Award No. 3880
Docket No. TE-3879

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Order of Railroad Telegraphers on the Delaware, Lackawanna and Western Railroad Company that John J. McCrone an extra board employe, be paid a day's pay on December 12, 13, and 14, 1946, under Rule 18 of the Telegraphers' Agreement, when a junior employe was assigned to cover a temporary vacancy on the third trick, 12 midnight to 8 A.M., at Clarks Summit on those dates.

EMPLOYES' STATEMENT OF FACTS: An agreement by and between the parties, bearing effective date of May 1, 1940, as to rules and May 22, 1946 as to rates of pay, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

L. W. Kearney, third trick towerman, assigned hours 12 o'clock midnight to 8 A.M., at Clarks Summit Tower reported off duty for one day, December 10, 1946, and in accordance with Rule 18, of the Telegraphers' Agreement, Extra Employe P. Rushin, seniority date May 9, 1944, who qualified under said Rule, was assigned to the one-day vacancy.

Extra Employe John J. McCrone, seniority date May 30, 1942, occupied a two-day vacancy, December 10th and 11th, at Cayuga Tower. McCrone finished the two-day vacancy at Cayuga Tower at midnight December 11th.

Instead of returning to his position at Clarks Summit Tower December 11th, L. W. Kearney requested and was granted the right to be off duty December 11th. Rushin continued at Clarks Summit on the basis that he was the senior qualified extra employe not working. December 12th Kearney again requested off for another day—the request was granted, but he was told he should lay off until further advised and refrain from continuing to create one-day vacancies. Effective December 12th John J. McCrone became the senior available extra employe not working, but he was not called to protect the Clark Summit vacancy of December 12, 13, and 14; instead P. Rushin, a junior employe was called.

The Organization, on behalf of J. J. McCrone, filed claim for $27.60 which represents earnings lost by him because he was not called to protect the said 3-day vacancy at Clarks Summit.

POSITION OF EMPLOYES: As indicated by the Organization's Statement of Facts, and dealing only with two extra board employes, namely, John J. McCrone and P. Rushin, the record is that McCrone established a seniority

2. Rushin was entitled to the vacancy until displaced by the senior qualified employe in accordance with Rule 17 (a).

3. McCrone did not comply with the practice on the Scranton Division to make his availability known on December 12, 13 and 14, 1946, nor did he make any effort to displace Rushin, otherwise, he would have been given an opportunity to work.

4. Rule 17 (a) was applicable in this case, and McCrone failed to comply with the intent of this rule in order to displace Rushin.

OPINION OF BOARD: As pointed out by the respective submissions of the parties the claim is for three days' pay for John J. McCrone, an extra board employe having seniority under the Telegraphers' Agreement, the effective date of which Agreement was May 1, 1940. The claim is that he should have been assigned to the third trick, midnight to 8 A.M. at Clarks Summit on December 12, 13 and 14, 1946, whereas instead a junior employe was assigned thereto. It is contended that the failure to assign him on these dates was in violation of Rule 18 of the Agreement.

The position was that of towerman and the regular occupant was L. W. Kearney.

Kearney reported off the position on December 10, 11 and 12, 1946. It appears that there was a separate reporting off by Kearney on each of the three days. When he reported off on the 12th he was instructed by the chief dispatcher to either arrange to report to work or report off until further notice. He chose to report off until further notice. He resumed his assignment the 15th.

McCrone was not available for the assignment on the 10th and 11th. P. Rushin, an employe junior to him, filled the position on those two dates. McCrone was available the 12th, 13th and 14th and it is the contention of the Organization that on those dates he should have been given the assignment and that Rushin should have been displaced and, because of failure in this respect the Carrier should compensate for the time lost.

The substantial contention of the Organization, as we understand it, is that under the facts there was not one but three temporary vacancies, namely, one each on December 10, for one day, one on December 11 for one day and one on December 12, which covered a period of three days. It agrees therefore that under the provisions of Rule 18 McCrone was entitled to fill the third vacancy or the one for three days. The rule is as follows:

"Rule 18—Extra Employes

A temporary vacancy of three (3) days or less duration will be filled by the senior qualified employe not then employed, if available."

The Carrier, in defense of the claim, urges that it had the right, under custom on the division whereby extra operators checked with Chief Train Dispatcher advising him of availability, to regard McCrone as unavailable and also that Rushin, having been given the assignment at a time when he was eligible, had the right to continue therein subject to Rule 17 (a), as follows:

"Rule 17—Temporary Vacancies

(a) When a position is vacant five (5) days it will be given to the senior qualified applicant. Applicant must make his intention known at least twenty-four (24) hours before starting time.

Incumbents of temporary vacancies may be displaced by a senior incumbent of a temporary vacancy that has terminated, otherwise a senior employe may exercise displacement rights only after each five (5) day period of the temporary vacancy."

If Rule 18 controls exclusively in this situation then it would appear that the contention of the Carrier that it had the right to consider McCrone unavailable does not rest on a sufficient foundation. The rule places no obligation on the employe to give notice of availability or to make application for such vacancies. On the other hand the Carrier binds itself by the rule to fill the vacancy by use of the senior qualified employe if he is available. With its knowledge of its operations and its employe assignments it must be presumed to know who are senior and who are apparently available. It ought not to be permitted to assume unavailability in the absence of effort to ascertain the fact in that respect.

The determination of whether or not Rule 17 requires a dismissal of the claim makes necessary some analysis of the terms and purport of the rule. It is to be observed that the first paragraph refers to a position vacant for five days. Whether it applies alone to a position already vacant for five days or as well to one which it is known will be for five days is on the face of the rule none too clear.

However, to fill a position in conformity with either view of this paragraph of the rule requires application by an employe seeking to fill the vacancy. No application was made by McCrone and, of course, this was proper since there was no opportunity for displacement or assignment under this paragraph. There was no position vacant for five days.

The Carrier submits that it was proper for McCrone to displace Rushin on the 14th and in fact offered to bring this about. The offer was declined, apparently on the ground that he thought he had no right to displace Rushin without giving the twenty-four notice of intention provided for in the first paragraph of Rule 17 (a). He signified his intention of taking the assignment on the 15th. The vacancy, however, no longer existed on the 15th since Kearney returned.

On the 12th McCrone had terminated his assignment to a temporary vacancy and he was senior to Rushin who was occupying a temporary vacancy. Under the rule the right of displacement existed.

Whose duty was it to see to it that McCrone was accorded his rights in this situation under the Agreement?

Had the vacancy been one contemplated by the first paragraph of Rule 17 (a), it appears that his rights would depend upon application and timeliness of his declaration of intention. We think, however, that his rights depended upon application of Rule 18. We are of opinion that under the facts here Rushin filled three vacancies no one of which exceeded three days and that it was the duty of the Carrier to have displaced him when McCrone terminated his previous temporary assignment.

We do not think, however, that the claim should be allowed for the third day, that being the 14th day of December, 1946. He was tendered the assignment for that day and declined. Beyond the statement that the reason for declining was his own and not that of the Carrier, nothing need be said. He ought not to be permitted to recover for loss of work offered to him which on his own volition he declined.

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 claim has been sustained for December 12th and 13th, 1946, and denied for December 14th, 1946.

AWARD

Claim sustained for December 12th and 13th, 1946, and denied for December 14th, 1946.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

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