

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, 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 Division Committee of the Brotherhood that:

(a) The Carrier violated the provisions of the Rules Agreement, effective May 1, 1942, particularly Rules 2-A-1(e) and 4-A-2(a) at Euclid Avenue Passenger Station, Cleveland, Ohio, Cleveland Division, when clerical position F-265 was blanked January 26, 1947.

(b) Mildred Ginsberg, Clerk, be allowed a day's pay at time and one-half on account of failure to allow her to fill this vacancy as claimed. (Docket C-328.)

EMPLOYEES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as the representative of the class of employees in which the claimant held a position and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employees between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e) of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

The claimant in this case is an employe holding a position covered by the Scope of that Rules Agreement having seniority standing on the Cleveland Division of the Carrier in Group 1.

Clerk Mildred Ginsberg was the incumbent of clerical position, Symbol No. F-272, located at the Euclid Avenue Passenger Station, Cleveland, Ohio. Position, Symbol No. F-272 is a six-day position and therefore the incumbent was observing her relief day on Sunday, January 26, 1947. The incumbent of clerical position, Symbol No. F-265, a seven-day position, was off duty due to illness on that date. There were apparently no extra clerks available to fill the vacancy, but Miss Ginsberg had made a previous verbal request to be considered for extra work in accordance with Rule 2-A-1(e). No other claims or requests were received from other employes—regular or extra.

Rule 2-A-1(e) reads as follows:

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Agreement and to Decide the Present Dispute in Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement, which constitutes the applicable agreements between the parties, and to decide the present dispute in accordance therewith.

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, or working conditions". The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the agreement 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 hereto 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 any such action.

CONCLUSION

The Carrier has established that there has been no violation of the applicable Agreement and that the Claimant is not entitled to the compensation which she claims.

Therefore, the Carrier respectfully submits that your Honorable Board should dismiss the claim of the Employees in this matter.

(Exhibits not reproduced.)

OPINION OF BOARD: The record discloses that Mrs. Betty Heath, the regularly assigned incumbent of Position Symbol No. F-265 in the Reservation Bureau, Euclid Avenue Passenger Station, Cleveland, Ohio, was off duty on Sunday, January 26, 1947, because of illness. Position Symbol No. F-265 was a regularly assigned seven-day positions with Saturday as the designated relief day.

Claimant, Mildred Ginsberg, who held seniority on the Cleveland Division in Group 1, was regularly assigned to an occupied clerical position Symbol No. F-272 in this same depot. Position Symbol No. F-272 was a six-day position with Sunday as relief day.

Claimant, who was qualified to do the work of position Symbol F-265, had, prior to January 26, 1947, orally requested to be considered for extra work in accordance with Rule 2-A-1 (e) of the parties' effective Agreement.

When the vacancy occurred on position Symbol F-265 on Sunday, January 26, 1947, Carrier did not fill the position for that day but left it blanked.

The Brotherhood contends that the Carrier violated Rule 4-A-2 (a) and 2-A-1 (e) of their effective Agreement when, on January 26, 1947, it blanked position Symbol F-265 and asks that Claimant be allowed a day's pay because thereof at time and one-half.

Rules of the parties' effective Agreement, so far as here material, are as follows:

4-A-2. (a)—"* * * except that employes necessary to the continuous operation of the carrier 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 regular assigned seventh day off duty, will be paid at the rate of time and one-half. When such assigned day off duty is not Sunday, work on Sunday will be paid for at the straight time rate."

2-A-1. (e)—"Positions or vacancies of thirty days or less duration may be filled without bulletining. The senior qualified available

employee 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 employee, provided this will not entail additional expense to the Company."

5-C-1. "Where extra employees are used extra boards will be established by agreement between the Management and the Division Chairman. The number of extra employees to be used and the manner in which they will work will be determined by written agreement between the Management and the Division Chairman."

Carrier relies upon Award 214 of its Clerical and Miscellaneous Forces Board of Adjustment as here controlling our interpretation of the applicable rule of the parties' Agreement now in effect.

There is no question but what decisions of a System Board are binding upon this Board. See Awards 233, 1793 and 3628 of this Division.

Award 214 would indicate that under the rule then in force, being 4-A-2 (a) of the parties' Agreement effective May 16, 1935, the question of whether or not Carrier could blank a day of a seven day per week assignment was one of fact and if actually the work did not require it then it could be done and the position would revert to a six day week.

As therein stated:

"* * * unless such seven day position and each of such positions be a continuous one, or is, actually filled for seven consecutive days by one or more employees, such position reverts back to a six day position governed by the rules or regulations of such positions."

Likewise, when an existing rule is readopted in a new contract without change all interpretations of that rule are carried forward as part of the new rule unless there be a declared intent to the contrary. See Awards 2679, 3889 and 4388 of this Division.

Although it may be argued, as Carrier does, that the language used in Rule 4-A-2 (a) of the Agreement of the parties effective May 16, 1935, under which Award 214 was rendered, is, in effect, the same as that of Rule 4-A-2 (a) of the Agreement of the parties effective May 1, 1942 and therefore, under the foregoing principles, that award and what is therein held is controlling, however, the fact remains that there is an actual difference in the language used.

Rule 4-A-2 (a) as contained in the present Agreement has been many times construed by this Division both before and after the effective date thereof. It has often been held that a position necessary to the continuous operation of the Carrier cannot be blanked in whole or in part and it is the duty of the Carrier to assign someone within the Agreement, as by its rules provided, to fill the vacancy. See Awards 561, 2783, 3054, 3465, 3745, 3814 and 3876 of this Division.

When a position is bulletined by the Carrier as a seven day position on the basis that it is necessary for its continuous operation and it is regularly assigned as such in order to obtain the benefits of this rule then the Carrier is estopped to claim otherwise and it cannot blank the position, although from time to time the amount of work may vary. If, in fact, it should have been or becomes a six day position the Carrier can proceed to establish it as such by proper methods.

There is evidence in the record of settlements made between the parties subsequent to the effective date of the present Agreement which are in accord with both parties' contentions. However, interpretations given a contract by the parties themselves will be adopted as controlling only when the contract is ambiguous. See Awards 561 and 3465 of this Division. Here there is no ambiguity in Rule 4-A-2 (a) as adopted by the parties effective May 1, 1942

for it has often been interpreted by this Board both before and after the effective date and such interpretation was or should have been known by the parties.

In view of the foregoing, we have come to the conclusion that the Carrier was obligated to fill this position on January 26, 1947, when the regularly assigned incumbent was absent therefrom because of illness.

Carrier further contends that under Rule 2-A-1 (e) Claimant is not eligible because of the exceptions thereto. As correctly stated in Award 3876 of this Division, the method of filling vacancies, as therein provided, is not to 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 record does not affirmatively show that any extra board agreement, pursuant to Rule 5-C-1, was ever entered into by the parties for the Euclid Avenue Passenger Station. In fact, the record evidences the fact that no qualified extra clerks were available at the time. In the absence thereof regularly assigned clerks would be entitled to the work. The absence of both conditions did not take the work, which is within the scope of the Agreement, out from under its provisions. Claimant, who was admittedly qualified, had applied for this work under Rule 2-A-1 (e) and was therefore eligible for it and the record shows she was available.

That the claim might have been made in behalf of others having, as between themselves and Claimant, a prior right to the work is of no concern to the Carrier as long as Claimant was eligible and available to do the work. Others are not making any claim and if they should the Carrier will not be required to pay more than once. See Awards 1646, 3890 and 4370 of this Division.

The penalty for work lost is the rate which the employee to whom it was regularly assigned would have received if he had performed the work. Since January 26, 1947 was a regular day of the assignment on position Symbol F-265 the basis for allowing the claim is the pro rata rate of the position.

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 Employees involved in this dispute are respectively carrier and employees 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 Agreement.

AWARD

Claim sustained but at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
BY Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of July, 1949.