Award No. 5924
Docket No. CL-5963

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

(1) That Carrier violated rules of the Clerks' Agreement in payment of compensation to William A. Linehan, Collector, in GPA and Car Accountant's Office, St. Louis, for services performed on Decoration Day, May 30, 1951, and

(2) That Mr. Linehan be allowed the difference between what he was paid at the rate $12.65 per day and what he should have been paid at $14.09 per day (time and one-half) or $2.16.

EMPLOYES' STATEMENT OF FACTS: Generally speaking, the clerical force in the office of General Freight Agent and Car Accountant, Mr. Reineke, at St. Louis, were off on Decoration Day, May 30, 1951, account legal holiday. There were, however, a few employes called in for service, among them Mr. Robert J. Whelan, regularly assigned to position of Revising Clerk, rate $12.65 per day. Mr. Whelan did not wish to work and was excused by his employing officer for service on that date.

Mr. William Linehan, regularly assigned to position of Collector, rate $14.09 per day, was the senior employe available for service on that date and was called and/or notified to report for service as Revising Clerk. He did so. He was allowed compensation for his labor performed, however, at the rate attached to position of Revising Clerk, amount $18.98; whereas, rate attached to his regular position of Collector equals $21.14 (overtime rate), difference $2.16, for which claim was filed by the Employes' Local Committee with the General Freight Agent and Car Accountant, Mr. Reineke, on June 6, 1951. Employes' Exhibit No. 1.

June 8, 1951, Mr. Reineke declined the claim. Employes' Exhibit No. 2. June 22, 1951, case was appealed to Director of Personnel Mr. Wicks and declined July 3, 1951. Employes' Exhibits Nos. 3 (a) and 3 (b).

Further effort was made to compose this dispute on the property, as evidenced by our letter to Mr. Wicks, dated July 6, his reply July 13, our letter to Mr. Wicks, July 16, and his letters, August 8 and October 11, the latter confirming the fact that this case was discussed in conference September 24. Employes' Exhibits Nos. 4 (a) to 4 (e), inclusive.

and 24 do not change the intent and meaning of any rules in the agreement. Their purpose is to outline the agreed upon manner in which seniority will be exercised in filling temporary vacancies.

There is no valid basis for the claim and it should be denied.

All data submitted in support of Carrier's position has been presented to the duly authorized representative of the Employes and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: May 30 (Decoration Day), 1951, W. A. Linehan was the regular occupant of the position of Collector, rate $14.09 per day. R. J. Whelan was the duly assigned occupant of the position of Revising Clerk, rate $12.65 per day. Both positions were in the same office and neither was assigned to be worked on the seven days recognized by the current Agreement (see Rule 44 (b) as legal holidays. Whelan was notified to perform work on his position on Decoration Day but upon request was excused from doing so by the Carrier official having that authority. On May 28, 1951, Linehan filed written request to be permitted to "old head" on Whelan's position on Decoration Day at its basic rate of $12.65 per day. Being the senior available employe he was permitted to do so and was paid the rate of such position at time and one-half, or a total of $18.98. The claim is based upon the premise that under exercising rules of the current Agreements he should have been paid the rate of his own position ($14.09) at time and one-half or a total of $21.14 for such service, the difference between what he was paid and what is claimed he should have been paid being $2.16.

The principal rule relied on by the Organization as warranting a sustaining Award is Rule 48 which deals with preservation of rates and, so far as pertinent to the issues here involved, reads:

> "Employes temporarily or permanently assigned to higher rated positions or work shall receive the higher rate while occupying such positions or performing such work, unless absent employe is being paid account of sick leave allowance; **employes temporarily assigned to lower rated positions or work shall not have their rates reduced.**
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> "A 'temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position during the time occupied, whether the regular occupant of the position is absent or whether the temporary assignee does the work irrespective of the regular employe. . . ." (Emphasis supplied.)

The gist of the Carrier's contentions are first that Rule 48 had never had application to work assigned in conformity with the seniority rules of the current Agreement and second, that even so, it has ceased to have application because of subsequently executed Memorandum Agreements Nos. 22 and 24, the one first mentioned dealing with the filling of temporary vacancies under the provisions of Rule 10 (c) of the working Agreement and the second with the filling of such vacancies by employes off duty on their assigned days of rest.

Turning to Carrier's second contention, to which we desire to give first consideration, it cannot be denied that Claimant was assigned to perform work on a day which was not part of any assignment. In a letter, bearing date of July 3, 1951, Carrier's Director of Personnel stated that neither of the involved employes was scheduled to work his regular position on the date in question, which was a holiday, and one of the very Memorandums (No. 24) on which Carrier relies provides that the term "unassigned days" as used therein includes all holidays. This means Claimant was performing unassigned work, not filling a vacancy, on Decoration Day. Once that point is made clear we think conclusions (1) that the Memorandum Agreements

have no application and (2) that Carrier's contention respecting them lacks merit become inescapable for, as we have heretofore indicated, they deal only with the filling of temporary vacancies. The fact, as Carrier points out, that Whelan was asked first to perform the work, that he was excused from doing so, and that Linehan was then called did not change its status as unassigned work or result in the creation of a "temporary vacancy" within the meaning of that term as used in either of such Agreements.

Further evidence that Memorandum No. 24, on which the Carrier places the most weight, has no application is to be found in the fact it is limited to employes off duty on their assigned days of rest and makes no reference whatsoever to those off duty on holidays.

Our conclusion Carrier's second contention cannot be upheld makes consideration of its first contention necessary. We think such contention was determined adversely to its present position by our Award 4469, wherein Carrier made the same claim respecting the applicability of the identical rule. Even then the question decided in such Award was not new to this Division. Long before in Award 3413 we had occasion to determine the force and effect to be given a rule providing "employes assigned temporarily to lower rated positions shall not have their rates reduced." Here, it is to be noted, Rule 48 is even stronger in that it comprehends employes assigned to lower rated work, as well as positions, shall not have their rates reduced. In that Award (3413) we said and held:

> "In Award No. 2687 the Claimant whose rest day was Sunday was assigned to work a lower rated position on two successive Sundays. He was paid straight time. His claim was for time and a half at the rate of his own position. Rejecting the contention of the carrier that a rule identical to Rule 11 was inapplicable, the Board said:
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> "'The Carrier urges, however, that Rule 50 was intended to apply only to the temporary filling of vacancies or where employes in conjunction with their regular work are temporarily assigned to assist in keeping up the work of another assignment due to the temporary absence of the regular incumbent. This Board has consistently applied the rule where the employe performed the duties of a higher rated position even for one day only. The interpretation advanced by the Carrier finds no support in the past awards of this Board. Certainly Rule 50 contains no specific limitation of that nature nor can such an interpretation logically be read into it.'
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> "We think Award 2687 is a sound and fair construction of the rule and a correct application of its terms.
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> "The second sentence of the rule merely accords a right which is the counterpart of the right accorded by the first sentence; and it should be given the same force and effect."

In an obvious attempt to forestall our conclusion Rule 48 is controlling under the facts of record in the instant case the Carrier asserts the Awards to which we have heretofore referred have no relevancy because Memorandum Agreements Nos. 22 and 24 have been entered into since their rendition. Our finding those Memorandums have no application has disposed of that contention.

Finally it is pointed out that Linehan volunteered and agreed to work the day in question at the lower rate of Whelan's position and urged that under such circumstances Rule 48 should not be applied. We are fully cognizant of the fact there are some inconsistencies in our Awards on this point (see decisions cited and dismissed in Award 3413) and that as recently as Award 4469 some statements appear which can be interpreted as indicating that there a different result might have been reached if the involved employe had been a pure volunteer. Nevertheless, and conceding Linehan was a

volunteer, there are at least three sound reasons which impel us to hold that Rule 48 has application and must be regarded as decisive. In the first place we think the short and simple answer is that the rule itself contains no language warranting the construction that a voluntary offer or request to perform work creates an exception to its clear and unequivocal direction that employes temporarily assigned to lower rated positions or work shall not have their rates reduced. In the next with such a rule and nothing to be found elsewhere in the Agreement to qualify or restrict its application we believe that negotiation is required if its terms are to be modified or disregarded. And, last but not least, we are convinced it cannot be said that Linehan's voluntary action made the involved provision of Rule 48 inapplicable. This Division of the Board is committed to the rule that voluntary action on the part of an individual employe subject to its terms cannot abrogate or nullify the provisions of a collective bargaining agreement. See Awards 3416, 5793, 5834 and the decisions therein cited.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

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