# Award No. 4986
# Docket No. TE-4872

## NATIONAL RAILROAD ADJUSTMENT BOARD
## THIRD DIVISION

Robert O. Boyd, Referee

---

## PARTIES TO DISPUTE:

## THE ORDER OF RAILROAD TELEGRAPHERS

## THE NEW YORK CENTRAL RAILROAD COMPANY (LINE WEST OF BUFFALO)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The New York Central Railroad (Line West of Buffalo), that the Carrier violated the rules of the Telegraphers' Agreement at South Bend, Indiana, when it permitted employes in the Ticket Office to exercise seniority and displace junior employes and required regularly assigned employes to suspend work on their regular positions claiming that positions 5, 6, and 10 were abolished, and

That in consequence of said violations the Carrier shall now reimburse employe E. S. Kowalski for one day's pay he lost December 9, 1946.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an agreement between the parties bearing effective date of July 1, 1946, as to rules of working conditions, copy of which is on file with the Board and by reference is made a part of this Statement of Facts.

Just prior to December 9, 1946 there were 7 regular assigned positions and 1 regular rest day relief job in effect at South Bend Ticket Office. Those pertinent to this dispute are:

| Job No. | Hours | Rest Day |
|---|---|---|
| 3 | 3:45 P.M.-11:45 P.M. | Wednesday |
| 5 | 7:00 A.M.- 3:00 P.M. | Saturday |
| 6 | 1:00 P.M.- 9:00 P.M. | Tuesday |
| 10 | 9:00 A.M.- 5:00 P.M. | Monday |
| 16 | 9:00 A.M.- 5:00 P.M. | Sunday |

On January 26, 1946 Claimant Kowalski was awarded Job No. 3. On November 22, 1946, he was advised that he was the senior applicant for Job No. 10 and would be advised later when he would be transferred from Job No. 3 to Job 10. He was still working Job 3 on December 6, 1946 when the carrier issued instructions that effective Monday, December 9, 1946, permanent positions 5, 6, and 10 would be abolished. Under the agreement employes have 10 days from date actually displaced to assert displacement rights. Job 3 which Kowalski was working as a temporary vacancy after November 22 was not abolished and he had the right under the temporary vacancy rule, Article 13(c), to remain on it until displaced by the regular incumbent or another senior employe who had displacement rights. He elected to remain on Job 3 until displaced.

The contentions of the Organization that Article 9, Article 12, or any other rule was violated at South Bend Ticket Office when claimant did not work Monday, December 9, 1946 is conclusively refuted by the facts as hereinbefore set forth and by the "picture" of service performed by the claimant during the first half of December, 1946 as reflected in the appended statement identified as Carrier's Exhibit No. 1.

CONCLUSION

The carrier submits that the foregoing conclusively shows that:

1. Claimant sustained no loss of earnings so that, if the instant claim for one day's pay for December 9, 1946 which claimant did not work is allowed, claimant would receive a total of 14 days' pay for the 15 days in the first half of December, 1946, whereas he would have received only 13 days' pay if he had remained on either assignment (Position 3 or Position 10) during the entire payroll period.

2. The allegation that Articles 9 and 12 of the Telegraphers' Agreement were violated is unfounded as Article 9 is not relevant and Article 12 was properly regarded.

3. The claim is without basis in equity, is not supported by the rules and should be denied.

(Exhibit not reproduced.)

**OPINION OF BOARD:** The facts, which are set forth in the submissions of the parties, are not in dispute.

The action of the Carrier in giving notice on December 6 that on December 9 the job positions numbered 5, 6 and 10 would be abolished, its subsequent action on December 10 cancelling the notice, the fact that it refilled the positions without advertising and bulletining them and the further fact that it reimbursed employes for time lost supports us in the conclusion that on December 9, the jobs were not in fact abolished.

On December 9 the claimant had a prior right to position 10. It had been assigned to him as a result of his bid when it was bulletined November 22, 1946. He worked his former position, job 3, on December 8, but on December 9 this job (No. 3) was filled by an employe having prior seniority to the claimant. December 9 was the regular relief day for job No. 10, and on December 10 the claimant filled this job which he owned by reason of his successful bid.

The issue raised by the facts of record in this case and our finding that jobs 5, 6 and 10 were not abolished is: was the claimant displaced from his position on job 3 on December 9 in accordance with the rules?

Article 13(c) of the Rules provides that an occupant of a temporary vacancy, which was the status of the claimant in job 3 on December 8, may be displaced by a senior employe having displacement rights. Article 24(b) provides that seniority will be effective only when vacancies occur, new positions created or the force reduced. This Article also provides that an employe will have displacement rights when he has actually been displaced. As we have already found that the jobs were not in fact abolished then there was no reduction in force and no employe was in fact out of a job and none had a right to exercise seniority and displace a junior employe; and consequently, the employe who displaced claimant had no displacement rights under the Agreement; and therefore, on December 9 the claimant was improperly denied his right to work that position. The Carrier did not transfer him to the job to which he had been assigned until December 10.

The Carrier shows that the claimant has worked the maximum number of days that was possible for him to have worked, and that, in fact, he lost

no pay by reason of not working position No. 3 on December 9. This is not denied, but the Organization contends that payment is due by reason of the violation, regardless. They cite two awards of this Division. In Award 3301 the claimant had a regular assignment from 8:00 A.M. to 4:30 P.M., but the Carrier required him to fill a temporary vacancy and started him at a different time than his regular assignment, and he earned as much as he would have on this regular job. The Oppinion of Board, Referee Simmons assisting, said, in part:

> "The rights of the employe under the assignment are not satisfied merely by paying the employe the equivalent pay for working other hours at some other job."

In Award 3913, an employe was not permitted to work a temporary vacancy to which his seniority entitled him although he worked a subsequent assignment and, in fact, lost no time. The Opinion of Board, Referee Yeager assisting, follows Award 3301.

In this latter Award (3913) the Board said in its Opinion:

> "It appears reasonable and proper to say under such circumstances as are disclosed here that a presumption of loss arises from the violation and that the Carrier should be required to respond with one day's pay for the position to which, in violation of the Agreement, it failed to call McCormick."

These cases are parallel to the instant case, and we have therefore concluded the claim is valid.

**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 Carier 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

The facts and Agreement sustain the claim.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 1st day of August, 1950.