

Award No. 1633

Docket No. CL-1576

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

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

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

(J. M. Kurn and John G. Lonsdale, Trustees)

STATEMENT OF CLAIM "Claim of the System Committee of the Brotherhood that Carrier violated the Clerks' Agreement on Dec. 24th, 25th, 31st, 1939 and January 1st, 1940, when it failed to fill vacancies occurring on positions necessary to continuous service, and declined to pay employees who suffered wage loss by such violation and such employees shall now be compensated to the extent of wage loss suffered thereby."

JOINT STATEMENT OF FACTS: "There were, during the period of time this claim covers five gangs assigned to work seven days per week under Rule 44, at the Seventh Street Freight Station, St. Louis, Mo., in the handling of LCL freight on the platform. Each gang consisted of:

1 Check Clerk,	Rate \$5.16 per day.
1 Picker,	do .57 per hour.
2 Truckers,	do .53 per hour.

"As provided in Rule 44 employees filling these positions were paid pro rata rate for their regular assignment of 8 hours each of the seven days of the week they worked.

"Employees regularly assigned to one complete gang laid off of their own accord and vacancies thereby created were not filled on each of the following dates:

December	24, 1939.
do	25, 1939.
do	31, 1939.
January	1, 1940."

POSITION OF EMPLOYES: "Employees contend that the action of the Carrier in failing to fill the positions on the dates in question by the use of extra men is a violation of our agreed upon Rules 24 and 44.

"Rule 24, fifth paragraph reads as follows:

"Temporary positions and vacancies and all extra work will be filled by oldest qualified extra employee, provided such employee has complied with the other provisions of this rule. Employees on extra list will be permitted to displace junior employees holding temporary positions or vacancies."

"The rule very plainly states that temporary positions and vacancies and all extra work WILL be filled by the oldest qualified extra employee and that carries with it the binding obligation to fill every vacancy that occurs.

We request that the men be paid for the time not used in line with the Agreement and it does not seem at all just to us to take advantage of the rule for many months and then when a holiday comes by to use less than the number of men assigned, and after the passing of the holiday raise the force back up and take advantage of the rule.

Am also informed that on January 3, 1940, one check clerk off duty and the position was not filled—this was 6 day job and the extra man should have been used to fill the position under the provisions of Rule 13 and jobs should not be blanked. We are asking that the senior man entitled to the work on that day be paid for the day.

Will you kindly advise?

Yours very truly,

/s/ C. J. Andereck,
General Chairman.

cy Mr. J. J. Cummins.'

"As previously stated, full list of employes for whom claims were made was at no time submitted to the Company until receipt of Mr. Andereck's letter December 19, 1940.

"We consider there is no merit to this claim and request that it be denied."

OPINION OF BOARD: The controlling facts in this case are not in dispute, they being jointly submitted to the Board by the parties. Briefly stated they are: At the Seventh Street Freight Station, St. Louis, Mo., there are five gangs of warehouse employes, occupying a total of twenty positions, regularly assigned to work each day of the year, or seven days per week, under the provisions of Rule 44. On December 24, 25, and 31, 1939 and January 1, 1940, the occupants of certain of these positions laid off of their own accord and the vacancies thereby created were not filled on any of these dates.

This claim involves the general question as to whether or not the Carrier is required to fill a temporary vacancy of one or more days on any day the regularly assigned employe may, for reasons of his own, lay off. This question has been before this Board on various occasions and in the recent Award, No. 1524, Referee Richards stated:

"Turning to the merits, and taking up first the portion of the claim to the effect that the carrier violated the agreement rules when it failed and refused to fill short vacancies on assigned positions at St. Paul General Store, the Board finds that several recent awards are in support of the carrier's contention that the agreements in evidence do not impose an obligation on carrier to fill short vacancies on assigned positions. Among these authorities are Third Division Awards 934, 1216, 1293, and 1412. Accordingly this contention of carrier the Board sustains."

It is the contention of the petitioner that under Rule 44 the Carrier is required to fill for each day of the year positions regularly assigned for seven days a week when an employe so assigned voluntarily lays off temporarily. The petitioner also cites the 5th paragraph of Rule 24 in support of its contention. The Carrier cites Rules 10 and 24. Rule 10 cover temporary vacancies and is as follows:

"TEMPORARY ASSIGNMENT: Positions or vacancies of thirty (30) days or less duration shall be considered temporary, and may be filled without bulletining."

There is no requirement in this rule that temporary vacancies must be filled. It simply provides that such vacancies may be filled without bulletining. There are no specifications contained in the rule as to what employes will be used in the event Carrier elects to fill the vacancies. This is set out in Rule 24 which will be referred to later. A rule similar to Rule 10 quoted above was cited in Award 1216. It is Rule 11 (b) and is as follows:

"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."

In Award 1216 Judge Danner after quoting from Award 934 and referring to various rules cited, commented on the above rule as follows:

"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."

Our attention is also called to that portion of Rule 24, reading:

"Temporary positions and vacancies and all extra work will be filled by oldest qualified extra employe, provided such employe has complied with the other provisions of this rule. Employes on extra list will be permitted to displace junior employes holding temporary positions or vacancies."

Rules 10 and 24 must be read together to determine the clear intent of the parties. Rule 10 is the primary rule dealing with temporary vacancies and there is no requirement in the rule that such vacancies must be filled. It simply provides that such vacancies may be filled without bulletining. There are no specifications in the rule as to how the vacancy will be filled in event the Carrier elects to do so, hence the additional provision in Rule 24, above quoted, providing that the oldest qualified extra employe will be used. There is nothing in Rule 24 making it mandatory to fill the temporary vacancy. It has to do entirely with rights of extra employes in relation to one another, that is, it is mandatory that in the event an extra employe is used, he must be the oldest qualified extra employe. But the Organization contends that Rule 44 requires the Carrier to fill for each day of the year positions regularly assigned thereunder. Rule 44 is as follows:

"REGULAR SUNDAY AND HOLIDAY WORK: Positions regularly assigned to work full time on Sundays and or the following holidays, namely: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation shall be considered the holiday), shall be paid straight time rate on such days, when hours worked are those constituting the regular week-day tour of duty.

"(NOTE: Above rule refers to position and not the individual employe. Example: Yard Clerk position regularly assigned to work seven (7) days per week. Occupant of position lays off on Sunday or holiday. The substitute receives straight time rate for the day's work.)"

With the contention of the Organization we cannot agree. Rule 44 has no application whatever to this dispute. It is a compensation rule pure and simple. It provides for the method of compensation on a position regularly assigned to work full time on Sundays and holidays and to those relieving the occupants of such positions on those days. Under this particular record the vacancies were temporary ones. There is nothing in the current agreement that requires the filling of these temporary vacancies when the employe lays off voluntarily. It necessarily follows that the claim must be denied.

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 there was no violation of the current agreement by the carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of December, 1941.