

Award No. 5925

Docket No. CL-5964

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 Employees:

(1) That Carrier violated rules of the Clerk's Agreement, when it failed to call Yard Clerk D. F. Drennan, in line with his seniority standing, on September 9, 1951, to fill temporary vacancy, position of Manifest and Chief Clerk, occasioned by the Relief Clerk's—Hubbard—inability to fill the assignment.

(2) That Drennan be allowed one day's pay, amount \$26.55, as time lost.

EMPLOYEES' STATEMENT OF FACTS: Among other clerical workers, employees in Seniority District No. 36 (Yard Department, East Division, East St. Louis, Ill.) are the following:

E. R. Heinecke — Seniority Date	August 12, 1916
D. F. Drennan — Seniority Date	October 20, 1923
B. G. Hubbard — Seniority Date	December 31, 1949

As of September 9, 1951, the particular date involved in the claim:

Heinecke was assigned to position of Manifest and Chief Clerk, hours from 11:00 P. M. to 8:00 A. M. rate \$18.72, assignment Mondays to Fridays with Saturday and Sunday as designated rest days, one hour overtime daily.

Drennan was assigned to position Clerk at North Hump, hours from 11 P. M. to 7:00 A. M., rate \$14.44, assignment Mondays to Fridays with Saturdays and Sundays rest days.

Hubbard was assigned to position of Relief Clerk, hours from 11:00 P. M. to 7:00 A. M.:

Monday	Extra	11 P. M. to 7 A. M.	\$14.44
Tuesday	Day of rest		
Wednesday	Day of rest		

Upon receiving Clerk Hubbard's request, the Agent notified Clerk Heinecke to work the Manifest position (Hubbard's assignment) and notified Clerk Hubbard to work the North Hump position.

The claimant, Clerk D. F. Drennan, assigned rest days Saturday and Sunday, then filed claim for a day at punitive rate because he was not called on his rest day to fill the Manifest position, alleging that it was improper to allow Clerk Hubbard to work any position other than the one to which assigned.

POSITION OF CARRIER: The Employees contend that if Clerk Hubbard was unable to work his assigned position he should not have been permitted to work any other position. In order to do that they must disregard Rule 10 (c) as interpreted by Memorandum Agreement No. 22, Exhibit B, which permits regularly assigned employees to fill temporary vacancies in other positions, commonly known as "old heading." The fact that Clerk Hubbard had an injured finger did not nullify his rights under Memorandum Agreement No. 22 as it did not interfere with his ability to properly work other positions. Had we not granted his request he would undoubtedly have made claim for the day and been supported by the organization.

The claim was discussed during a conference starting September 24, 1951, following which the General Chairman wrote us October 16, Exhibit C, to which we replied denying the claim October 19, Exhibit D. In his letter the General Chairman alleged that the Agent had no right to shift Clerks Hubbard and Heinecke "under the rules of the agreement" but he does not specify what rules. His difficulty in citing an applicable rule is understandable because there are none. As previously stated, Clerk Heinecke had made no request for overtime work and was simply working in place of unavailable furloughed or extra men, the only difference being that because he was regularly assigned and working on his rest day he was allowed punitive instead of pro rata rate. A furloughed or extra man is subject to assignment where needed and Clerk Heinecke assumed those conditions the same as they. The fact that his assignment was changed has no bearing whatever on the case.

The shifting of employees was caused by the actions of Clerk Hubbard, fully in accord with Memorandum Agreement No. 22 interpreting Rule 10 (c), leaving the claim without merit and it should be denied.

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

(Exhibits not reproduced.)

OPINION OF BOARD: As of Sunday, September 9, 1951, Heinecke, seniority date 1916, was regularly assigned to and held the position of Manifest and Chief Clerk, a 7-day position, with rest days Saturday and Sunday. Claimant Drennan, seniority date 1923, was regularly assigned to the position of Clerk at North Hump, a 7-day position, also with rest days Saturday and Sunday. Relief Clerk Booth, regularly assigned as such, relieved Drennan on his rest days. Hubbard, seniority date 1949, was assigned to a 7-day position of Relief Clerk, with rest days Tuesday and Wednesday. On Sunday he regularly relieved Heinecke on the position of Manifest and Chief Clerk.

On the date first above mentioned Hubbard notified the Carrier's agent, in writing, that he was incapacitated and could not relieve Heinecke's position that day because of an injured finger but advised "will work some place else if the change can be arranged." On the same date Relief Clerk Booth was working another assignment and was not available for relief on Drennan's position. Due to this fact the Carrier had notified Heinecke to work in Booth's place. Upon receiving Hubbard's notice it cancelled that notification early on the morning of September 9th and instructed Heinecke to work his own position, hours 11:00 P.M. to 8:00 A.M. Thereupon it assigned Hubbard to

fill the vacancy occasioned by Relief Clerk Booth's absence and work Drennan's position on September 9, which was one of the latter's rest days.

Under the facts of record and the prevailing Agreement there can be no question regarding the Carrier's right to assign Heinecke to work his own position on one of his rest days. There were no extra or furloughed employees available and Rule 39 (f) of the current contract provides: "Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have forty (40) hours of work in that week; in all other cases, by the regular employees." See Award 5465 where, in construing the force and effect of an identical rule we said and held:

"The day in question, December 25, 1949, which was both Sunday and Christmas, and a rest day of Clifton's regular position, became an unassigned day when Relief Clerk Arbon was assigned to another position. Since there were no extra or unassigned employees available, Rule 5 (d) required that the work be assigned to the regular employee, Clifton. The Carrier violated the Agreement in using Drew instead of Clifton, the regular employee."

In addition even in the absence of such a rule we have repeatedly held that the work would have belonged to the regular occupant of the position. See Award 5475 which reads:

"The rule is firmly established by a long list of Awards that work on rest days should be assigned in the first instance to the regularly assigned relief man, if there be such; secondly, to an extra man; and if an extra man is not available, to the regular occupant of the position on an overtime basis. Awards 4728, 4815, 5333. The regular occupant of the relief position or an extra man was not available. The work, therefore, belonged to Claimant.

"Carrier contends that the day in question was a part of the relief man's assignment and for that reason the stated rule does not apply. The principle is not different since the advent of the forty hour week, there being simply two rest days instead of one. The day involved was a rest day of Claimant's position even though it was a part of the work of a regularly assigned relief man."

By the same token, unless there are other rules of the working Agreement, effective January 1, 1950, or subsequently negotiated Agreements permitting it to do otherwise, the Carrier would have been required to assign Drennan to work his position on September 9, one of his assigned rest days. He was the regularly assigned occupant thereof and the absence of Booth, who was regularly assigned to fill such rest day, created a temporary vacancy in that position on such date.

We find nothing in other rules of the working Agreement limiting or restricting the force and effect to be given the requirements of Rule 39 (f). However, resort to the record reveals the parties to the January 1, 1950, Agreement were not content to let it stand as originally executed. On March 16, 1951, they executed Memorandum Agreement No. 24, the first paragraph of which reads:

"Employees off duty on their assigned days of rest will be used when the company chooses to fill temporary vacancies that cannot be taken care of at pro rata rates by rearrangement of regular forces or the use of furloughed or extra men. They will be used in seniority order, subject to fitness and ability, as defined in Rule 7, and the conditions outlined below." (Emphasis supplied.)

There is much to be desired in Memorandum Agreement No. 24 that is not there and, under other conditions and circumstances, we can visualize difficulties in applying its terms. However, limited to the facts of the instant

case, we are not confronted with those difficulties and are not disposed to speculate as to the force and effect to be given its terms. It suffices to say the first paragraph of such Agreement, which we have quoted at length for illustrative purposes, definitely indicates an Agreement on the part of the executing parties to modify the terms of Rule 39 (f) of the working Agreement so that now the two Rules (39 (f) and Memorandum Agreement No. 24) must be read and construed together. When that is done we are forced to conclude that by virtue of the execution of Memorandum Agreement No. 24 the rule now in force and effect on this particular property is that where work is required by the Carrier to be performed on a day which is not a part of any assignment it may be performed by rearrangement of regular forces or the use of furloughed or extra men and in all other cases by the regular employee. With the rule so construed, since Hubbard was a member of the regular force on September 9, 1951, we are constrained to hold the Carrier did not violate the Agreement when, on that date, it rearranged its regular forces by assigning Heinecke to work the rest day of his regularly assigned position and assigned Hubbard to fill the vacancy on Drennan's position.

The employees insist this results in a violation of the principles of seniority. We agree that prior to negotiation of Memorandum Agreement No. 24 that would be so. However, there is nothing to preclude the employees impinging upon previously existing seniority rights by contract if they see fit to do so. We think it is clear that was what was contemplated and accomplished by the parties in the first paragraph of such Memorandum when they expressly recognized that unassigned work on temporary vacancies in an existing position could be performed by rearrangement of regular forces or the use of furloughed or extra men before calling the regular employee. The result, as we have heretofore indicated, is that Claimant has failed to establish he had the exclusive right to perform the work in question on his own position on September 9th, 1951, under the existing conditions and circumstances.

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 Employees involved in this dispute are respectively Carrier and Employees 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 did not violate the Agreement.

AWARD

Claim denied.

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.