the agreement."

In Award No. 792 of this Division the claim that the carrier should have called the claimant to fill a temporary vacancy was based on Rule 15 of the Agreement between the parties. This provides:

> "Except as provided in Rule 11, nothing within this agreement shall be construed to permit the reduction of days for regular assigned employes covered by this agreement below six (6) days per week, except that this number may be reduced, in a week in which holidays occur, by such holidays."

Rule 11 referred to provides in substance that employes "required to report for work at regular starting time and prevented from performing service by conditions beyond control of the carrier, will be paid for actual time held with a minimum of two hours." The Division, in denying the claim stated, that "the claim must stand or fall upon the interpretation of Rule 15." It then proceeded to set forth its course of reasoning:

> "If the word 'employes' as used in Rule 15 means 'positions' as was held in Award No. 413 then cases falling under Rule 11 constitute the only exceptions under which a 'position' may be filled below six days per week. Yet we find that under Rule 21 an employe may be absent on sick leave and the 'position' need not be filled provided the other employes keep the work up. The same is true under Rule 22 as to vacations and under Rule 35 carrier is allowed five days within which to bulletin vacancies and five additional days within which to fill such vacancies. It must therefore follow that the word 'employes' as used in Rule 15 of the current agreement does not mean 'positions' even though the words may be used interchangeably in other places in the agreement."

In the present dispute the claim is based upon Rule 62 of the agreement between the parties. This provides:

> "Nothing herein shall be construed to permit the reduction of days for the employes in Class 1 and Class 2 below six (6) days per week, except that this number may be reduced in a week in which holidays occur by the number of such holidays."

It will be noted that this rule with unessential differences is the same as that involved in Awards Nos. 413-416. It is identical with the rule involved in Award No. 792 with the important difference that it contains no reference to a rule comparable to Rule 11 involved in Award No. 792.

Technically it is possible to reconcile Award No. 792 with Awards Nos. 413-416. It seems clear that the Division in Award No. 792 seized upon

the reference in Rule 15 to Rule 11 as the primary basis for its conclusion. It may accordingly be assumed—though, of course, one cannot know this for a certainty—that but for this reference to Rule 11, the Division in Award No. 792 would have followed its Award No. 413. In this connection, however, it may be assumed that the Award No. 792 squarely conflicts with Award No. 413 in principle. Even on this assumption, the Division feels impelled to reaffirm the position that it took in Award No. 413 with respect to the obligation of a carrier to fill a temporary vacancy of less than thirty days. While it is not entirely satisfied with the course of reasoning in Award No. 413—as is evident from the vigorous dissent therein registered—it nevertheless feels that it represents the sounder view with respect to the proper interpretation of the rule involved.

(2) While the Division feels impelled to reaffirm the position taken in Awards Nos. 413-416 with respect to the obligation of a carrier to fill temporary vacancies under the rule there involved, it cannot sustain the position of the petitioner that the regularly assigned employe should have been assigned to fill the temporary vacancy involved in this dispute.

In support of this portion of the claim, the petitioner relied primarily on Rule 4 of the agreement. This provides:

> "Employes covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail except, however, that this provision shall not apply to the excepted positions."

Viewing this phraseology abstractly, it is difficult if not impossible to justify the conclusion that it lays any obligation upon the carrier to "promote" regularly assigned employes to temporary vacancies of the character here involved, even assuming that the term "promote" can appropriately be used in this connection. It is true that in Award No. 105 the Division used language which might be construed to justify the petitioner's contention here. On the other hand, in its Award No. 706 the Division, contrary to the contention of the carrier, ruled that the assignment of signalmen to temporary vacancies was not promotion within the meaning of the rules there involved. Certainly in a situation such as this, even assuming that there is doubt as to the meaning of the rule involved, the Division should not adopt an interpretation which would undoubtedly cause much confusion and produce inefficiency in many situations. Moreover, it is significant that in all prior disputes before this Division in which the petitioner has asked that the carrier be required to fill temporary vacancies of less than thirty days, the claim has been presented in the name of the senior qualified available furloughed employe. In Award No. 413 it is stated in the Position of Employes that "we contend that W. C. 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." Attention is also called to certain awards of Express Board of Adjustment No. 1, presented by the petitioner to the Division in connection with the present claim, in which it was stated that "where a vacancy on a bulletined position occurs through any cause the senior furloughed employe reporting shall be entitled to work the vacancy provided, however, that final assignment therefor shall not be made more than thirty minutes in advance of the starting time of the work."

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 employe involved in this dispute are respectively carrier and employe 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 carrier under the rules of the agreement was not required to call a regularly assigned employe to fill the temporary vacancy involved in this dispute.

AWARD

The claim is denied in accordance with the special finding.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 22nd day of March, 1939.

PARTIAL DISSENT ON AWARD 829—DOCKET CL-786

I concur in the finding that the carrier is not required under the rules of the agreement to call a regularly assigned employe to fill a temporary vacancy, and in the denial of this claim; but I am wholly unable to understand, or agree to, the finding of the Referee that the term **employes** is equivalent in meaning to, and interchangeable with the term **positions.** As I conceive our duty, it is to apply the plain meaning of the language used in the rules of the agreement. I find no evidence in the opinion of any attempt to analyze the contract, but a process and result that either attribute to the contracting parties ignorance of ordinary terms, or, proceeding with more respect for the parties' intelligence, undertake to disregard completely their clearly expressed meaning and substitute another and different meaning. This meaning may be more suitable to the tastes of the Referee than is the contract the parties made; but it has a source in no place that I am able remotely to suspect, unless it be in some preconception which the Referee is willing to require the carrier to accept instead of the contract it has made. We operate under the Railway Labor Act, which permits us only to interpret the rules agreed to by the parties. I shall proceed with my discussion upon the theory that we are a Division of the Adjustment Board created, empowered, and limited by that Act. See Award 42.

The claim is, in brief, that a short vacancy must be filled, notwithstanding there may be no necessity to fill it, and that it may be such that a temporary employe cannot be trained to discharge its duties before the need to fill it has terminated. The mere statement of this absurdity gives reasonable assurance that a contractual provision supporting it is not likely to be found; and in truth there is none. The opinion concedes the case turns on Rule 62 of the agreement, reading:

> "Nothing herein shall be construed to permit the reduction of days for the employes in Class 1 and Class 2 below six (6) per week, except that this number may be reduced in a week in which holidays occur by the number of such holidays."

So far as the majority are concerned, the contract either has no four corners, or there is lacking desire to explore them so that the particular intent of particular rules may be determined from the contract as a whole and each rule in its proper setting[1]; and thus the process of the opinion is

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[1] "An agreement should be interpreted as a whole and the meaning gathered from the entire context, and not from particular words, phrases or clauses. In fact, the entire agreement is to be considered to determine the meaning of each part. All provisions should, if possible, be so interpreted as to harmonize with each other." Am. Jur., Vol. 12, Title "Contracts," Sec. 241.

not the process of construction. Support for the claim is not found in the rule itself, but by a finding, on authority of Awards 413 to 416, which involved or should have involved a contract made by other contracting parties, that the term **positions** is synonymous with and may be used interchangeably with the term **employes**. Now these awards themselves did not apply the contract then before the Division, and legislated in a manner prohibited by law, as was made perfectly clear by the dissents filed in those cases, here referred to. The majority confess that they are "not entirely satisfied with the course of reasoning in Award No. 413—as is evident from the vigorous dissent therein registered." No dissent was rendered on Award 413, which denied the claim, and I presume the reference is to the dissents on Awards 414 and 415, which thoroughly exposed the "course of reasoning" referred to as not reasoning at all. Now the error which the majority confess inheres in the "course of reasoning" of those awards is simply that that reasoning did not interpret and apply the contract, but unlawfully legislated. Having practically confessed this, the majority, nevertheless, and, I submit, proclaiming that their act is taken knowingly and deliberately, elect to follow the authorities that misconstrued another contract in misconstruing, or, more properly, refusing to construe, the one before us.

The sole pertinent step in the reasoning of the majority that I have not touched upon is its refusal to follow Award 792, in which this Division (Referee DeVane) refused to follow Awards 413-416, and proceeded to analyze, interpret, and apply the contract before it, in the true exercise of our lawfully delegated quasi-judicial power. No dissent was registered. Both in process and result, that award would require us in the present case to reach a conclusion opposite the majority's conclusion. The only difference between the exact rule in issue in Award 792, and the one here involved, was the preface to the rule in the former case, reading, "Except as provided in Rule 11 . . ." Rule 11 related to the method of payment for employes reporting and not used. The majority's reasons for rejecting the sound processes, and the sound result, of Award 792, are contradictory as well as equivocal. In reality, no reason is assigned. While acknowledging in the end that Award 792 "squarely conflicts with Award No. 413 in principle," the opinion, wishful for distinction, recites with apparent self-contradiction, that "It seems clear that the Division in Award No. 792 seized upon the reference in Rule 15 to Rule 11 as the primary basis for its conclusion." It is not clear that the Division did any such thing; indeed, it is clear that it did not. Award 792 was not in any respect based upon the reference to Rule 11 in the Reading schedule, and could not have been so based by any process of reason. The Referee in that case so declared in discussing that award. The Referee in the instant case was fully informed in detail of that discussion and of Referee DeVane's positive declaration that Award 792 did not turn on Rule 11. Award 792 simply gave effect to the intent of the parties as manifest from their language; the majority prefer simply to follow a precedent which does not give effect to the intent of the parties as manifest from their language.

Thus far I have discussed Part (1) of the opinion of the majority. In the entire absence of any attempt on their part to analyze the agreement itself, I must undertake that function. In doing so, I address myself primarily to the question of whether the parties meant **employes** when they used that term in Rule 62.

Seniority rights (see Rules 3, 4, and 6) have to do with priority between employes. They do not provide that work of any character must be performed, or any position maintained. They deal only with work that is performed. The incidents of the exercise of seniority rights are established by the rules, and only insofar as they are so established do they have any concrete meaning; right of an employe, and correlative duty of employer, must have some basis in the contract between them, and may not be created by us from our imaginations or personal predilections. I start, then, with the premise that the carrier is not bound to perform any certain work, or

offer employment to senior employes, unless there is a rule requiring it to do so; and I shall proceed to examine the rules in turn to ascertain what requirements they impose.

The promotion rule (Rule 4) does not **require** promotion; it forces the carrier to perform no work. Employes are **in line for promotion;** when promotions are made, they must be made on the basis of **seniority, fitness, and ability;** but the rule does not force the carrier to perform work which will afford opportunities for promotion or create promotion opportunities. The rule constrains the carrier only when promotions are actually made. Accordingly, exercise of seniority was strictly "governed by these rules"; and the effect of them was to exempt from the application of seniority rules temporary vacancies and positions of less than thirty days' duration, leaving the carrier free not to fill such if it desired. I shall now examine the clear proof of my thesis.

Rule 12 is the conclusive evidence. It provides that positions or vacancies of thirty days or less duration may be filled without bulletining; that when an employe is on leave of absence for more than sixty days "the position shall be bulletined and filled in accordance with these rules." It is perfectly clear that temporary vacancies are not within the scope of the seniority rules' application; and this conclusion is put beyond doubt, first by the fact that the process of bulletining (Rule 10) and the device of "bumping" on bulletined positions by displaced employes (Rule 15) are the only devices provided for the exercise of seniority. The process of bulletining requires time, and the exercise of free choice by the employes (Rules 10 and 7). During the period of bulletin, the carrier is free to fill the job with an unassigned employe, and if no bids are received, the position may be permanently filled without regard to the rules (Rule 11). The applicant awarded a bulletined position is allowed thirty days to learn the routine and demonstrate his capability to discharge the responsibilities except when it is apparent in a shorter time that he cannot qualify (Rule 8). It is perfectly clear that seniority rights, which "will be governed by these rules," are limited to positions that must be bulletined.

Considering the agreement as an entirety there is abundant evidence of a discriminating use of terms. It contains 66 rules. The first three rules, under the headings **Scope, Definition of Clerk,** and **Seniority,** make abundant use of the term **employe,** none of the term **position.** Accordingly there is no excuse thus far apparent for asserting that the parties did not know what they meant when they used the term **employe,** or that they meant something not within the meaning of that term when employing it. Following the agreement to its end, we find:

(1) The term **employe** is used without association with the term **position** in 36 rules.[1]

(2) The term **position** is used without association with the term **employe** in 3 rules.[2]

(3) The terms **position** and **employe** are used together, with unmistakable contrast of the distinct meaning each term has, in 19 rules.[3]

(4) In eight rules neither the term **position** nor **employe** is used.[4]

Any attempt to use these two terms interchangeably in the contract leads to ridiculous results. For example, positions would have seniority (Rules

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[1]Rules 1 to 3, 16, 17, 22 to 32, 34, 36, 37, 39, 41, 43 to 46, 48 to 52, 54, 58, 62 to 65.
[2]Rules 11, 57, 61.
[3]Rules 4 to 10, 12 to 15, 18 to 21, 53, 55, 59, 60.
[4]Rules 33, 35, 38, 40, 42, 47, 56, 66.

3-16); employes would be bulletined (Rules 10-11-12); positions would be in line for promotion (Rule 4). The examples can be multiplied to the end of the contract; and in every instance an absurd result is apparent, and the obvious intent of the parties is destroyed. Can we then apply this process to change the meaning in some instances, but not apply it in other instances where the result is not only to change meaning but make ourselves too obviously ridiculous? The question answers itself. Our function is to determine the meaning of language used, not to say that the parties meant **black** when they wrote **white, positions** when they wrote **employes**. They chose the terms and we must apply them, not give effect to some, and assume the prerogative denied us of changing others. When the parties used the term **employes** in Rule 62, they used the term **employes**; and we can only apply that language.

Now this term **employe** has a definite meaning. An employe is a person, as is clear from our knowledge of the term, the provisions of the contract, and the Railway Labor Act itself. (See, e. g., Section 1, fifth: "**employe** includes every **person** in the service.") Very clearly Rule 62 was designed to apply to employes. In Award 332, Referee Corwin said, concerning a similar rule:

> " . . . Clerks of the class involved in this dispute formerly worked largely on a monthly basis. Rule 3 of the schedule altered that but its concluding paragraph provides that the **working days of employes** covered shall not be reduced below six per week except by holidays. Evidently this was intended to guarantee the integrity of at least a week's employment, and provide that when, as in the present instance, the carrier elects to work **its employes** on four days of each week it cannot escape payment for six unless a holiday intervenes."
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> (Emphasis supplied.)

By no stretch of the imagination can this rule be contorted to mean that "every position must be filled six days each week"; yet that proposition must be substituted for Rule 62 before this claim can be sustained.

Referee DeVane in Award 792 approached the point here made when he said, "The question appears . . . to be too important to be left to interpretation of contracts where one man thinks his guess as good as another." The contract does not require guesswork. Referee DeVane applied a process similar to the one I have undertaken, and in logical continuance thereof, and concluded the claim before him should be denied. The same process must be applied to this case.

A comparison of the rules relied upon by the employes in the instant case, with similar rules involved in the case covered by Award 792, shows them to be in all essentials substantially the same.

In his opinion in Award 792, after referring to the various rules invoked by the employes, the Referee said:

> "However, the claims must stand or fall upon the interpretation of Rule 15 in the light of other provisions of the agreement."

The other provisions of the agreement are those analogous to the ones I have heretofore discussed. Rule 15 is the so-called six-day guarantee rule; it is a parallel to Rule 62 in the schedule here in issue.

In his analysis of the rule, the Referee said:

> "If the word 'employes' as used in Rule 15 means 'positions' as was held in Award No. 413, then cases falling under Rule 11 constitute the only exceptions under which a 'position' may be filled below six days per week. Yet we find that under Rule 21 an employe may

be absent on sick leave and the 'position' need not be filled provided the other employes keep the work up. The same is true under Rule 22 as to vacations and under Rule 35 carrier is allowed five days within which to bulletin vacancies and five additional days within which to fill such positions. It must therefore follow that the word 'employes' as used in Rule 15 of the current agreement does not mean 'positions' even though the words may be used interchangeably in other places in the agreement. This does not mean that the carrier is free to leave established positions unfilled as other rules of the agreement amply cover such a situation. See Rules 35, 42, and 45."

Had the majority interpreted the agreement, they could not have escaped the conclusion that the term **employes** used in Rule 62 means employes, and not positions. A process such as that followed by them results in changing rules, which is a function not within the jurisdictional authority of this Board.

/s/ J. G. TORIAN

The undersigned concur
in the above dissent:

/s/ C. C. COOK
/s/ R. H. ALLISON
/s/ GEO. H. DUGAN
/s/ A. H. JONES