Award No. 6734
Docket No. CL-6976

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

HOUSTON BELT & TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that—

(a) The Carrier violated the Clerks' Agreement on June 23, 1953 when it required C. O. Hart to vacate his regularly assigned position at South Yard and work another position at Congress Avenue Yard. Also

(b) Claim that Mr. Hart be paid for the position he was required to vacate.

EMPLOYES' STATEMENT OF FACTS: On the date in question Mr. Hart was the regularly assigned incumbent of Yard Checker position at South Yard with hours 3:00 P. M. to 11:00 P. M.

On June 23, 1953 Mr. Hart worked his regularly assigned position from 3:00 P. M. until 5:40 P. M.

At 5:40 P. M., despite his objections, Mr. Hart was required to vacate his position, go to the Congress Avenue Yard and work Transfer Clerk position No. 506.

Mr. Hart was paid one day at Transfer Clerk's rate, but nothing for his regular position that he was required to vacate.

POSITION OF EMPLOYES: The integrity of agreements and the seniority rights of employes are the principle issues in this case.

Seniority rights are very valuable to employes, as it is only through the exercise of such rights that employes can obtain the position and work they desire and are entitled to.

The agreement provides for establishing and the exercise of such rights and it was through the exercise of those seniority rights, in accordance with the agreement rules, that Mr. Hart obtained the position at South Yard.

It is our position that when an employe bids for and is assigned to a position that he has a contractual right to occupy that position and perform

Apparently Hart's basis for claiming the two days' pay was that he worked on two different assignments during his hours of assignment, if we are to judge from the information above quoted from his original claim, and Mr. Newbill's letter of July 27, quoted above, while mentioning the "under protest" feature, goes on to say "inasmuch as Mr. Hart filled two positions within the same eight hours he is entitled to pay for each position."

It is the Carrier's position that there is no provision in applicable agreement on which to base such a claim, but that, to the contrary, the first clause of Rule 50(a) covers the case, providing that an employe "temporarily or permanently assigned to higher rated positions or work shall receive the higher rates for the full day while occupying such position or performing such work." Hart was, as previously indicated, allowed the higher rate, the rate applicable to Position 506, for the full day.

In Mr. Dyer's letter August 22, quoted in Carrier's Statement of Facts, he made no mention of any protest from Hart about working Position 506, but does state that extra board agreement was violated when Hart was required to vacate his position and assume the vacancy created in emergency when Clerk Allen became sick after working some two hours. The Carrier does not understand Mr. Dyer's mention of the "extra board agreement" unless he, like Mr. Newbill, takes the position that Hart filled the vacancy under protest, and Mr. Dyer did not seem to imply this. As previously stated, neither Hart's claim nor Chief Yard Clerk Riddle's report intimated that it was not Hart's desire to assume Allen's vacancy, on a higher rated job. As for the other provisions of the "extra board agreement", it is Carrier's position that they were fully complied with in accordance with a practice of long standing—the practice of considering Congress Avenue, McKinney Avenue and South Yard offices as one office in re-arranging force to fill vacancies. However, Carrier does not feel that this is in any way involved in this claim.

The sole question here is, we believe, whether Rule 50 (a) applies to this case, and we think its wording clearly indicates that it is applicable. Support for this is given by the fact that no rule in applicable agreement provides any such double-pay penalty.

(Exhibits not reproduced).

OPINION OF BOARD: Except for one point, to be presently discussed, there is no dispute between the parties regarding the controlling facts. Therefore they will be stated in highly summarized form.

June 23, 1953, Claimant, C. O. Hart, was the regularly assigned occupant of Relief Yard Checker Position 530 at Carrier's South Yard, with assigned hours 3:00 to 11:00 p. m., rate according to the position filled, and had commenced work at the same yard on his assigned position for that day, namely relief of a Yard Clerk position, rate $13.95 per day. On such date Clerk Allen, regularly assigned as Transfer Clerk, Position 506, rate $14.37, hours 3:00 to 11:00 p. m., at Carrier's Congress Avenue Yard, worked two hours of his assignment and, upon reporting personal illness, was permitted to go home. Thereupon, at approximately 5:00 p. m. there being no qualified extra boards available to fill Position 506, the Carrier required Claimant to vacate his regular assignment or position and work the remainder of Clerk Allen's tour of duty. The position he had been occupying was then filled by Extra Clerk Grimm. For service as above related Claimant was paid 8 hours at the higher rate of the Transfer Clerk position, Allen, the Transfer Clerk, was paid two hours for the period of time he worked his position and Grimm was paid 8 hours at the pro rata rate of the position Claimant was required to vacate. Following payment to Claimant as above indicated he made claim for an additional day's pay for the daily rate of the position he had been required to vacate which was ultimately refused. The instant claim was then filed with this Division of the Board.

With what has been heretofore related it can now be stated the essence of the Claimant's position is that Carrier be required to pay a penalty for

requiring him to vacate the South Yard position in violation of the Agreement notwithstanding he was paid the higher rate of the temporary vacancy filled by him pursuant to provisions of Rule 50 (a) of that contract.

In support of the foregoing position Claimant places great weight on a Memorandum Agreement, dated July 3, 1950, which so far as pertinent, should be quoted. It reads:

> "It is mutual agreed between the parties hereto that the following conditions will govern the filling of temporary vacancies in Seniority District No. 1:
>
> "(a) All temporary vacancies caused by regularly assigned employes laying off will be filled by the rearrangement of the remaining regular assigned force in that office, with senior employes being given their choice.
>
> "* * *
>
> "(j) In the rearrangement of the regular force under the provisions of Paragraph (a) it is understood that such employes cannot be required to work temporary vacancies if they do not desire to do so."

Other rules, particularly those relating to seniority rights of employes, are relied on but, for reasons to become obvious, require no quotation or detailed reference.

At the outset it may be conceded, as the Brotherhood points out, this Division of the Board recognizes and applies the principles (a) that the intent and purpose of seniority rules is to protect employes' rights to the respective positions they have secured under a current agreement and (b) that a preservation of rates rule such as Rule 50 (a) is to be regarded as encompassing rating provisions and is not to be construed in such manner as to impair or nullify other clear and unambiguous rules specifically defining the rights of the parties. It can be said, however, that it also recognizes and consistently applies a third principle, long established, that, in the absence of any specific rule in a current agreement to the contrary, the Carrier, in case of an emergency, may require an employe to leave a regularly assigned position and temporarily fill a vacancy in another position without violating the seniority rules, or for that matter other rules, of such agreement. See e.g., Award No. 4499, where it is said:

> "We have held many times that an employe cannot properly be required to suspend work on his regularly assigned position in order to work on another position except in emergencies. To do so in violation of this principle is considered a suspension of work to absorb overtime in violation of Rule 20, current Agreement."

No useful purpose would be served by here citing the numerous other Awards of this Division dealing with the principle to which we have last referred as most of them can be found upon resort to the Opinion in Award 6732, this day decided, where, although that claim was sustained on the basis the facts failed to establish an existing emergency, such principle is recognized, discussed and approved.

Without laboring the record it may be said it is our view the facts and circumstances, as heretofore set forth in the preliminary factual statement of the Opinion, established the existence of such an emergency as to bring it within the rule adhered to in the Awards to which we have just referred.

Having concluded as just indicated the next question confronting us is whether there is anything in the Agreement warranting a conclusion Carrier's action resulted in a violation of the Agreement notwithstanding the existence

of the emergency. Claimant insists the Memorandum Agreement heretofore quoted has that effect because he protested or objected to such action at the time he was instructed to temporarily fill the vacancy occasioned by the sudden illness of Yard Clerk Allen. On the other hand, the Carrier insists just as strenuously that Claimant made no objection to the involved instructions and worked Allen's position without protest. Turning to the Memorandum we note section "(j)" thereof does provide that in the rearrangement of the regular force employes cannot be compelled to work temporary vacancies if they do not desire to do so. However we think a fair and literal construction of the rule is that in the existing situation Claimant was required to protest prior to filling the vacancy in order to invoke its terms.

Thus it appears the all decisive question now before us is whether Claimant protested the Carrier's action prior to filling the temporary vacancy. Again, nothing is to be gained by laboring the factual details on which we base our decision. It suffices to say that after a careful and extended review the most we can say for the record, from the standpoint of evidence entitled to probative force, is that it discloses a complete standoff in the proof adduced by the respective parties. In that situation, mindful of the rule (see Award No. 6063) the burden of proving a disputed factual issue rests upon the one who relies upon it to maintain his position, we are constrained to hold Claimant has failed to establish such issue with the result his claim cannot be sustained.

Another contention advanced by Claimant, to the effect the factual question just disposed of was not in dispute on the property and hence is not subject to review, lacks merit and requires little, if any, attention. The record clearly shows the claim was progressed on the property upon that basis; hence the question was inherent in such claim from the time of its inception.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 record fails to establish that Carrier violated 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 27th day of July, 1954.