

Award No. 843

Docket No. CL-788

**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 assign Theo. Huttie, to temporary vacancy in position of Carder and Sealer at Minneapolis Freight House for the period July 19th to 31st, 1937, but did assign an employe his junior to said vacancy, and that

"(2) The Carrier shall now reimburse Theo. Huttie for wage losses suffered as a result of said rule violation."

EMPLOYEES' STATEMENT OF FACTS: "Mr. Fred Wagemann, the regularly assigned incumbent of position of Carder and Sealer, rate \$4.48 per day, at the Minneapolis Freight House, was absent from duty from July 19th to July 31st, 1937, a period of twelve (12) working days.

"This short vacancy was filled by appointment of R. L. Snape, Caller, with seniority date of May 1, 1922, without regard to the seniority and promotion rules of the agreement.

"Theo. Huttie, Stevedore, rate 54¢ per hour, with seniority date of November 8, 1919 was a senior qualified and available employe entitled to be promoted and assigned to the said vacancy.

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

"Rules 3—4—6 and 12 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 ability being sufficient, seniority shall prevail except, however, that this provision shall not apply to the excepted positions.

bulletin rule, Number 10, and assignments to vacancies and new positions of more than thirty days and vacancies of more than sixty days' duration where employees are on leave-of-absence are thus made.

"Rule 12 is an exception to Rule 10. It stands alone and is complete within itself, and it seems very clear that Rules 4 and 6 are inoperative as to a position or temporary vacancy coming under the provisions of Rule 12. If this were not so, there is no valid reason for the rule.

"The Carrier submits the following:

- (a) That there is no rule defining what employe should be used when such temporary vacancy is filled at the discretion of the Company;
- (b) That a ruling of your Board contrary to the position of the Carrier and to the practices existing on the property since 1920 would have the effect of writing a new rule into the Schedule, which, I submit, your Board is not authorized to do.

"The Carrier further states that in the instant case under the provisions of the Schedule heretofore quoted, it was not required to call Theo. Huttie to fill temporary vacancy in position of Carder and Sealer—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 a junior employe holding a regular assignment to fill a temporary vacancy;
- (2) There is no rule in the Schedule requiring it to call a junior employe holding a regular assignment at a lower rate of pay to fill a temporary vacancy;
- (3) There is no rule in the Schedule requiring it to call the senior extra or furloughed employe to fill a temporary vacancy;
- (4) There is no rule in the Schedule requiring it 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, and again without prejudice to its position hereinbefore set out, the Carrier further submits there are at least five employes on the Class 2 seniority roster who are senior to Theo. Huttie, whose hourly rate is less than paid the Carder and Sealer assignment which was vacant, and if the Committee's theory is correct—that the temporary vacancy should have been filled on basis of seniority and by an employe assigned to a position at a lower rate under the provision of the Schedule—then it would be our position that one of the employes senior to Huttie would be entitled to the difference in pay and that Huttie would have no claim.

"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 reasons 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: Fred Wagemann, regularly assigned to a position of carder and sealer, a Class 1 position, at the Minneapolis freight house of

the carrier, was absent from his work from July 19 to 31, 1937. In his absence the carrier called R. L. Snape to fill the vacancy. At the time Snape was occupying a position as caller, a Class 2 position, at the freight house. His seniority on the Class 2 Roster dated from May 1, 1922. He held no seniority on the Class 1 Roster. He had, however, held an assignment as carder and sealer from June 1, 1927 until April 30, 1930, when he was displaced by a senior employe. During the period from 1930 down until the date of the origin of this dispute, Snape on several occasions had temporarily filled assignments to this class of service.

The petitioner contends that the carrier should have called the claimant, Theo. Huttie, to fill this temporary vacancy. At the time the temporary vacancy occurred, Huttie was employed at the freight house in question as a stevedore, a Class 2 position. As a Class 2 employe his seniority dated from November 8, 1919. At the time in question Huttie's name did not appear on the Class 1 Roster. The record indicates, however, that at some previous time he had had approximately fourteen years of experience in Class 1 service.

The situation here presented may be summarized briefly. A vacancy of less than thirty days occurred in a Class 1 position. So far as the record discloses there were no qualified furloughed employes available to fill the vacancy. Working in Class 2 positions, however, were two employes who had been demoted from Class 1 service in force reductions. From aught that appears to the contrary each of the two employes possessed sufficient fitness and ability to have filled the temporary vacancy, and the two employes were equally available. One of them, however, had considerably more seniority than the other, although other employes on Class 2 Roster had more seniority than either. What in these circumstances was the obligation of the carrier under the Agreement between the parties?

Under Rule 62 the carrier is under obligation to fill temporary vacancies. (See Awards Nos. 413, 414, 415, and 416). While Rule 12 relieves the carrier of any obligation to bulletin such vacancies, it does not in the opinion of the Division relieve it of the duty of filling them. Its obligation is to fill such vacancies in the first instance from available qualified furloughed employes. In the assignment of a furloughed employe to such a vacancy, the carrier must respect the seniority of the available employes. (See Awards 105 and 132.) If there are no qualified furloughed employes available, the carrier is obligated in the next instance to call qualified employes who have been demoted. Rule 4 states that "employes covered by these rules shall be in line for promotion." Certainly employes who have been demoted from Class 1 positions and have lost their seniority on Class 1 Roster, are in line for promotion within the meaning of Rule 4. While Rule 4 does not of itself impose a duty on the carrier to promote employes, it does indicate the manner in which the carrier must perform its obligation under Rule 62 to fill temporary vacancies.

In the opinion of the Division, however, the carrier is not required by the Agreement to fill temporary vacancies from demoted employes in terms of seniority. The petitioner apparently admits this interpretation in that, without any explanation for doing so, it presented the present claim in the name of an employe who is junior in seniority to at least five other employes on Class 2 Roster. In view of the practical considerations involved in the filling of temporary vacancies—vacancies which may range in duration from one day to thirty days—the carrier should be allowed this discretion in making temporary assignments.

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 rules of the Agreement do not require the carrier to fill temporary vacancies from demoted employees, actually assigned to work, in terms of their seniority.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 14th day of April, 1939.

PARTIAL DISSENT ON AWARD 843—DOCKET CL-788

While concurring in the denial of the claim, I protest the dictum of the Referee's opinion.

For the purpose of the opinion, it should have sufficed to hold that neither the employee used in a temporarily vacant Class 1 position, nor the claimant who asked damages because he was not used, held any Class 1 seniority rights. That holding is made but preliminary as a springboard, first, for the gratuitous dictum fortifying a previous decision ignoring the contract between the carrier and its employees, and, secondly, for an equally gratuitous new adventure in prohibited rule making.

We have shown in our dissent on Award 829, which should be considered a part of this dissent, the indefensible processes used in that award to destroy a contract and write a new one. The contract was not analyzed; late and soundly reasoned precedent was ignored; and the proposition advanced that the parties when using the term **employees** meant **positions**. This ridiculous perversion of language and manifest intent is sought to be perpetuated in the present award by the following dictum, which is as devoid of purpose in the opinion as Award 829 was of reason:

"Under Rule 62 the carrier is under obligation to fill temporary vacancies. (See Awards Nos. 413, 414, 415, and 416.) While Rule 12 relieves the carrier of any obligation to bulletin such vacancies, it does not in the opinion of the Division relieve it of the duty of filling them."

Impelled by no issue presented for decision, the Referee purports to construe the rules, in reality writing new ones, and attempts to destroy those agreed upon. Apparently following a desire to transmute his own ideas into obligations of the carrier, instead of properly limiting his activities to our lawful jurisdiction of interpretation, the Referee holds that because employees are in line for promotion, the carrier must promote some one of them even though it needs none and does not desire to use any. There is nothing in the contract or practice to require this, as demonstrated in Award 792 and our dissent on Award 829.

/s/ J. G. TORIAN

The undersigned concur
in the above dissent.

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