

Award No. 7293

Docket No. CL-7464

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 when it failed and refused to permit Clerk J. K. Cunningham to work Messenger Position, Fort Worth, November 14, 1953; and,

(b) J. K. Cunningham shall now be paid eight (8) hours at overtime rate of Position No. 129, Fort Worth, for November 14, 1953.

EMPLOYEES' STATEMENT OF FACTS: The regular assigned occupant of Swing Position No. 9, which provides relief on Messenger Position No. 135, Fort Worth, Texas, each Saturday, was sick and unable to protect his assignment on Saturday, November 14, 1953. The regular assigned occupant of Messenger Position No. 135 was also sick and unable to protect that position on his Saturday rest day, November 14, 1953. Carrier, under provision of Section 10-a of Article III of the current Agreement, had an application from Mr. J. K. Cunningham, the regular occupant of Passing Clerk Position No. 129, to be advanced to any temporary vacancy of one or two days' duration which he could fulfill on his Saturday and/or Sunday rest days and for which no qualified off-in-force-reduction employee was available at the point. Instead of notifying or calling Mr. Cunningham, the only employee at Fort Worth who applied for the temporary vacancy on November 14th, Carrier called Leta Thomason, an off-in-force-reduction employee, who had already worked 40 straight time hours in that work week, and who had no right whatever to fill the vacancy in question.

POSITION OF EMPLOYEES: It is the position of the Employees that Carrier violated the provisions of Article III, Section 10-a of the current Agreement when on November 14, 1953 it used off-in-force-reduction employee Leta Thomason on the one day vacancy on Messenger Position No. 135 and refused to give effect to the application of the Claimant J. K. Cunningham to fill such vacancy.

Article III, Section 10-a, provides that vacancies of fifteen (15) calendar days or less duration shall be considered temporary and, if to be filled, shall be filled (1) by recalling the senior qualified and available off-in-force-

It is apparent that Cunningham did not make request to protect the vacancy in question and his application, as referred to by the Employees, merely consisted of verbal information furnished to the Chief Clerk several months prior to the date the instant vacancy occurred, to the effect that "he would like any extra work that showed up". Since Item (2) of Article III, Section 10-a, contemplates that an assigned employee making application for a vacancy thereunder will temporarily relinquish rights to his regular assignment and remain on the temporary assignment for the duration thereof, Cunningham's request for any extra work that showed up certainly cannot be construed as an application to temporarily "advance" to the lower rated position.

The Employees place emphasis upon the fact that Miss Thomason had worked 40 hours in the week involved, but **so had the claimant.**

The position of the Employees in the instant dispute is not consistent with that advanced by them on other occasions. In fact, it is in direct conflict with that advanced in their previous claim in behalf of Train Checker C. M. Hazel at Gainesville, Texas, which is now on appeal to the Third Division of the National Railroad Adjustment Board under Docket No. CL-7340. In the Hazel claim, it was the contention of the Employees that Article VII, Section 1-e, takes precedence over Article III, Section 10-a, in instances where off-in-force-reduction employees are not available to fill temporary vacancies of fifteen calendar days or less duration and that Claimant C. M. Hazel had prior rights to work on his Thursday rest day, August 13, 1953, in preference to a senior employee, M. E. Liedtke who made application to advance to the vacancy in question under the provision set forth in Item (2) of Article III, Section 10-a.

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 J. K. Cunningham is for eight hours "at overtime rate of Position No. 129", which the Carrier construes as meaning time and one-half Cunningham's regular rate of \$15.39 per day. 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. Also, in the event it should be decided that Cunningham has a valid claim to the work that was performed by Leta Thomason as Messenger on November 14, 1953, there certainly would be no basis for compensating him at his regular rate of \$15.39 per day in lieu of the regular messenger's rate of \$11.66 per day. When an employee makes a bona fide application to advance to a temporary vacancy under the provision of Item (2) of Article III, Section 10-a, he certainly is entitled only to the rate of pay of the position actually worked.

In conclusion, the Carrier respectfully asserts that the claim of the Employees 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.

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

OPINION OF BOARD: Claimant was regularly assigned to Passing Clerk Position No. 129 at Fort Worth, Texas. He was assigned Monday through Friday, with Saturdays and Sundays as rest days. It appears that Miss Ollie Finch was regularly assigned to Messenger Position No. 135, with an assigned work week of Monday through Friday, with Saturday and Sunday

as rest days. One B. E. Erwin was regularly assigned to Relief Position No. 9 and relieved Finch on her Saturday rest day. On Saturday, November 14, 1953, Erwin reported sick and Carrier used off-in-force-reduction employee, Leta Thomason to fill the vacancy in the relief position on that day. Thomason had worked 40 hours that week and claimant contends that he should have been used.

The controlling rule is:

"Vacancies of fifteen (15) calendar days or less duration shall be considered temporary and, if to be filled, shall be filled (1) by recalling the senior qualified and available off-in-force-reduction employee not then protecting some other vacancy (such off-in-force-reduction employee 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 employee available, by advancing a qualified employee 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, * * *." Art. III, Sec. 10(a), Current Agreement.

The record shows that Leta Thomason had worked Monday through Friday and was paid time and one-half for her Saturday work. The rate of pay on the Messenger position was \$11.66 per day. Claimant's daily rate was \$15.39. The day in question was one of claimant's rest days, but the work involved was a vacancy on a regular relief assignment having no relation to his own position. It seems clear to us that under the quoted rule, the vacancy should have been filled (1) by recalling the senior off-in-force-reduction employee, such employee not thereby to have any claim to work more than 40 hours in a work week, (2) by advancing a qualified employee making application therefore, and (3) without regard to the rules, but with the preference stated in the rule. It seems to us that the only question to be determined is the right of Leta Thomason to do the work. If she was not properly used, claimant necessarily has a valid claim whether because he applied for the work or because of his seniority right to overtime work.

The Carrier asserts that the parenthetical clause was placed in the rule to protect against claims by senior available qualified off-in-force-reduction employees who may have worked forty hours in a work week when junior off-in-force-reduction employees not having worked 40 hours in the work week were used. From this the argument is made that the use of an off-in-force-reduction employee for more than 40 hours in the work week is not prohibited when there are no other off-in-force-reduction employees available. We cannot agree with the Carrier that the language of the rule conveys any such meaning. We think the parenthetical clause clearly means that an off-in-force-reduction employee may not work more than 40 hours at straight time in a work week and that after working 40 hours, such employee is unavailable by force of the rule. Consequently Leta Thomason was improperly used. Under such circumstances a senior available employee had a right to work the vacancy at time and one-half, assuming that a qualified employee did not make application therefor. Claimant was such a senior employee and could properly make the claim. Awards 3220, 6019, 7034, 7176.

The claim will be sustained at the pro rata rate of the Messenger position filled, the rate being \$11.66 per day.

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 violated.

AWARD

Claim (a) sustained. Claim (b) sustained for eight hours at pro rata rate of Position No. 135.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 20th day of April, 1956.