

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that A. C. Stoneburner, Clerk, be paid eight hours pay at the rate of time and one-half, due to the blanking of position B-26-G, Terre Haute, Indiana, on October 25, 26, 27, 28 and 29, 1945. (Docket W-399.)

EMPLOYEES' STATEMENT OF FACTS: The claimant, A. C. Stoneburner, is regularly assigned to position B-23-G, Yard Office, Terre Haute, Ind., with a tour of duty from 8:00 A. M. to 4:00 P. M., with relief day Monday. This position was rated at \$198.96 per month during the period involved in this claim.

Position B-26-G involved in this claim is also located in the Yard Office, Terre Haute, Ind., with a tour of duty from 8:00 P. M. to 5:00 A. M., with relief day Sunday. This position was rated at \$179.96 per month during the period involved in this claim.

Both positions B-23-G and B-26-G are so-called seven-day positions and the employees assigned to them are necessary to the continuous operation of the carrier.

There is an extra list agreement in effect in accordance with the provisions of Rule 5-C-1 of the Rules Agreement, effective May 1st, 1942. The employees on this extra list protect vacancies in regular positions at this location.

Position B-26-G became vacant on October 25th, 1945, due to the resignation of the regular incumbent and, at that time there were no extra or unassigned clerks available for this position. Because of this, position B-26-G was not filled (blanked) on October 25th, 26th, 27th, 28th and 29th, 1945, except that Clerk W. H. Johnson was continued on duty after the completion of his regular tour of duty on Position B-19-G for five hours on one day (October 26th, 1945), to assist with work usually performed on Position B-26-G.

During the period of the claim the claimant worked his regular assigned hours (8:00 A. M. to 4:00 P. M.) except his relief day which was October 29th.

POSITION OF EMPLOYEES: The question at issue in this case is whether or not the carrier is required to use an available qualified regular clerk to fill a vacancy in a regular position when there are no extra or qualified unassigned clerks available, instead of blanking the position.

The Railway Labor Act, in Section 3, First, subsection (i) confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules and working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreements between the parties to it. To grant the claim of the Employees in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION.

The Carrier has shown that, under the applicable Agreement between the parties to this dispute, the Claimant made no request for the work on Position No. B-26-G, and that furthermore, the Claimant could not have been used on his regular position and Position No. B-26-G, since he would have been unable to secure adequate rest between the assignments.

It is, therefore, respectfully submitted that the claim is not supported by the applicable Agreement and should be denied.

OPINION OF BOARD: This is a claim of the Brotherhood that Clerk A. C. Stoneburner, is entitled to a day's pay at time and one-half rate for clerical position, Symbol B-26-G at Terre Haute, Indiana, October 25 to 29, inclusive, 1945, on account of the blanking of the position on those dates. The position is a seven-day position necessary to the continuous operation of the Carrier. The assigned hours of the position are 8:00 p.m. to 5:00 a.m., with relief day on Sunday.

Stoneburner held a regularly assigned position, Symbol B-23-G at the same location with assigned hours from 8:00 a.m. to 4:00 p.m., with relief day on Monday. At this location there is another Clerk's position designated Symbol B-19-G. There is also an extra board carrying one clerk.

On the days in question position Symbol B-26-G was not filled. There was no unassigned extra clerk on these days. Stoneburner was at the time occupying his regularly assigned position. This vacancy was not within the assigned hours of Stoneburner.

The Organization contends that the Carrier wrongfully blanked the position and that there being no extra clerk available, Stoneburner was entitled to have the vacancy assigned to him outside his regular assignment and that the Carrier, on account of its failure in that respect, is bound to pay him for the assignment at the time and one-half rate, or the rate to which he would have been entitled had he been allowed to occupy the position.

The Carrier in defense against these contentions asserts that here was a situation where there was no one available under the Agreement who was eligible to occupy the position, therefore it was proper to leave it vacant.

It asserts that Stoneburner and the occupant of position Symbol B-19-G were not available for the reason that the periods between the assigned hours of these two positions and the hours of the vacated position were too short to allow them time for sufficient rest, and further that they were not available since no application has been made agreeable to the provisions of Rule 2-A-1 (e) as follows:

"(e) Positions or vacancies of thirty days or less duration may be filled without bulletining. The Senior qualified available employe requesting such position or vacancy or requesting a bulletined position or vacancy, pending assignment of a successful applicant, will be assigned, except where agreement under Rule 5-C-1 requires the use of extra employe, provided this will not entail additional expense to the Company."

Since if it be found that the Carrier's contention with regard to Rule 2-A-1 (e) is sustained that would dispose of any individual claim of Stone-

burner, this subject will be dealt with first. To this end it becomes necessary to seek the true meaning of the provision. The meaning must be ascertained by what the provision says specifically and what it says when read in relation to the other rules of the agreement.

The provision means that vacancies of thirty days or less duration may be filled without bulletining by someone coming within the scope rule of the agreement; that if qualified and available employees shall make application for a vacancy of thirty days or less, not required to be bulletined, or shall make application for a vacancy in a position required to be bulletined, the senior available applicant shall be assigned to the vacancy; that if a position or vacancy is filled in this manner the senior available employee assigned shall, in the case of vacancy of thirty days or less be entitled to hold the assignment for such period and in the case of a position required to be filled by bulletin he shall be entitled to hold the assignment until the position or vacancy is filled by bulletin; that this method of filling such positions or vacancies shall not be employed if it conflicts with an extra board agreement entered into pursuant to Rule 5-C-1, or if to follow it would entail extra expense to the company.

The provision does not exclude other methods of filling such positions or vacancies, nor does it say that if they are not filled by this method they may for the time be blanked. Also the provision against additional expense to the company does not attach to any other method.

The method provided by Rule 2-A-1 (e) for filling this vacancy was not resorted to, since no available employee made applications agreeable to its terms. Therefore it may not be said that the Organization is precluded by this rule from asserting claim on behalf of Stoneburner.

This was a position necessary to the continuous operation of the Carrier and it became the duty of the Carrier to assign this vacancy to some one, and to some one covered by the scope rule of the agreement. The only recognizable exception is emergency. It is not deemed that an emergency existed here.

This Division has repeatedly held that positions necessary to the continuous operation of the carrier may not be blanked.

It has also held that work embraced within the scope rule of an agreement may not be removed therefrom.

It has further held that a temporary vacancy in a regularly assigned position belongs to the employees to whom it is given by the agreement to the exclusion of employees and others having no rights to it when there is an employee available in the class or group entitled to perform it.

The next question which arises is that of whether or not there was an employee or employees available in this class or group entitled to perform in this vacancy. Within the meaning of the precedents of this Division there was. They were Stoneburner and the occupant of position Symbol B-19-G. These two could have occupied the vacancy as overtime. This being true the position was wrongfully blanked under the precedents of this Division.

It is readily observable that if this vacancy had on all of these days been assigned to Stoneburner his efficiency in these two positions might have been greatly impaired but under all of the facts as disclosed by the record a practical application of the following admonitory statement in the opinion in Award 3193 probably could have been made in avoidance at least in part of this speculative impaired efficiency.

"The Carrier can usually avoid such contingencies by a judicious assignment of employees under the Agreement to overtime work. If conditions become so emergent as the Carrier suggests, an understanding with the Organization can usually be obtained. If the Organization should, under such circumstances, become arbitrary and capricious in its action, we doubt not that this Board would

adequately protect management if it pursued a reasonable and necessary course."

The thought in mind here is that if this vacancy had been assigned on alternate days of the occupants of positions Symbol B-23-G and Symbol B-19-G the objection that the occupant of the vacancy had it been assigned would not have had sufficient opportunity for rest would have been largely removed.

The claim will be sustained but we do not think that the claimant is entitled to have the time and one-half rate allowed. Precedents of this Division are to the effect that the penalty for work lost is the rate which the employe to whom it was regularly assigned would have received if he had performed the work. The regular occupant of this position would have received the pro rata rate. The claim will be sustained at the pro rata rate.

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 Agreement has been violated.

AWARD

Claim sustained at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of April, 1948.