

Award No. 1216  
Docket No. CL-1220

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Harris L. Danner, Referee

**PARTIES TO DISPUTE:**

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

**WABASH RAILWAY COMPANY**

**STATEMENT OF CLAIM:** "Claim of the System Committee of the Brotherhood that O. T. Davis, H. M. Brock and Wm. Vance, clerks employed in office of the Superintendent, Moberly Division, were entitled to assignments of higher rated positions and should have been paid at rates of \$6.90, \$6.71 and \$6.13 per day, respectively, for a period of three days, March 29, 30 and 31, 1939. Claim is made for wage losses suffered by reason of the Carrier's failure and refusal to advance them as a result of vacancy on position of Assistant Chief Clerk on such days and dates. Claim for rate of position held by Wm. Vance, rate \$5.21 per day, is also made for J. W. Ballinger, senior qualified extra clerk, for the three days."

**EMPLOYEES' STATEMENT OF FACTS:** "Position of Assistant Chief Clerk was established by bulletin notice dated September 10, 1934, in office of Superintendent, Moberly Division, with a basic rate of \$6.50 per day, and specifying an assignment of six days per week. E. D. Miller was assigned to position by bulletin notice dated September 17, 1934.

"As proof of above stated fact, we append hereto and by reference made a part hereof, Employees' Exhibits Nos. 1 and 2; same being true copies of Carrier's bulletins dated September 10, 1934 and September 17, 1934.

"Position of Assistant Chief Clerk was without an occupant on March 29, 30 and 31, 1939. E. D. Miller, regular occupant, was absent. The rate of position was blanked on those dates.

"Rule 11 (b), fourth paragraph, Schedule for Clerks, reads:

'Positions or vacancies of thirty (30) days or less duration shall be considered temporary and may be filled without bulletining provided the senior competent employe in the office involved shall be assigned to the vacancy.'

"On March 29, 30 and 31, 1939, O. T. Davis, regularly assigned to position of Valuation Accountant, was the senior competent clerk in the office involved for vacancy of Assistant Chief Clerk; H. M. Brock was senior competent employe for position of Valuation Accountant and Wm. Vance was senior competent employe for position of Timekeeper, regular assignment of H. M. Brock.

"Rule 11 (i) reads:

'In case of reduction of force or abolishment of position (except temporary positions) notice of same will be posted five (5) days prior to the effective date of such reduction or abolishment.'

"The foregoing shows that the alleged claim set up by the committee in their ex parte statement of claim is without basis under the rules of the Schedule for Clerks, and, therefore, the contention of the committee should be dismissed and the claim denied.

"In support of the position of the carrier, attention is invited to Award No. 934 of the National Railroad Adjustment Board, Third Division, which disposed of the principle involved in the alleged dispute referred to herein.

"The submission of this alleged dispute to the Board by the committee is without question an attempt on their part to obtain a **new rule**, in a manner contrary to the provisions of Rule 24 of the existing agreement and Section 6 of the Railway Labor Act, which they failed to obtain by direct negotiations with the carrier.

"Therefore, it is obvious that the alleged dispute referred to herein is not properly before or subject to a decision by the Board, and, accordingly, should be dismissed for lack of jurisdiction.

"The carrier affirmatively states that all matters referred to in the foregoing have been discussed with the committee and made a part of the particular question in dispute.

"Oral hearing is requested."

There is in evidence an agreement between the parties bearing effective date of August 1, 1929.

**OPINION OF BOARD:** The question before us is whether or not the employer is required to fill a temporary vacancy caused by an employe laying off as a result of sickness or personal reasons. One of the rules involved is 11(b), fourth paragraph:

"Positions or vacancies of thirty (30) days or less duration shall be considered temporary and may be filled without bulletining, provided the senior competent employe in the office involved shall be assigned to the vacancy."

The employes contend that Rule 11(b) should be considered in the light of Rules 11(f) and 11(i), and Rules 2(e), (f), and (g). These rules are as follows:

"(f) When a clerk is assigned to any other position temporarily, he will not thereby forfeit his regular assignment which will be filled subject to his return."

"(i) In case of reduction of force or abolishment of position (except temporary positions) notice of same will be posted five (5) days prior to the effective date of such reduction or abolishment."

"(e) Employes covered by these rules shall be paid on the daily basis. To determine the daily rate for monthly rated employes, multiply the monthly rate by (12) and divide by three hundred and six (306).

"(f) Nothing herein shall be construed to permit the reduction of days for employes covered by these rules 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.

"(g) Positions (not employes) shall be rated and the transfer of rates from one position to another shall not be permitted."

This particular phase of the contract has been before the Board many times. Opinions have been rendered, first, in favor of the contention advocated by the employes; second, in favor of the contentions of the carriers; third, in favor of the contentions of the employes; and lastly, the previous awards in favor of the employes were overruled by Referee Swacker. In Award No. 934, Referee Swacker said:

"The precedents are in hopeless conflict. Awards 413 to 416 of this Division construe the guarantee as running to the position and not the employe, Award 792 directly overrules those awards and on an identical rule as that here involved holds that the guarantee is to the employe, not to the position. On the other hand, Awards, 825, 829, 830 and 843 overrule Award 792 and revert to the holding of Award 413. All of the foregoing awards were rendered by referees and vigorous dissents were filed by carrier members to those holding that the rule relates to positions.

"It is most unfortunate to have such confusion in the precedents, but when a referee cannot in good conscience follow the last one he should be able to advance sound reasoning to warrant overruling it. Such is the case here. I shall, therefore, proceed to analyze the previous decisions (although the rules are not identical they are similar in substance, and the difference in incidental facts is not material).

"Decisions 413-416 are based wholly on the predicate that the words 'employes' and 'positions' as used throughout the agreements are interchangeable terms. This is patently unsound. As pointed out by Dissenting Opinion in Award 829, the term employe is used without association with the term position in 36 rules in the agreement there involved; the term position is used without association with the term employe in 3 rules; the terms position and employe are used together with unmistakable contrast of the distinct meaning each term has in 19 rules. A few illustrations suffice to show the absurdity of the contention that the terms employe and position are interchangeable. For example, under the Bulletin rule employes rather than positions would be bulletined; under the Promotion rules positions would be in line for promotion rather than employes, and many other such illustrations could be made. It should be said at this point that it was necessary to adopt this predicate because the language of the six-day guarantee rule speaks of employes, not positions. At this point then it may be observed that a fundamental rule of law governing construction of contracts was violated. There was no ambiguity, no basis, or grounds for going outside the plain language of the rule. Nevertheless, these decisions disregard the elementary rule that where language is plain there is no room for interpretation, and adopt a fallacious basis upon which to construe the rule different from the plain meaning of plain words—words which it is evident are used with discrimination throughout the agreements.

"Award 792, in reaching the opposite conclusion and applying the language as written, recognizes the conflict and squarely overrules Awards 413 to 416."

"Awards 825, 829, 830, and 843 overrule Award 792 and rest themselves squarely on Award 413, notwithstanding the fact that its infirmities were pointed out by the Dissent therein and notwithstanding the admission that its reasoning is not satisfactory.

"These awards also seem to rely upon Express Board of Adjustment No. 1 Decision E-326, quoted from the effect that where a vacancy on a bulletined position occurs the senior furloughed employe reporting shall be entitled to the work. This decision has no bearing whatever; it simply holds that where the position is worked the senior reporting employe is entitled to the work. It does not purport to hold that the position must be worked; that question was not involved. It simply decides who is entitled to the work when performed.

"The six-day guarantee rule originated during Federal Control. Its obvious purpose was to make effective seniority principles as opposed to share-the-work practices. It is well-known that at times the practice has prevailed of employing a larger number of employes for

a short work-week five or four days rather than a smaller number of employes for a full six-day week. This, of course, is directly contrary to the basic principle of seniority involved in substantially all railroad agreements. The effect and intent of the rule, therefore, was to require the establishment of as many full six-day week positions as possible and to guarantee to the incumbents of such assignments six days' pay per week. The guarantee was of course intended strictly to run to the employe so that he might have the advantage of his seniority. It would make a complete perversion of the language of the rule to construe it to mean that an extra or furloughed man is guaranteed the opportunity to work any vacancy on a regular assignment, created by the assignee himself, and that the carrier is obligated to fill such vacancy.

"What is held herein is not to be deemed as in any respect a modification of previous holdings of this Board concerning the Sunday rule. There the guarantee is that the position will be filled seven days a week; that is the consideration upon which the carrier is permitted to pay straight time for the Sunday work rather than time and one-half.

"From what has been said it follows that Awards 825, 829, 830, and 843 must be overruled and Award 792 reaffirmed."

Additional reasons might be cited why the award of Referee Swacker is a proper interpretation of the rule. The rule does not say that temporary vacancies "must be filled"; the rule says that the position "may be filled without bulletining." In other words, if the employer elects to fill a temporary vacancy, it may do so without bulletining position, providing it assigns a senior competent employe in the same office. If we interpret the rules to mean "must" be filled, then and in that event, it would necessitate the advancing of the entire force of employes in an office in the event the senior employe laid off for a period of one day. We do not believe the parties making the rules contemplated such a result.

**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 no violation of the rules is shown.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 28th day of October, 1940.