

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

THE FORT STREET UNION DEPOT COMPANY

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

(a) Carrier violated the current Agreement between the parties when, on May 29, 1952, it either required or permitted Information and Reservation Clerk Mrs. Mary Hodges to suspend work on her regularly assigned relief position from 6:30 A. M. to 3:30 P. M. for the purpose of filling a position of Ticket Clerk created for one day with hours from 12 noon to 8:30 P. M., thereby absorbing overtime that Claimant Gus Ando would have received had he been called to fill the position in accordance with his seniority rights, and

(b) As a penalty for the violation, Claimant Gus Ando shall now be compensated a day's pay for May 29, 1952, at time and one-half the rate of \$15.13, plus cost-of-living adjustment.

EMPLOYES' STATEMENT OF FACTS: On the date in dispute, i.e., May 29, 1952, Claimant Gus Ando was regularly assigned to a relief ticket clerk's position at the Fort Street Union Depot at Detroit, Michigan. He had an assigned work week of Friday through Tuesday, rest days Wednesday and Thursday. On his rest day, Thursday, May 29, 1952, Carrier augmented its ticket clerk forces by the addition of one position, for the purpose of handling an increased amount of traffic due to the holiday on May 30.

There were no qualified extra unassigned or furloughed employees available to fill this position for one day. This made it necessary for the Carrier to use a regularly assigned employee to fill the position. However, instead of calling Claimant Ando, who was qualified and available and the senior employee, on his rest day, to fill the position in accordance with his seniority rights, Carrier removed a junior employee, Mrs. Mary Hodges, from her regularly assigned relief position of clerk in the Information and Reservation Bureau, with hours 6:30 A. M. to 3:30 P. M., for the purpose of filling the position of ticket clerk with hours 12 noon to 8:30 P. M.

The seniority ratings of the two employees here involved are:

Relief Ticket Clerk Gus Ando—May 1, 1940

Relief Information and Reservation Clerk Mary Hodges—August 1, 1943.

senior employee off on rest days to fill a short position or vacancy, or to acquaint this employee with the fact that a vacancy exists on his rest day.

If the intent of this rule were that the carrier has an obligation to advise all employees of all short vacancies, the rule would simply provide that all vacancies will be advertised. This the rule does not provide. The regulation is that only vacancies or new positions of more than thirty days duration will be advertised, thus making it clear that employees desiring vacancies of less than this duration are obligated to make their wants known to the carrier.

The situation on May 29, 1952 was that a regularly assigned employee scheduled to start work at 6:30 A. M. on a position rated at \$12.89 expressed a willingness and desire to step up under Rule 10 onto a position constituting a promotion to her, going on duty at 12:00 Noon and rated at \$15.13 per day. This she had every right to do and the carrier did not violate Rule 31 in permitting her to do so. The organization cannot dispute the fact that Rule 10 has operated constantly in the past and continues to operate at all times to permit a regularly assigned employee to "suspend" his regular assignment while occupying a temporary job under Rule 10.

Mr. Ando's only claim, as we see it, is that he should have unseated the regular employee his junior who had declared for the job. Assuming, without acknowledging that Mr. Ando had the right to do this, thus taking over a short vacancy on his rest days after having worked five days in his work week and in view of Rule 25 (2) (a) of the agreement, his only claim would be that he missed the opportunity to work a straight time day in the exercise of seniority. No rule of the agreement permits employees to exercise their seniority under Rule 10 to work an overtime shift when no overtime shift is required and none has been authorized. It is fundamental that any employee electing to take a position assumes the conditions of that position.

(7) Without prejudice to the position of the Carrier that any claim in this case is unsupported by the rules, it is further our position that if Rule 31 was here violated as claimed by the organization the penalty is properly in favor of the employee "suspended" and there should be no pyramiding of penalties. See Award 5927.

This Carrier does not agree with the position of the employees that "it is no concern of the Carrier on whose behalf the claim is presented."

It is further the position of the Carrier that if any claim in behalf of Mr. Ando is sustained, the straight time rather than time and one-half rate would apply as penalty. At least three of the Awards (3271-5269-5926) upon which the employees rely to sustain their position so hold. (See Award 5930). Many other Awards of the Third Division also so hold. A comparative few of these are: 3193, 5271, 5437, 5444, 5721, 5831, 5895 and 5929, all of which are referred to by your Board in Award 5978, which deals with this point alone.

All data contained in this submission has been placed before the employees.

(Exhibits not reproduced)

OPINION OF BOARD: On May 29, 1952, Claimant was regularly assigned as a relief-ticket clerk at the Fort Street Union Depot at Detroit, Michigan. He was assigned a work week of Friday through Tuesday, with Wednesday and Thursday as rest days. On Thursday, May 29, 1952, one of Claimant's rest days, Carrier augmented its ticket-clerk forces by the addition of one position because of increased traffic due to May 30 being a holiday. There were no qualified extra or furloughed employees available to fill this one-day position. This made it necessary to call a regularly assigned employee for the work. The Carrier used one Mary Hodges, a regularly assigned relief clerk in the Information and Reservation Bureau on the higher-rated one-day position, and a qualified extra employee was used on her regular position on that day. Claimant contends that he should have been called on his rest day

to perform the work at the time-and-one-half rate. It is not disputed that Claimant was senior to Mary Hodges on the Clerks' roster at this point and his qualifications to do the work are not questioned. The Organization relies upon Rule 31, current agreement, which provides:

"Employees will not be required or permitted to suspend work during regular hours to absorb overtime."

In addition to the foregoing rule, the Organization contends that Rule 10, current agreement, was also violated. This rule provides:

"Positions or vacancies of thirty (30) calendar days duration or less shall be considered short vacancies and will be filled without bulletining but in making the assignments, the provisions of Rules 7 and 15 will be observed. Where there is reasonable evidence that such vacancy or position will exist for more than thirty (30) days, it shall be bulletined in accordance with Rule 8, showing, if possible, probable duration."

It will be observed that in the filling of the one-day position that it was to be considered a short vacancy under Rule 10 and that it could be filled by the Carrier for the one day without bulletining it. The parties are in agreement that this is so. Rule 7, referred to in Rule 10, provides that these employees shall be in line for promotion based on seniority, and fitness and ability, the latter being sufficient, seniority to prevail. Rule 15 provides that seniority will govern in reducing forces.

From the foregoing we must conclude that the one-day position which was created to augment the work of the ticket clerks should be filled just as if it were a one-day vacancy in a regularly assigned position. This means that Rule 7 must be observed; in other words, that Mary Hodges was in line for promotion to the higher rated position and, having sufficient fitness and ability, she was entitled to it as against any qualified employee junior to her. Claimant asserts, however, that he had the superior seniority dating which is, of course, true. But he could not take the position on the basis that it was a promotion for him any more than if it had fallen on one of his regular work days. His claim is based on the proposition that the work was overtime and not a newly created position which is not the fact. His claim is for rest day work at the time-and-one-half rate, which under the 40-hour week agreement he can have only as a last resort. Rule 25 (2) (g) (7) supports this statement. It says:

"The least desirable solution of the problem would be to work some regular employees on the sixth or seventh days at overtime rates and thus withhold work from additional relief men."

But Rule 7, specifically mentioned in Rule 10 as one that must be observed, authorized Mary Hodges to take the promotion. The evidence is clear that she was willing to accept the promotion, and the fact that she worked it on such a basis, is sufficient to sustain her right to do so under the promotion rule. On the other hand, the Carrier has the right to have the work done at the straight-time rate if it can do so without violating agreement provisions. Awards 4969, 6036, 6873.

We are again faced with the assertion that the method of handling resulted in the absorbing of overtime. We quite agree that if the Carrier had been unable to have the position filled at the straight-time rate without violating the agreement, the senior employee entitled to work it at the penalty rate would have been entitled to perform it. The factual situation in Award 7039 was very similar to the one before us. We there said:

"It appears that a regularly assigned clerk-caller was sick and unable to fill his position on July 16, 1952, and subsequent days. Since it was not then known how long he would be off duty,

it was treated as a short vacancy and claimant was temporarily assigned to that position and paid the higher rate of his regular position.

"Such temporary assignment is in full accord with the provisions of Rules 8 (short vacancies) and 20 (b) (extra employes) and claimant was properly paid under Rule 40 (i) (preservation of rates). No overtime being worked or needed, Rule 38 (k) (absorbing overtime) is not applicable to that situation." (Parentheses ours.)

In Award 6819, this Board recognized the right of a Carrier to rearrange the force to meet situations arising because of the existence of temporary vacancies and to pay such persons whose assignments are rearranged in accordance with the provisions of the preservation of rates rule. It specifically holds that the absorbing overtime rule does not apply.

In that Award 6036 we stated:

"Certainly the proper purpose of the establishment of new positions of short duration is to obtain the performance of work at straight time rates instead of at overtime rates, * * *"

If the work here in question had been overtime work, Claimant would have been entitled to perform it as against Mary Hodges by virtue of his seniority. But it was not such and Carrier could properly have it performed as it did. Mary Hodges could properly perform it under the promotion rule and be paid in accordance with the preservation of rates rule. Mary Hodges' position was filled by an extra man qualified to perform it, although he could not qualify as a ticket clerk. There was no violation in this method of handling. We can find no support in the rules for the claim as made.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 10th day of November, 1955.