Award No. 2467
Docket No. CL-2478

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

St. Clair Smith, Referee

PARTIES TO DISPUTE:

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

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that A. W. Zander be paid one day's pay at time and one-half the rate of $5.365 for March 11, 1943.

EMPLOYES' STATEMENT OF FACTS: Employes and positions covered by Rule 1 of the Agreement between the parties, rates of pay, hours of service, days of rest and seniority as of March 11, 1943, were as follows:

EMPLOYE AND TITLE POSITION	RATE	HOURS	REST DAY	CLASS ONE SENIORITY
G. W. Hill, Chief Clerk	209.40	8:00 am to 5:00 pm	Sunday	
W. E. Mulvihill, Engine Dispatcher	245.40	7:30 am to 4:30 pm	None	11- 1-14
Frank Conroy, Engine Dispatcher	198.40	5:30 pm to 2:30 am	None	7- 1-18
Ethel L. McDonald, Steno-Clerk	6.19	8:00 am to 5:00 pm	Sunday	9-11-23
John Taylor, *Clerk-Caller	5.365	4:00 pm to 1:00 am	Saturday	12- 2-09
A. W. Zander, *Caller	5.045	7:00 am to 4:00 pm	Monday	8- 6-26
B. A. Gassmeyer, Messenger	3.68	8:00 am to 5:00 pm	Sunday	1- 2-43

(*) Positions necessary to continuous operation of Carrier.

On assigned rest days of John Taylor (Saturday) and A. W. Zander (Monday) at the period of this claim they were being relieved by the Messenger whose petition in turn was being filled by a Laborer, Mechanical Department, regularly employed under the scope and provisions of the Firemen & Oilers Agreement. The use of the laborer as relief or extra employe on work or positions covered by the Clerks' Agreement is being contested by the employes in another case before the Division.

Clerk-Caller, John Taylor, was on vacation March 9th through March 12th, and, the Messenger (Gassmeyer) was being used as relief for Taylor. On the date of this claim, Thursday, March 11th, the Messenger called in in the afternoon and reported he was sick and would be unable to work on Taylor's

Your claim is completely outside the purview of the Agreement and is entirely unreasonable. Your claim is denied.

Yours truly,

(Signed) P. C. Voorhees
Superintendent"

In connection with the last paragraph of Rule 43, the words "when it is possible for the Carrier to do so" were placed in the Rule to cover a situation where, on a seven-day position, the regular incumbent was taking his assigned day of rest, and if it is not possible to procure a relief man or there are no extra men available, then the job need not be filled. The Board will note that this Rule was negotiated after the rendition of Award 1853 which Award covered a situation where a position was not filled when the regular incumbent laid off on his own accord. It was with this Award in mind that the Carrier insisted that the phrase "when it is possible for the Carrier to do so" be placed in the Rule. It was definitely understood and agreed to in the negotiations between the parties and a Mediator from the National Mediation Board, that the word "possible" would not be construed to mean that the Carrier would be required to fill a position by calling in a man who had already worked his eight hours on his own regularly assigned job, and pay penalty rates in order to comply with the requirement to fill the job seven days of the week. It will be noted that in Award 1853 the Employes did not make any claim that a regularly assigned employe on another job or shift should be called to work on his seventh day or be doubled over to fill the claimant's job, but the claim was that the claimant should have been paid rate and one-half for the previous Sunday because the job was not filled on the day that the claimant laid off.

We hold that it would be inconsistent to rule that in the instant case the Carrier should have doubled Zander over to fill a seven-day position, when in Award 1853 the Board said that due to the circumstances surrounding that case the claimant was not entitled to rate and one-half for the previous Sunday worked because of the fact his job was not filled on the day that he laid off on his own accord, as it was not possible for the Carrier to fill the job. The Board did not say in Award 1853 that when the regular incumbent of a position lays off on his own accord the Carrier is obligated to work some regularly assigned employe from another shift to satisfy the requirements of filling the job the full seven days. What the Board did say, however, was that when a seven-day position is blanked on an employe's regular day off, he, the employe, was entitled to time and one-half for the previous Sunday worked, but the Referee qualified that statement by saying that there was not a single Award that had been called to his attention that held that that principle was applicable to the situation covered by Award 1853. The Carrier respectfully submits, therefore, that the situation obtaining in Award 1853 is not materially different from the situation that exists in this instant case. Had the Relief Clerk Gassmeyer reported on March 11 to work in Taylor's place the position would have been filled the full seven days. That was the same situation that surrounded the case in Award 1853—the claimant there would have filled his job had he not elected to lay off.

OPINION OF BOARD: The primary question is whether the contractual obligation of Rule 43 to fill a seven-day position, "when it is possible for the Carrier to do so," required the Carrier to double an available worker at punitive rates on a day of temporary vacancies occasioned by illness.

The rule to be interpreted reads:

"Rule 43—SUNDAY AND HOLIDAY WORK. Work performed on Sundays and the following legal 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 at the rate of time and one-half except that employes necessary to the continuous operation of the carrier and who are regularly assigned to such service will be assigned one regular day off duty in seven, Sunday if possible, and if required to work on such regularly assigned seventh day off duty will be paid at the rate of time and one-half time; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time rate.

. "The Company will identify or designate all positions necessary to the continuous operation of the railroad and will post such information on the bulletin board. Positions necessary to continuous operation will be filled seven days each week, including weeks in which holidays occur, when it is possible for the Carrier to do so."

The seven-day position in question, as a Clerk-Caller at the roundhouse, was assigned to one Taylor 4:00 P. M. to 1:00 A. M., except Saturday, his day of rest. On Saturday a regular relief man was assigned. At the time in question Taylor was on vacation and a relief man was filling the vacancy. On a Thursday the relief man notified the Carrier at noon that he was ill and would be unable to report. No other relief or extra clerk was available and the position was not filled on that day. Claimant was assigned on a seven-day position as Caller at that office 7:00 A. M. to 4:00 P. M., except Monday, and had worked his assignment on the Thursday in question. It is asserted that he was available to fill the vacancy, and claim is made for eight hours at time and a half.

It will be observed that Rule 43 is the standard Sunday and Holiday Rule, with an added paragraph whereby the Carrier expressly agrees that positions necessary to the continuous operation of the railroad, "will be filled seven days each week, * * * when it is possible for the Carrier to do so." The claim is predicated upon this quoted language.

The Carrier advances two propositions in justification of its disallowance of the claim: viz., (1) that within the true intent and meaning of the contract it was in fact impossible for it to fill the position on that day, and (2) that its guaranty of six days' work to claimant had been fulfilled and that he is without right in the premises. We are of the opinion that neither of these contentions can be sustained.

The argument under Carrier's first proposition is that the quoted words, "were placed in the Rule to cover a situation where, on a seven-day position, the regular incumbent was taking his assigned day of rest, and if it is not possible to procure a relief man or there are no extra men available, then the job need not be filled." The Carrier further says that it insisted that the quoted phrase be placed in the Rule, and further says: "It was definitely understood and agreed to in the negotiations between the parties and a Mediator from the National Mediation Board, that the word 'possible' would not be construed to mean that the Carrier would be required to fill a position by calling in a man who had already worked his eight hours on his own regularly assigned job, and pay penalty rates in order to comply with the requirement to fill the job seven days of the week." The statements are disputed by the employes.

It is not our function to determine actual intentions. We are limited to a consideration of the intention made manifest by the written agreement. To reform the agreement so as to bring it into accord with the actual intention of its makers, is beyond our competency. In the absence of ambiguity, we have no other office to perform than to desire to declare the meaning the words of the agreement make plain. We perceive no ambiguity here. In unequivocal words the Carrier has agreed to fill the position seven days each

week, if possible so to do. The employes agreed to forego punitive Sunday and holiday rates in return for a guarantee of a position affording seven days of work. See Award 934.

Assigned their common significance, the words do not just deal with the assigned day of rest; they deal with every one of the seven days of the week. Neither do they deal with but a part of the possibilities; they require the exhaustion of all possibilities. To say that the Carrier has done everything possible to fill the position when it had canvassed less than all of its total available labor supply, is to say what one of common understanding would recognize as untrue. It is not unreasonable to believe that the contract contemplated an occasional use of a worker at punitive rates in order that the Carrier might gain the larger advantage of the year round operation of the whole rule. We conclude that a literal interpretation is impelled and hold the contention to be without foundation.

We turn to the second proposition of the Carrier, viz., that having fulfilled its guaranty to claimant of six days of work, claimant is without a right to demand additional work. This contention must be viewed from the background of that which was decided in Award 1646. It was there held, "The essence of the claim is by the Organization for violation of the agreement. The claim for the penalty on behalf of North is merely an incident." With this principle in mind, we consider whether the fact that a worker has been accorded six days of work pursuant to the guaranty in the contract, disqualifies him to serve as the instrument of the Organization in a proceeding which has for its purpose the enforcement of the Carrier's specific obligation to supply seven days of work on this position. The premises of the present assertion is that after enjoying his six days of work, claimant is not entitled as a matter of right to claim more work. In fact, the point was ruled against the Carrier in Award 2341. It was there said: "The Carrier * * * contends that when their regular assignments have been protected, the agreement has been fulfilled. We are not in accord with the Carrier on this point. It is well known that regular assigned employes often desire and are often required to do extra work outside of their regular assignment, generally at increased rate of pay. This work may be said to be incidental to their regular assignment." But we labor it further.

The Carrier does not question but what claimant was in fact available. Neither does it assert, nor could it, with the support of reason or authority assert that claimant would not have been obligated to respond to a notice or call to perform the described service. Putting to one side limitations imposed by the order of seniority, which have been held to be a matter of no concern to the Carrier in considering the rights or qualifications of a claimant in proceedings of this character (See Award 1646), it seems reasonable to conclude, predicated upon the essential nature of these contracts, that wherever they manifest an intention to impose a duty to perform certain work of the Carrier, there is thereby made manifest an intention to create a correlative right to perform that work. The fulfillment of the six day guaranty does not limit or qualify the duty to work when in fact available, and by the same token, it does not qualify or limit the correlative right to work. We hold the Carrier's second proposition to be untenable.

The Carrier violated the working agreement and must respond by making the penalty payment. Awards 1646 and 2282.

We have not considered what the case would be under a rule lacking the express obligations of the last paragraph of Rule 43, and have intended to indicate no opinion as to what our view would be in such circumstances.

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 violated the working agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of February, 1944.