Award No. 5921
Docket No. CL-5942

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

MIDLAND VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway Clerks that the Carrier violated the Clerks' Agreement at Muskogee, Oklahoma, on November 9, and 30, and December 1, and 2, 1950:

(a) When it used Mr. J. W. Young, an employe holding no rights under the Clerks' Agreement to fill vacancies on Yard Clerks' Positions, and

(b) That Mr. P. H. Sudderth, senior available Yard Clerk, be compensated for eight (8) hours at punitive rate for each of these days.

EMPLOYES' STATEMENT OF FACTS: On or about June 5, 1950 Carrier employed a new employe, without previous service or experience, to relieve the Yard Clerks at the Muskogee Yard and the Clerks at the Muskogee Freight Station so they could get their vacations in 1950.

This new man (Mr. J. W. Young) was not assigned to vacation relief work by Bulletin in accordance with our Bulletin Rule 9, or Short Vacancy Rule 11, hence, did not establish seniority under Rule 3 of our General Rules Agreement.

When Mr. Young finished relieving the Clerks on vacation relief on November 7, 1950, the Carrier started using him (Young) as a Clerk in a relief capacity at the Muskogee Station and Yard, to fill short vacancies caused by Clerks laying off account sickness or other reasons.

On November 9, 1950, Mr. Young was called and used to relieve Yard Clerk Pat Brown from 11:59 p. m. to 7:59 a. m. who layed off that day. On November 12, 1950 the senior available Yard Clerk, Mr. P. H. Sudderth, made proper claim, on overtime basis, for this day's work (November 9th). Yard Clerk Sudderth was the regular assigned Relief Yard Clerk established by the 40-Hour Week Agreement.

On November 30, December 1, and 2, 1950, Mr. Young was called and used to relieve Relief Assignment Clerk C. W. Emerson from 3:59 p. m. to 11:59 p. m. who laid off these three days. On December 4, 1950 the senior available Yard Clerk, Mr. P. H. Sudderth, made proper claim, on overtime basis, for these three day's work (November 30, December 1, and 2, 1950).

OPINION OF BOARD: On November 9, 1950, J. W. Young was called and used to relieve a temporary vacancy on a Yard Clerk position at the Carrier's Muskogee Yard and Station, account of the regularly assigned occupant of such position laying off. On November 30, and December 1 and 2, 1950, at the same location there was a temporary vacancy in a regularly assigned relief position, due to the occupant thereof laying off, and the same man (Young) was used to fill this vacancy. On the dates in question there were no furloughed or extra board employes available. In fact it is conceded no extra board was being maintained at such point.

The undisputed facts are that J. W. Young, the individual who was used by the Carrier as above stated, had made application for a position as Yard Clerk on May 18, 1950, and during the period June 5 to November 8, 1950, inclusive, relieved clerical employes in Station and Yard service at Muskogee, who were on vacation, a total of 105 days prior to August 28, 1950. As of the date last mentioned to September 2 following Young was used to relieve a regularly assigned Yard Clerk, who had laid off on his accord, for a period of four delays. Between November 3 and 8, 1950, he was also used to relieve a regularly assigned clerk, account of the latter laying off on his own accord, for a period of three days. It is admitted that up to the last mentioned date he had never been regularly assigned to a position which had been bulletined.

The instant claim, and the Organization's position with respect thereto, is based upon the premise that under the related facts and circumstances Young had no right under the Clerks' current Agreement to fill vacancies on Yard Clerk's positions, that under such Agreement the Claimant was entitled to fill the temporary vacancies on such positions on November 9 and 30 and December 1 and 2, 1950, by reason of his being the senior available Yard Clerk, and the Carrier's action in assigning Young to fill such temporary vacancies in lieu of an employe in his position resulted in a violation of such Agreement.

When Carrier's contentions are analyzed its primary position is that a person holding an employe status under the controlling Agreement with no established seniority rights can be used to fill short vacancies under Rule 11 of such Agreement.

For informative as well as decision purposes it will be necessary to quote certain Rules of the current Agreement, effective July 1, 1940, and make brief reference to others, which are regarded as either controlling or decisive of the issues involved.

Subdivision (a) of Rule 3, relied on by both parties, states that seniority begins at a time the employe's pay starts in the respective seniority group in which employed but provides that Group 1 and 2 employes newly employed in a seniority district, except janitors and porters, will not be considered as having established their seniority rights until assigned in accordance with provisions of the Agreement to a position which has been bulletined.

Without what appears to us to be good cause the parties labor at length the interpretation to be placed in the foregoing rule. We shall not do so. This portion of Rule 3 means exactly what its language imports, i.e., that an individual employed by the Carrier acquires an employe status on the day pay for service starts but does not establish seniority until assigned to a position which has been bulletined, and we shall proceed accordingly.

Subsection (a) of Rule 11, also relied on by both parties, reads:

> "New positions or vacancies of less than thirty (30) calendar days duration shall be considered short vacancies and may be filled without bulletining. However, when there is reasonable evidence that such vacancies will extend beyond the thirty (30) day limit, they shall be immediately bulletined, showing, if practicable, probable or expected duration."

have heretofore referred, have been superseded or are no longer applicable. This conclusion we believe is supported by practically all of our Awards where the question has been squarely presented and passed upon. See e. g., Awards 2490, 3860, 3868, 4037, 4278 and 5717. Many more Awards could be cited but the foregoing suffice to demonstrate the applicable and well established rule on which our decision is based.

In reaching the conclusion just announced we have not overlooked Carrier's contention to the effect that to hold as we have indicated would mean that it would never be able to hire and use new employes. We do not agree. Under the Rules existing on this particular property seniority rights of employes can be exercised only in case of vacancies, new positions or reduction of forces. Without elaborating on the subject it suffices to say this leaves ample room for the Carrier to employ and use new employes. That this is true is evidenced by the fact the Organization concedes the right of the Carrier to use Young on vacation relief. Neither have we failed to note and give consideration to its contention there is no distinction between a short vacancy caused by a vacation and one caused by sickness or because the regular employe is laid off for other reasons. The fallacy in this contention becomes obvious when it is remembered the Vacation Agreement itself (Article 12 (b) expressly provides that absence from duty by employes on vacation will not constitute "vacancies" in their respective positions under the terms of any agreement.

Turning now to grounds relied on by the Carrier as precluding application of the rule that seniority must be observed in the filling of short vacancies on its property. The first argument advanced is that on March 12, 1951, some three months after the occurrence of the events giving rise to the instant dispute, the parties (1) entered into a written supplemental agreement whereby as of that date new employes would be permitted to perform work of the kind here involved and (2) that when that agreement was consummated Carrier assumed the instant claim was thereby disposed of. The Organization does not agree with Carrier's construction of such agreement. Even so we are not called upon to construe its terms and shall not do so. Nothing is to be found therein providing for retroactive disposition of existing claims so the one now confronting us must be disposed of on the basis of rules in existence at the time of the alleged violation. Touching phase No. 2 of this contention we find no evidence of record warranting Carrier's assumption execution of the new agreement disposed of the present claim and the Organization, without refutation, denies any understanding or agreement to that effect. Therefore, the last phase of this contention cannot be upheld.

Finally Carrier contends it has been the accepted practice on this property to use employes without seniority rights but with employe status to fill short vacancies of the kind in question and protect all vacancies on bulletined positions where the regular assigned employe laid off on account of illness or for other reasons. This is denied by the Organization. In fact the latter insists it has been the practice of long standing to call the senior available clerk to fill vacancies on Yard Clerk positions. Therefore, keeping in mind the Carrier has the burden of establishing past practice, we must disregard unsupported statements made by the parties and turn to other portions of the record for the purpose of ascertaining what probative evidence, if any, sustains it. Carrier says this appears from the service record of Claimant and the other Clerks now regularly assigned to the Muskogee Yard and Station. That record does disclose their respective seniority dates are based on the first day pay started for their service and antedates the date they were assigned to a bulletined position. But that does not mean, as Carrier insists, that these employes were protecting Yard Clerk vacancies during that time and we find no concrete or probative evidence in the record to show it. For all we know they may have been doing the very thing Young was doing from June 5, 1950, to November 8, 1950, filling positions of employes off on vacation, or they may have been used as new employes in performing other work to which employes holding seniority were not entitled. Moreover, it appears from letters written by the Carrier's own

Vice-President and General Manager, one dated March 16, 1950, and another dated December 19, 1950, that whatever practice, if any, was in force and effect on the property on the dates disclosed by such employes' service record was different than the practice on which the Carrier now relies. Under such conditions and circumstances we are unwilling to say that past practice excused the Carrier from complying with rules of the Agreement requiring the observance of seniority in filling short vacancies.

The fact the Agreement was violated does not warrant a sustaining Award at the punitive rate. The rule, to which we adhere, is that under the prevailing circumstances Claimant's reparation for the violation is limited to the pro rata rate and it is so ordered.

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 Carrier violated the Agreement.

AWARD

Claim sustained at the pro rata rate as indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 12th day of September, 1952.