

Award No. 4970
Docket No. CL-4847

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

**THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY—COAST LINES**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) Carrier violated the rules of the Clerks' Agreement when it required and permitted Mr. C. L. Maus, Roundhouse Laborer, Winslow, Arizona, to perform clerical work covered by the scope and operation of the Clerks' Agreement and by such action deprived employees who hold seniority rights in that district and to this work their right under the Clerks' Agreement to perform such work; and

(b) F. M. Upham shall be compensated at the rate of \$9.36 per day on the basis of eight (8) hours per day at time and one-half rate on dates when such violation occurred, viz., October 10 and 16, November 2 and 28 and December 11, 1946.

EMPLOYEES' STATEMENT OF FACTS: In the Mechanical Department at Winslow, Arizona, there exists three positions identified by payroll numbers 22, 23 and 24 rated \$9.36 per day. Position No. 22 being titled General Clerk and Positions 23 and 24 titled Dispatching Clerk, the hours of assignment being 4:00 p.m. to 12:00 midnight, 8:00 a.m. to 4:00 p.m. and 12:00 midnight to 8:00 a.m., respectively. On October 10 and 16, November 27 and 28 the occupant of Position 23, with assigned hours 8:00 a.m. to 4:00 p.m., was absent from duty. On December 11, the occupant of Position 24, with assigned hours 12:00 midnight to 8:00 a.m. was absent from duty. Roundhouse Laborer C. L. Maus, who holds seniority rights under the Shop Crafts' Agreement, but who holds no seniority rights under the Clerks' Agreement, was instructed by the Carrier to perform the duties of these vacant position notwithstanding the fact that qualified employees holding seniority rights to such work were available, ready and willing to perform same on an overtime basis as had always been the custom and practice in similar circumstances.

Mr. F. M. Upham, occupant of Position 22, hours 4:00 p.m. to 12:00 midnight, and who has hours of assignment consecutive with hours of assignment of the two vacant position, Nos. 23 and 24, was available and willing to perform such overtime service but was denied the right, whereupon he submitted overtime tickets to the Master Mechanic claiming payment on the basis of eight (8) hours at time and one-half rate for each day involved. These tickets were declined by the Master Mechanic on the grounds that the vacancies on Positions

produce an occupant for the temporary vacancy that it may be filled without regard to the agreement rules.

The Employees have also contended that it has been the practice and custom from time immemorial for the Carrier to require and permit clerical employees to work positions where vacancies occur on an overtime basis and instances when positions could not be filled under the provisions of Article III, Section 10-a, and further alleged that the handling involved in the instant dispute constitutes an apparent abandonment of such practice and custom. The Carrier emphatically denies that it has been the "custom and practice" to double regular assigned employees on overtime in the protection of vacancies of the nature here involved to the exclusion of all other methods of filling such vacancies, as inferred by the Employees. Certainly the Carrier has upon occasions in the past protected such vacancies in that manner, and obviously it must do so when the position is to be filled and there is at the time no other possible way in which it can be protected, but it will be apparent to the Board, and as also previously pointed out hereinabove, that the Carrier is definitely not required to do so under the terms of Article III, Section 10-a. The handling is left entirely in the hands of the Carrier under that rule, provided the therein specified alternatives do not produce an occupant for the temporary vacancy. Regardless, "custom and practice", as the Board has so often held, cannot ordinarily change definite rules of the agreement where the terms thereof are clear and unambiguous, such as are those of Article III, Section 10-a.

In conclusion the Carrier reiterates that the instant claim is without support in the rules of the current Clerks' Agreement, and those of the National Vacation Agreement, or otherwise. It is in fact nothing more than an attempt to repudiate and nullify the Carrier's right to fill temporary vacancies without regard to the agreement rules, as specifically provided for in Article III, Section 10-a of the current Clerks' Agreement. The instant claim should be denied in its entirety.

The Board's attention is here again directed to the fact that the Brotherhood's claim contemplates that the complainant L. F. Upham shall be compensated at punitive time and one-half rate for time not worked on October 10 and 16, November 27 and 28 and December 11, 1946. Without prejudice to its aforestated position that the instant claim is without support in the rules of the current Clerks' Agreement, and those of the National Vacation Agreement, or otherwise, the Carrier further asserts that the Third Division has repeatedly held that time not actually worked cannot properly be treated as overtime and paid for at punitive rates, but that compensation under such circumstances must be limited to the pro rata rate—see Awards 3587, 3876, 3890, 3910, 4037, 4046, 4179 and many others.

(Exhibit not reproduced).

OPINION OF BOARD: There is established at Winslow, Arizona, three positions entitled General Clerk (Position No. 22) and Dispatching Clerks (Positions Nos. 23 and 24), assigned 4:00 P.M. to 12:00 midnight, 8:00 A.M. to 4:00 P.M. and 12:00 midnight to 8:00 A.M., respectively. These positions are within the Clerks' Agreement and a clerk is regularly assigned to each. On October 10 and 16, and on November 27 and 28, 1946, the occupant of Position No. 23 was absent from duty. On December 11, 1946, the occupant of Position No. 24 was also absent from duty. There was no qualified off-in-force-reduction employe available to fill the position. Carrier thereupon assigned Roundhouse Laborer C. L. Maus, an employe with the Shop Crafts' Agreement and holding no seniority rights under the Clerks' Agreement, to work the positions on the dates specified. The Organization contends this was a violation of the Agreement in that the work was not assigned to an employe under the Clerks' Agreement.

The Carrier asserts that Roundhouse Laborer Maus was properly assigned under Article III, Section 10-a, current Agreement, providing:

"Section 10-a. Vacancies of fifteen (15) calendar days or less duration shall be considered temporary and, if to be filled, shall be filled (1) by recalling the senior qualified and available off-in-force-reduction employe not then protecting some other vacancy; (2) if there is no such off-the-force-reduction employe available, by advancing a qualified employe in service at the point who makes application therefor. If neither of these alternatives produces an occupant for the vacancy, it may be filled without regard to these rules, but employes holding seniority in Class 3 on the same seniority district, whether in regular employment or otherwise, shall be given preference in accordance with Section 8-e of this Article. Individual Class 3 employes shall not be compelled to protect such temporary service, but those accepting it will do so at the rate applicable thereto and without penalty to the company, either through payment of expenses or otherwise. If taken from regular employment, they will return thereto when released from the temporary vacancy."

This question involving the same rule on this Carrier has been interpreted by this Board. Award 4962. For the reasons in that award we sustain the claim here made at the pro rata rate of the position, except November 28, 1946, Thanksgiving Day, will be paid at time and one-half.

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 was violated.

AWARD

Claim sustained per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois this 31st day of July, 1950.

DISSENT TO AWARD 4970, DOCKET CL-4847

This Award relies entirely upon Award 4962.

The dissent to that Award is equally applicable here and, by reference thereto, is made a part of this dissent.

/s/ A. H. Jones
/s/ R. H. Allison
/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ C. C. Cook