

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, 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 and Steamship Clerks that the Carrier violated the Clerks' Agreement at Muskogee, Oklahoma, when

(a) In January and February 1953 it failed and refused to fill the positions of B-10 Clerk, C-6 Clerk and E-10 Clerk, Accounting Department, pending assignment, and

(b) That all employees involved or affected by the Carrier's action be compensated for all loss sustained.

EMPLOYEES' STATEMENT OF FACTS: During January and February 1953 the following positions in the Accounting Department, Muskogee, Oklahoma, became vacant and were bulletined, but were not filled pending assignment:

Title of Position	Dates positions were not filled
B-10 Clerk	January 2nd to 7th inclusive
C-6 Clerk	January 8th to 13th inclusive
E-10 Clerk	February 2nd to 5th inclusive

POSITION OF EMPLOYEES: The material facts in this case are not in dispute and involve the failure and refusal of the Carrier to fill positions pending assignment by bulletin.

There is in evidence an Agreement between the parties bearing effective date January 1, 1953, in which the following rules appear which the Employees cite as being in violation:

Rule 10, Section (a) of the Agreement provides:

"(a) Bulletined positions will be filled temporarily pending an assignment in the following order:

1. Calling the senior qualified and available furloughed employee.

Paragraph (b) of the Employees' Statement of Claim reads:

"That all employees involved or affected by the Carrier's action be compensated for all loss sustained."

We do not understand the meaning of such statement and when questioning the General Chairman in conference the answer was not forthcoming. The facts are that there were no employees adversely affected and no wage loss sustained by any employees.

The inference is that the carrier should compensate some person on the basis that such person was not employed to fill the positions during the bidding period. There can be no possible justification for making such payment, nor is there a requirement of the rules cited or any other rules in the agreement that payment be made on such basis.

Since this is an ex parte case, this submission has been prepared without seeing the employees' statement of facts or their contention as filed with the Board, and the carrier reserves the right to make a further statement when it is informed of the contention of the petitioner, and requests an opportunity to answer in writing any allegation not answered by this submission.

Carrier's Exhibit A is attached hereto.

All data submitted herewith in support of the carrier's position has been presented to the employees or their duly authorized representative and is hereby made a part of the matter in dispute.

(Exhibits not reproduced.)

Oral hearing is requested.

OPINION OF BOARD: This case involves vacancies that occurred on three Clerks' positions during January and February, 1953.

Position B-10 became vacant when the regularly assigned occupant bid in a position in another department. The Carrier advertised the vacancy for bids on January 2nd, and filled it on the 8th by assigning it to employee Gilreath who previously occupied position C-6, the B-10 position having been vacant from the 2nd to the 7th, inclusive, or a total of six days.

Position C-6 became vacant when the regular occupant was assigned to B-10. The Carrier advertised this vacancy for bids on January 8th and filled it on the 14th by assigning it to employee Ashworth, who had previously occupied a Group 2 Office Helper position, the C-6 position having been vacant from the 8th to the 13th, inclusive, or a total of six days.

Position E-10 became vacant when the regular occupant was granted a leave of absence. The Carrier advertised this vacancy for bids on February 2nd and filled it by assigning it on the 6th to employee Jacobs who had previously held a Group 2 Office Helper position, the E-10 position having been vacant from the 2nd to the 6th, inclusive, or a total of five days.

The two vacant Office Helper positions were filled by newly employed persons immediately after such positions became vacant.

The claim is that all employees involved or affected by the Carrier's failure to fill the vacancies in positions B-10, C-6 and E-10 referred to above, be compensated for all loss sustained.

The Organization relies on Rule 10 (a) of the Agreement that became effective on January 1, 1953, and which, in so far as applicable, reads:

"(a) Bulletined positions will be filled temporarily pending an assignment in the following order:

1. Calling the senior qualified and available furloughed employee.
2. If there is no such furloughed employee available, by a qualified employee in service in the same group and in the same seniority district who makes application therefor.

NOTE 1. It is intended that this rule be fairly applied and due consideration will be given the senior employee desiring the position, but in the application of this condition it is not the intention to unduly disrupt the work in the department and/or to operate to work a hardship on the Company.

3. If neither of these alternatives produces an occupant for the position, it will be filled by appointment."

Our attention has been directed to the fact that the words, "will be filled," twice appearing in Rule 10(a) and quoted above read, "may be filled," in the agreement in effect prior to January 1, 1953.

The parties agree that during the periods when positions B-10, C-6 and E-10 were vacant there were no qualified furloughed employees available, and that no applications to fill said temporary vacancies were received by the Carrier from any qualified employee in service in the same group or seniority district. The Carrier also asserts that it could not fill the vacancies with new employees because there were no such persons possessing the necessary qualifications available for employment. This statement is challenged by the Organization which says that the fact that the positions were filled immediately following the bidding periods is evidence that the persons assigned to fill the vacancies pursuant to the bulletins were available and qualified for temporary assignment during the periods of the vacancies. As we understand the Organization's contention, it is that the Carrier violated Rule 10 (a) by not assigning Gilreath, Ashworth and Jacobs on a temporary basis to the positions to which they were ultimately assigned, at the times the bulletins for bids for these positions were posted.

It must be assumed that the parties intended to accomplish something when they changed the present rule to read "will be filled," instead of "may be filled," as had formerly been the case. That being true, the Carrier was, under the agreed facts, obligated to fill the vacancies by appointments. We are not called upon to say what our decision would have been if it had been established that it was impossible for the Carrier to comply with the requirements of the Rule. It is enough to say that the three employees who were subsequently assigned to the positions might have been temporarily assigned when the vacancies occurred. There can be no question as to their qualifications or availability. Award 1754 sustained a claim under a rule and a factual situation strikingly similar to this case.

The claim is not for a penalty, but is a money demand that all employees involved or affected be compensated for the losses sustained. The only employees shown to have been adversely affected are Gilreath, Ashworth and Jacobs, and the extent to which they were adversely affected would be measured by the differences between what they earned on the positions that they occupied during the periods when the positions to which they were subsequently assigned were vacant and what they would have earned had they worked on the vacant positions to which they were ultimately assigned, the losses to be calculated on the basis of assigned rates. Award 4075.

We find no basis for claims on behalf of any other employees. There is no showing that there were any other vacancies or, if any such existed,

that any employes covered by the Agreement was entitled to fill them. The Carrier says that the two Office Helper positions formerly occupied by Ashworth and Jacobs were immediately filled by newly employed persons, and this statement is not denied.

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 as per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 16th day of July, 1954.