Award No. 5926
Docket No. CL-5965

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, and of John M. Sullivan, that Carrier violated Agreement governing rates of pay and working conditions of employes represented by the Brotherhood:

(a) When on May 19, 1951, an employe junior to Claimant John M. Sullivan in instant case was called to fill temporary vacancy on a 3:00 P. M. to 11:00 P. M. shift at Wiggins No. 5 Yard Office, E. St. Louis, Illinois.

(b) That Claimant John M. Sullivan be paid wage loss sustained amounting to one day's pay, rate **$14.27**, amount **$21.41** (time and one-half).

EMPLOYES' STATEMENT OF FACTS: Mr. Paul Fayollat was the regularly assigned Relief Clerk on second shift on 3:00 to 11:00 P. M. assignment in No. 5 Yard at East St. Louis, Illinois on Saturday and Sunday of each week. On Saturday, May 19, 1951, Mr. Fayollat was **Old Heading** on another vacancy, therefore, not available for his regular assignment thus creating a temporary vacancy in this position. There were no available extra men. There were, however, three employes off on their designated rest days, namely:

J. J. McCarthy	seniority date	November 9, 1913
John M. Sullivan	seniority date	October 1, 1917
C. E. Kroner	seniority date	May 7, 1918.

The Employes' immediate Supervisory Officer, Mr. O. R. Moss, Agent, advised that he made an effort to call the senior employe, i.e., Mr. McCarthy, but without success. He made no effort to call the next employe in seniority order, i.e., Mr. Sullivan. He did call Mr. Kroner, junior to Mr. Sullivan. In explanation for not calling Sullivan, Mr. Moss stated that he did not intentionally run around Sullivan, but as he—Sullivan—was not a regular assigned second shift man, he was not called to fill the vacancy created by Mr. Fayollat's absence. It might here be stated that Sullivan was temporarily working the second shift job at Wiggins No. 2 Yard Office vice H. L. Lueker, regularly assigned, but off on vacation. Sullivan's regular position is 1st shift swing job.

As stated in our reply of July 18, Exhibit 4, that paragraph lends no support whatever to their contention; in fact, it is fatal to it, because the paragraph provides that employes wishing to participate in overtime work must comply with the conditions prescribed in the Agreement, one of which, Item (2), provides that he must file notice of his desires with his superior. It was fully understood that those who did not file such notices did not desire overtime work and would have no right to make claim if not used.

In the last paragraph of his letter, Exhibit C, the General Chairman alleges seniority rules, not specifying any number, support their claim. Memorandum Agreement No. 24, Exhibit A, executed as a result of their request, modified the seniority rules to the extent indicated in the Agreement and they cannot, when an employe fails to live up to the Agreement, go back and claim support from the seniority without regard to the Agreement. Otherwise, there would have been no point in their asking us to negotiate the Agreement.

The case was discussed with the Employes during conference starting September 24 at which time they maintained position previously taken and claim was again denied in our letter of October 11, Exhibit E.

After seeking and obtaining an agreement in accord with their wishes, the Organization should not now be supported in repudiating the agreement and the claim 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: The facts of this case are conceded and of little consequence to a decision of the issue involved.

For present purposes it suffices to say the Carrier contends Memorandum Agreement No. 24, executed on March 16, 1951, is all decisive of such issue and admits that if it is not Award No. 2341, et cetera, relied on by the Organization and the seniority rules to be found in the current Agreement, effective January 1, 1950, are applicable and warrant the sustaining of the claim on the grounds therein set forth. Differently stated, the Carrier's position is that Memorandum Agreement No. 24 when executed by the parties superseded theretofore existing rules of the current Agreement relating or pertaining to the filling of short vacancies by employes off duty on their assigned days of rest, when furloughed or extra men were not available, and permitted it to fill the temporary vacancy in question with an employe holding junior seniority rights without calling Claimant or otherwise recognizing his senior seniority status, notwithstanding he was qualified and available to fill such vacancy. On the other hand the Organization admits the Memorandum would be controlling under the foregoing conditions if, pursuant to its terms, the junior employe had filed written notice of his desire for temporary vacancy work but contends that since it is conceded no notice had been filed with the Carrier by any employe the Memorandum Agreement has no application and the seniority rules of the current Agreement, particularly Rule 7, prevail with the result it is entitled to a sustaining Award. Touching this phase of the Organization's position the Carrier contends that in seniority districts where no employe has filed his name it is at liberty to use the most available employe without regard to seniority. In fact it asserts that even if the written Memorandum is not susceptible of that construction the Organization subsequently orally agreed that it might be so construed.

The record discloses the parties are not in agreement as to the motivating cause of the execution of Memorandum No. 24; that there is serious dispute between them as to what was intended by its terms, and even greater controversy over what, if any, oral agreement was ever reached respecting

how they were to be construed. With the record in that state, and without attempting to discuss divers rules of contractual construction influencing our view, we have concluded it is our duty to determine the rights of the parties upon construction of the written instruments executed by them without passing upon their intention at the time the contracts were executed or attempting to modify the terms of one of those instruments on an alleged parol understanding.

In directing attention to the instruments heretofore mentioned it must be kept in mind there is actually no cause for construing the seniority rules of the current January 1, 1950, working Agreement since it is conceded that unless they have been superseded by Memorandum No. 24 application of their terms to the existing facts and circumstances entitled Claimant to a sustaining Award. Therefore, without more ado, we turn to such Memorandum Agreement the first paragraph of which reads:

> "Employes 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;"

It is true, as the Carrier suggests, that following the portion of the Memorandum just quoted, there is a paragraph providing that "employes desiring to participate in the work will file written notice to the effect," also another paragraph stating what the employes who have filed such a notice must do to preserve their rights under that Agreement. Nevertheless, when that instrument is read in its entirety and everything that is to be found therein carefully analyzed, we fail to find anything: (1) Providing what is to be done respecting seniority when—as here—employes have failed to file written notices under its terms; (2) stating that theretofore existing seniority rules of the current Agreement are to be disregarded and short vacancies filled at the discretion of the Carrier without regard thereto; or (3) specifying, as the current Agreement did when executed (see Rule 2), that the Memorandum Agreement superseded and was a substitute for all theretofore existing agreements, practices, and working conditions in conflict therewith. Moreover, we note the quoted paragraph of the Memorandum itself expressly provides that employes off duty and used on their assigned days of rest will be used in seniority order, also that Rule 7 of the January 1, 1950, Agreement providing that promotions, assignments, and displacements under these rules shall be based on seniority, fitness, and ability, with seniority prevailing where fitness and ability is sufficient, is still in full force and effect. In view of the foregoing conditions and circumstances we are constrained to hold that Memorandum Agreement No. 24 is to be construed as applying only to situations where notices have been filed in conformity with its terms and that in the absence of action bringing employes within the scope thereof the Carrier cannot ignore seniority but is required to fill short or temporary vacancies in accord with and in the manner contemplated by the seniority rules of the current Agreement. To so hold gives force and effect to all agreements in existence between the parties. To hold otherwise, as the Carrier would have us do, would result in our reading something into Memorandum Agreement No. 24 that is not there and completely disregard the seniority rules of the current Agreement to which we have just referred.

It follows from what has been heretofore said and held that the Carrier's action was in violation of the Agreement and that Claimant is entitled to a sustaining Award. However, this is penalty payment, not compensation for time actually worked. Therefore, the rate should be that which the incumbent of the position would have received if he had performed the work. See Awards 4467, 5117, 5240, 5444, 5548, 5607 and 5721 of this Division. That, under the facts of record, would have been the pro rata, not the punitive, rate.

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 (a) sustained. Claim (b) sustained at the pro rata rate.

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.