Award No. 5269
Docket No. CL-5324

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee.

PARTIES TO DISPUTE:

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

THE OGDEN UNION RAILWAY AND DEPOT COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the Ogden Union Railway and Depot Company and/or its officers violated the terms of the existing agreement

(a) By failing or refusing to call and work Mr. Merrill Haven on 5 A. M. to 1 P. M. Station Director position on December 7, 1949; and

(b) The Depot Company shall now compensate Mr. Haven for eight hours' pay at rate of time and one-half for December 7, 1949.

EMPLOYES' STATEMENT OF FACTS: The Ogden Union Railway and Depot Company is a switching terminal facility at Ogden, Utah jointly owned and operated by the Union Pacific and the Southern Pacific Railroad Companies, where this claim arose.

On the date of this claim, December 7, 1949, there were assigned to the Station Director forces, along with other station directors in the Union Station, L. L. Griffith to position number 87-7 working 5:00 A. M. to 1:00 P. M., Mr. Merrill Haven to position 87-6 working 5:30 P. M. to 1:30 A. M., and Mr. E. S. Crompton, Relief Station Director, with Tuesday and Wednesday as rest days of each week.

On Wednesday, December 7, 1949, the carrier granted Mr. L. L. Griffith permission to be absent from position 87-7. There were no established extra men available to fill this position, there is no extra board agreement providing a means to fill the position, and there were no furloughed employes available to fill the position. Hence, it became necessary to fill the position by calling another regularly assigned available Station Director to fill this position.

Seniority dates of the two involved employes are as follows:

Merrill Haven	Terminal Seniority date	Sept. 20, 1938
E. C. Crompton	" " "	Dec. 26, 1941

The officer in charge calling the Station forces called Mr. Crompton who is the junior of the two named employes to work on position 87-7

to 3 P. M. The record shows that Claimant LaFreniere held assignment as Passenger Director working from 6 P. M. to 2 A. M., and had already worked eight hours on this date. Relief Passenger Director Crompton, who had performed no service on this date, was called to fill the vacancy. The Employes contended that the senior employe was S. LaFreniere, and notwithstanding the fact that he already had performed eight hours' service on this date, a claim is entered in his behalf for eight hours at the punitive rate of time and one-half on the basis that he should have been used in lieu of Crompton.

We return now to the claim of M. Haven. The circumstances are identical: On December 7, 1949, a vacancy of one day existed on position of Passenger Director working from 5 A. M. to 1 P. M. Crompton was again used. The record will show that S. LaFreniere was available, as he was in the other case, having worked from 6 P. M., December 6, 1949 to 2 A. M., December 7, 1949. The Employes, however, come forth with a claim not for LaFreniere but for Mr. Haven, who is the junior employe.

In the instant case, if Haven had been used the Employes would then contend that LaFreniere should have been used. As stated in the LaFreniere claim, if one day vacancies are to be filled as an exercise of seniority basis then it is incumbent upon the employe desiring the position to make application for it. A claim cannot properly be asserted because a junior employe is used unless he has made such application.

The Employes' positions are contradictory to the point of direct opposition and as such are rendered untenable, as the assertion in one case that LaFreniere, being the senior employe, should have been used, is effectively controverted by the assertion in the other under identical circumstances that Haven, a junior employe, should have been used. To sustain the position in one case is to deny it in the other.

The claim of Haven cannot be sustained as the Employes' contention that the senior employe must be used is incompatible with the claim since Haven, as we have shown, was not the senior employe.

(Exhibits not reproduced.)

OPINION OF BOARD: As of Wednesday, December 7, 1949, there were seven positions of Passenger Director maintained by Carrier serving around the clock on overlapping shifts. Three relief assignments were in effect to relieve the aforesaid positions on assigned rest days. On December 7, 1949, one of the employes regularly assigned to the 5 A. M. to 1 P. M. shift was absent and the vacancy was filled by calling one of the incumbents of the regularly assigned relief positions who was then on his rest day. The latter employe was junior to Claimant who was regularly assigned on the 5.30 P. M. to 1:30 A. M. shift, rest days, Tuesday and Wednesday.

Essentially the same contentions are made by Carrier and employes in this docket as in Award 5266. Actually the only factual difference is that in this docket the question of proper selection of employes to fill a one-day vacancy on a regularly assigned position is involved, whereas in Award 5266 overtime hours arising in connection with class of work was involved. Here there were no extra or furloughed employes available to fill the vacancy. Under these circumstances and under the principles therein stated, the senior available, regularly assigned employe should be called for the work. As we paointed out in our Opinion in Award 5266, it is the Carrier's duty to police the Agreement. If the senior, regularly assigned employe is called but not available, obviously, no basis exists for a claim if the next senior employe is called. Here, Carrier did not attempt to call the senior man. In that it was in violation of the Agreement. A sustaining award is indicated.

Carrier's contention, to the effect if the senior man must be called, the Company should be relieved from payment of punitive time under Rule 53 providing that the Company shall not be penalized by the payment of

punitive time in the exercise of seniority rights, etc., is untenable. The requirement of payment of the punitive rate is not occasioned by the exercise of seniority but by the employe qualifying for punitive rate under the overtime rules of the Agreement because of service in excess of eight hours in the day or work on his relief day as the case may be. However, in assessing the proper penalty in this docket, it must be borne in mind that the Claimant did not perform any work. The penalty rate for work lost because it was given to one not entitled to it under the Agreement is the rate which the occupant of the regular position would have received, if he had performed the work. Here, the regularly assigned employe would have received the pro rata rate had he worked on Wednesday, December 7, 1949. Accordingly, that is the proper penalty.

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 Employe involved in this dispute are respectively Carrier and Employe 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 Carrier violated the Agreement.

AWARD

Claim (a) sustained and (b) 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 19th day of March, 1951.