

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

**STATEMENT OF CLAIM:** Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement:

1. When on Saturday, January 2, 1954, in violation of Rules 8, 24, 25 (f) and related rules, it required regularly assigned Check Clerk J. R. Twente, Rate \$14.48 per day, at Seventh Street Freight Warehouse, Seventh and Poplar Streets, St. Louis, Missouri, hours 8 A. M. to 12 Noon; 1 P. M. to 5 P. M., seven day job, Saturday through Wednesday, rest days Thursday and Friday, to suspend work on his regular assignment and go to Miller Street Station, 124 Miller Street, St. Louis, Missouri, and work the position of Route Clerk, filling a temporary vacancy account regularly assigned Route Clerk B. Fisk granted permission to lay off, in lieu of utilizing Route Clerk J. A. Radosevich, regularly assigned at Miller Street Station, an incumbent of the Route Clerk position and work, who, on January 2, 1954, was off on one of his rest days:

2. Route Clerk J. A. Radosevich shall be paid 8 hours at the punitive rate of \$2.715 per hour, \$21.72, account available and entitled to perform the work under provisions of Rule 25, Clerks' Agreement.

**EMPLOYES' STATEMENT OF FACTS:** The Carrier maintains at its Miller Street Freight Warehouse, 124 Miller Street, St. Louis, Missouri, two regularly assigned positions classified and rated as Route Clerks as follows:

Name	Rate	Seniority Date	Days and Hours of Assignment	Unassigned and Rest Days
B. Fisk.	\$14.48	3/16/20	8AM-12N; 1 PM-5PM, Tuesday through Saturday, six day position.	Sunday & Monday
John A. Radosevich	14.48	11/1/41	7:45AM-12N; 1PM-4:45PM Monday through Friday, five day position.	Saturday & Sunday

Clearly this provision is intended to avoid disputes about verbal understandings. No such dispute is here involved and the rules specifies no penalty for failure to comply. The claimant would not have received any pay by reason of compliance with the rule. The record shows the Carrier took appropriate steps to see that this rule is complied with in future in line with its policy to see all rules are complied with whether any penalties are involved or not. As a matter of fact a record was made of this move on the time and payroll records of the Carrier, but no copy furnished the Division Chairman.

It is the position of the Carrier that there is no agreement requirement nor authority for payment of this claim.

(Exhibits not reproduced).

**OPINION OF BOARD:** Petitioners here present a claim in behalf of J. A. Radosevich, Route Clerk, assigned hours 7:45 A. M. to 4:45 P. M., less one hour off for lunch, with Saturday-Sunday assigned rest days, for eight hours' pay, punitive rate, account of having been denied (the Organization asserts) the right of performing work accruing to his position on Saturday, January 2, 1954.

The work in question was that of a position, occupied by employe Fisk, Route Clerk, with same assigned hours, but with Sunday and Monday as rest days, being vacated on the date shown above, the work being performed by J. R. Twente, Route Clerk, likewise with the same assigned hours but with Thursday and Friday as rest days.

It is asserted that Claimant Radosevich was entitled to perform the duties of the vacancy on his rest day since he was regularly assigned to the same location (Miller Street) within the meaning of Rules 8 and 9(b) and with the same hours and substantially the same rest days. The Organization pointed out that since employe Twente, whom it asserts was regularly assigned to a different location, namely Seventh Street, was instructed by the Respondent to fill the position, the indication is clear that such work was necessary; and that the performance of same in this manner had the effect of denying work to a regular employe at his assigned location, as well as the denial of overtime to the "incumbent of the position" within the meaning of Rules 24 and 25(b); and, finally, that Rule 9(c) was not complied with.

The Respondent took the position that there being no extra or unassigned employe available to perform the work in question and with no senior employe requesting the right to fill the temporary vacancy, Rule 9(b) gave them (the Respondent) the right to move an assigned employe from his regular position to perform work required during the hours of his assignment.

The parties are in substantial agreement as to essential facts. There existed a temporary vacancy on the date in question. There were no extra unassigned or furloughed employes available to fill the vacancy and no employe requested that he be permitted to do so. There is a conflict of record as to whether Respondent "canvassed" employes to fill the vacancy. However, it is clear that the work in question was on an assigned day and during the assigned hours of employe Twente, who was directed to perform same.

It cannot properly be said that Rule 8 as written or the manner of its (the rule) application on the property, places a construction on the word "location" as contained in Section (b) thereof which limits, under present circumstances, work performance to a single building or facility.

Rule 9, however, contains specific provisions as to the criteria to be followed in filling temporary vacancies. Paragraph (a) has to do with those instances where a senior employe requests that he (the employe) be permitted to fill same. No such request was made here. Paragraph (b) of Rule 9 provides that, when a temporary vacancy is not filled under Paragraph (a) and where there are no (as here) extra unassigned or furloughed employes avail-

able, a regular employe may be moved from his regular position. This was what occurred at the time in question. Rule 9(b) contains an exception which is not applicable here. It is a fundamental rule of contract construction that where exceptions to the general application of a provision thereof are present, all other exceptions are presumed to have been considered and excluded by the parties.

This Board has held in numerous Awards that a Carrier is not bound to pay the punitive rate for work done if the same can be accomplished at the straight time rate, within the framework of the collective agreement. Rules relied upon by the Petitioner do not preclude such an accomplishment here.

Petitioners assert and the Respondent admits, that Paragraph (c) of Rule 9 was violated. This Rule requires written notice be given the Division Chairman of the Organization when an employe is moved (as here) from his regular position at the direction of the Carrier. It is evident that the purpose of the notice requirement was to avoid possible disputes arising from oral agreements. The Board is of the opinion that the failure to give such notice creates a presumption that the agreement was violated and thereupon places the burden upon a Carrier of proving that its actions were not in contravention of the effective agreement. The Respondent here has met that burden and an affirmative Award is not justified.

**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

Claims 1 and 2 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon  
Secretary

Dated at Chicago, Illinois, this 2nd day of February, 1956.