Award No. 5325
Docket No. CL-5348

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Angus Munro, Referee

PARTIES TO DISPUTE:

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

THE OGDEN UNION RAILWAY & 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 Mr. Sam LaFreniere to work Passenger Director Position 87-8 from 6:00 A. M. to 3:00 P. M., March 28, 1950; and

(b) The Company shall now compensate Mr. LaFreniere for 8 hours' time at the punitive rate of pay of the established Passenger Director position for said violation.

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 dispute arose.

On Tuesday, April 28, 1950 the company permitted Mr. T. D. Ritchie to lay off from his regular assignment, Passenger Director, position number 87-8 from 6:00 A. M. until 3:00 P. M.

There is no established extra board of extra employes and there were no available furloughed employes to fill the vacancy, whereupon it became necessary to call other regular employes to fill the vacancy at overtime rates of pay on this date.

Mr. S. C. LaFreniere was regularly assigned to position of Passenger Director, position number 87-5 with assigned hours from 6:00 P. M. to 2:00 A. M. on the date of this claim. He has an established terminal seniority date of August 14, 1937.

Mr. Earl S. Crompton was regularly assigned to Relief Passenger Director position, himself assigned Tuesday as one of his rest days, and of course, this claim occurred on Tuesday. Mr. Crompton's terminal seniority date is December 26, 1941.

Before 6:00 A. M. on Tuesday, April 28, 1950 the duly designated officer of the company notified Mr. Earl S. Crompton who is the junior of

application for the vacancy. Having already been assigned to one position by reason of being the senior qualified applicant therefor, the carrier had no right under the agreement to arbitrarily assign him to another position for which he had not made application.

In applying Rule 46 to temporary vacancies in accordance with prior awards of your Board, the carrier submits that it must be done under some method by which the employe's desires can be determined. The term, "seniority rights . . . may be exercised . . ." contemplates within itself that an employe desiring to exercise his seniority to a vacancy must make his desires known to the carrier. Obviously, the rule could not otherwise be applied in a rational manner. A senior employe may not want the vacancy, whereas a junior employe does. The carrier has no way of reading the minds of its employes to determine which one wants to exercise his seniority onto the vacancy and which one does not. The carrier is, however, vitally interested in having the work performed by a qualified employe and in accordance with the agreement.

The answer to issue No. 1 could, the carrier submits, be in the affirmative only upon the condition that the employe desiring the vacancy make application therefor, the seniority basis then to apply to the senior qualified applicant. To hold otherwise would lead to absurdity, and it has been held by the Board on numerous occasions that its function is to interpret agreements so as to arrive at a reasonable as distinguished from an absurd result.

In reference to issue No. 2, the carrier submits that the facts of record show the claimant in this case did not make application for the vacancy, and he cannot claim a right to it for that reason. He could claim a right to exercise his seniority to the vacancy only in the event he made application for it and he was the senior qualified applicant. Even then, his right would be subordinate to an extra or furloughed employe under Rule 39.

In reference to issue No. 3, the awards cited by the employes as holding that the exercise of seniority rules apply to one day vacancies of the character here involved also hold that the pro rata and not the punitive rate should be paid. In Award 4571, the Board held that—

> "The organization claims pay at the premium rate. We have consistently held that the penalty rate for work lost because it was given to one not entitled to it under the agreement is the rate which the regular occupant of the position would have received if he had performed the work."

Application of these principles in this case would proscribe payment of the punitive rate. Moreover, payment of the punitive rate is proscribed by Rule 53 of the effective agreement reading:

> "53. EXPENSE TO THE COMPANY. The company shall not be penalized by the payment of punitive time in the exercise of seniority rights or for personal convenience of employes."

The claim submitted by the employes for 8 hours at the punitive rate to Mr. Sam LaFreniere, March 28, 1950, is without merit or support, and it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Based upon an examination of the record herein we find no material difference in the facts here before the Board and those in Award 5269, Opinion by Referee Francis J. Robertson, in that the principle therein set out is applicable to the instant case.

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 there was a violation of the Schedule.

AWARD

Part (a) of claim sustained.

Part (b) of claim sustained 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 April, 1951.