Award No. 7176
Docket No. CL-7340

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

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

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

(a) Carrier violated the current Clerks' Agreement at Gainesville, Texas, August 13, 1953, when it refused to permit C. M. Hazel, occupant of Position No. 233 to work that position on that date; and,

(b) C. M. Hazel shall now be paid eight (8) hours at overtime rate at rate of pay of Position No. 233 for August 13, 1953.

EMPLOYES' STATEMENT OF FACTS: As of the date the instant claim arose, August 13, 1953, Mr. C. M. Hazel was the regular assigned occupant of Train Checker Position No. 233, Gainesville, Texas, hours 10:30 P. M. to 6:30 A. M., assigned to work Friday through Tuesday, rest days Wednesday and Thursday, and being relieved on rest days by rest day relief Position No. 15, occupant M. C. Ownbey. Mr. Ownbey, the regular occupant of Swing Relief Position No. 15 was on his scheduled vacation during the period from August 3 through August 14, 1953, inclusive, and his position was being filled during this period by an extra employe, one F. K. Barton.

On Thursday, August 13, 1953, Mr. Barton was not available to protect Rest Day Relief Position No. 15. There were no off-in-force-reduction employes available to perform this rest day relief service on Thursday August 13, 1953, but instead of notifying or calling the regular occupant of Train Check Position No. 233, Mr. C. M. Hazel, to report and protect his own position on his rest day, Carrier assigned or permitted the occupant of Swing Relief Position No. 13, M. E. Liedtke, to protect Train Checker Position No. 233 on August 13, 1953, which date was also one of his rest days. Mr. Liedtke is in no way connected with or assigned to relieve Position No. 233 and had no rights to protect that position when the assigned relief employe was unable to protect it and the regular incumbent was available, ready and willing to protect it.

POSITION OF EMPLOYES: The instant dispute arises as a result of Carrier's failure to call and use the regular employe for work required to be performed on his position on his rest day when the regular relief employe was absent and there was no qualified off-in-force-reduction employe available.

part of any assignment. The extra employe **was used to relieve four days of the regular relief assignment** and the rest days of the regular employes." (Emphasis supplied)

The Employes' contention that Article VII, Section 1-e, takes precedence over Article III, Section 10-a, in instances where off-in-force-reduction employes are not available to fill temporary vacancies of fifteen calendar days or less duration can have no possible effect in the instant dispute wherein the vacancy in question was definitely a part of the regular assignment of Swing Position No. 15. Article VII, Section 1-e, reads:

"Section 1-e. 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 the senior qualified and available off-in-force-reduction employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

which clearly indicates it applies only where work is required by the Carrier to be performed on a day which is not a part of any assignment.

Third Division Award No. 6019, which was also relied upon by the Employes in their handling of the instant claim on the property, covers a dispute involving a five-day per week position, the rest days of which were not included in a regular relief assignment; therefore, work performed on such a rest day was work that was performed on a day which was not a part of any assignment. The Carrier emphatically believes your Honorable Board will have no difficulty in deciding that the decision rendered in Award No. 6019 can have no possible application or bearing to the instant dispute.

Without prejudice to its position, as previously set forth herein, the Carrier desires to call attention to the fact that the claim in behalf of Claimant C. M. Hazel is for eight hours "at overtime rate", which the Carrier construes as meaning at time and one-half. It is a well established principle, consistently recognized and adhered to by the Board, that the right to work is not the equivalent of work performed under the overtime and call rules of an Agreement. See Awards 4244, 4645, 4728, 4815, 5195, 5437, 5764, 5929, 5967 and many others.

In conclusion, the Carrier respectfully asserts that the claim of the Employes in the instant dispute is entirely without merit or support under any of the rules in the governing "Clerks' Agreement" or "Supplemental Agreement" and should be denied in its entirety.

The Carrier is uninformed as to the arguments the Employes will advance in their ex parte submission and accordingly reserves the right to submit such additional facts, evidence and argument as it may conclude are necessary in reply to the Organization's ex parte submission or any subsequent oral arguments or briefs submitted by the Organization in this dispute.

All that is contained herein is either known or available to the Employes and their representatives.

OPINION OF BOARD: On August 13, 1953, Claimant was the regular assigned occupant of Train Checker Position No. 233 at Gainesville, Texas. He was assigned to work Friday through Tuesday, with Wednesday and Thursday as rest days. The rest days were worked by regularly assigned relief employe M. C. Ownbey. From August 3 through August 14, 1953, Ownbey was on his regularly scheduled vacation and his position was being filled during his vacation period by extra employe F. K. Barton. On Thursday, August 13, 1953, Barton was not available to protect the work of the relief

position and Carrier used the occupant of Swing Relief Position No. 13, M. E. Liedtke, who made application therefor, to perform the work, there being no furloughed or extra employes available. Claimant contends that he, as the occupant of the regularly assigned position, No. 233, should have been used.

The Organization relies on Article VII, Section 1-e, current Agreement which 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 the senior qualified and available off-in-force-reduction employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

The Carrier contends that the dispute is controlled by Article III, Section 10 (a), current Agreement, which provides in part:

> "Vacancies of fifteen (15) calendar days or less duration shall be considered temporary and, if to be filled, shall be filled (1) be recalling the senior qualified and available off-in-force-reduction employe not then protecting some other vacancy (such off-in-force-reduction employe not thereby to have any claim to work more than 40 straight time hours in a work week); (2) if there is no such off-in-force-reduction employe available, by advancing a qualified employe in service at the point who makes application therefor. If neither of these alternatives produces an occupant for the vacancy, it may be filled without regard to these rules, but employes holding seniority in Class 3 on the same seniority district, whether in regular employment or otherwise, shall be given preference in accordance with Section 8-e of this Article. * * *"

In the confronting case, the rest day work was assigned to a regular relief employe. It is not, therefore, unassigned work as that term is used in Article VII, Section 1-e. When the relief employe was absent from work, the position could be filled in the same manner as any other temporary vacancy. Under the Agreement before us, the controlling rule is Article III, Section 10 (a). Carrier filled the temporary vacancy in accordance with the latter rule and, consequently, there was no violation of the Agreement when the Carrier used Liedtke to do the work, there being no qualified off-in-force-reduction employe available for the work.

There appears to be some confusion in the awards of the Board as to the meaning to be given to Article VII, Section 1-e, and similar rules in other agreements, regarding work on rest days which are assigned to a regular relief position. After an examination of these previous awards, we conclude that the correct interpretation is contained in Award 6503, wherein it is said:

> "On January 6 and 7, 1951, there was a temporary vacancy on a regularly bulletined relief assignment due to the incumbent taking part of his vacation on those days. * * * It is admitted that no extra or other unassigned employe was available and therefore the Carrier was required by Rule 5 of the June 10, 1949 Agreement to use the senior regular man available to fill the vacancy. Two regular men who were off on their rest days applied for the vacancy, and it is agreed that Claimant Jones was properly chosen because he was senior. * * *
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> "There was some argument that claimant filled the vacancy on days 'not part of any assignment,' as referred to in Rule 37 (j). This is obviously a misconception. Actually, the temporary work was done on the first two days of a regular assignment of five working days. True, it was a relief assignment, but a relief assignment is bulletined the same as any other regular assignment, though

Rule 28½ (e) permits different starting time, duties, and work locations on different days. It happened that the first two days of the regular relief assignment were also the two rest days of the claimant on his own assignment. But this must always happen when extra or other unassigned men are not available to fill such vacancies, and senior men off on their rest days must, under the rules, be used to fill them."

See also, Award 6521.

Under the rule thus stated, Article VII, Section 1-e, does not apply and the position taken by the Organization has no support under the rules of the Agreement before us.

A contention was advanced in the discussion of this case by the Board that there was no vacancy within the meaning of Article III, Section 10 (a). This contention is based on Article (12b) of the Vacation Agreement which states in part:

"As employes exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute 'vacancies' in their positions under any agreement. When the position of a vacationing employe is to be filled and regular relief employe is not utilized, effort will be made to observe the principle of seniority."

It is clear that the intent of the cited rule was to fully protect employes on vacations in that, as to such employes, their rights were to be maintained just as if they were actually working. But the rule itself contemplates that the positions of employes on vacation might be filled. As to employes thus needed, the rule governing temporary vacancies applies. It was never contemplated that positions of employes on vacation could not be filled.

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 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 17th day of November, 1955.