

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

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

MIDLAND VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks that the Carrier violated the Clerks' Agreement at Muskogee, Oklahoma beginning August 12, 1953, when

(a) It failed and refused to fill the position of F-7 Assistant Rate Clerk, Accounting Department, pending assignment, and

(b) That Mr. J. F. Durant be paid for wage loss sustained, representing the difference in the rate of his former position, E-12 Clerk, rate \$13.77 per day, and rate of \$15.45 per day attached to the position of F-7 Assistant Rate Clerk, for August 12, 13, 14 and 17, 1953.

EMPLOYEES' STATEMENT OF FACTS: During August, 1953, the following new position was established in the Accounting Department, Muskogee, Oklahoma, and was bulletined, but was not filled pending assignment:

Title of Position	Dates position was not filled
F-7 Assistant Rate Clerk	August 12th to 17th inclusive

POSITION OF EMPLOYEES: The material facts in this case are not in dispute and involve the failure and refusal of the Carrier to fill positions pending assignment by bulletin.

There is in evidence an Agreement between the parties bearing effective date January 1, 1953 in which the following rule appears which the Employees cite as being in violation:

Rule 10, Section (a) of the Agreement provides:

"Bulletined positions will be filled temporarily pending an assignment in the following order:

1. Calling the senior qualified and available furloughed employee.

2. If there is no such furloughed employee available, by a qualified employee in service in the same group and in the same seniority district who makes application therefor.

date of first service, even though assigned on January 20, 1953. In other words, no exception was taken nor was a complaint filed account the newly created position not being filled during the bidding period and pending assignment. As previously stated, the representatives of the employees and the representatives of the carrier have not heretofore considered a newly created position as having been established until the position has been advertised and assignment made.

We agree that the employee who was assigned to the position in the instant case was available for the position during the bulletin period, however, it was a known fact that such employee did not have sufficient fitness and ability to perform the duties, nor was he assigned on that basis, therefore, the provisions of Rule 10 were not controlling.

We do not attempt to say that Rule 10 distinguishes "vacancies" from "new positions." We do say that through the years under the rules which existed at the time and under the rules controlling in the instant case, the General Chairmen have acquiesced in our position that a newly created position was not considered as having been established until the position has been advertised and assignment made. Furthermore, there was no requirement that the employee who was assigned to the position fill such position during the bulletin period because he did not possess the sufficient fitness and ability to perform the duties.

In view of all the facts and circumstances, the claim as made in this case is without merit and your Honorable Board is respectfully petitioned to render an award upholding the contention of the carrier.

All data submitted herewith in support of the carrier's position has been presented to the employees or their duly authorized representative and is hereby made a part of the matter in dispute.

(Exhibits not reproduced).

OPINION OF BOARD: The controlling facts in this case are not in dispute.

Petitioners contend that on August 12, 1953 a new position was established and bulletined by Carrier. Claimant was awarded the new position on August 18, 1953. This claim is for the days between bulletining and the awarding of the position and for difference between the rate Claimant received in his former position and the rate of the new position. Cited in support of the claim is Rule 10(a) which reads:

"Bulletined positions will be filled temporarily pending an assignment in the following order:

1. Calling the senior qualified and available furloughed employee.
2. If there is no such furloughed employee available, by a qualified employee in service in the same group and in the same seniority district who makes application therefor.

NOTE 1. It is intended that this rule be fairly applied and due consideration will be given the senior employee desiring the position, but in the application of this condition it is not the intention to unduly disrupt the work in the department and/or to operate to work a hardship on the Company.

3. If neither of these alternatives produces an occupant for the position, it will be filled by appointment.

NOTE 2. The provisions of paragraph (a) do not apply to clerical positions at the Muskogee Yard Office, instead bulletined positions in that office will be filled temporarily pending an assignment as follows:

1. Calling the senior qualified and available furloughed employee.

2. By the senior available individual who has acquired an employe status in accordance with the provisions of paragraph (a) of Rule 3.

3. By the senior available and qualified employee in that office making application therefor.

4. If the foregoing procedures do not produce an occupant for the position, it will be filled by appointment.

Also cited is Award 6719 with other Awards of this Division and that Rule 10(a) was changed to read "Bulletined positions will be filled * * *" where it previously read "may be filled * * *"

Also cited is the Bulletin Rule 9.

In Award 6719 we held in part

"It must be assumed that the parties intended to accomplish something when they changed the present rule to read 'will be filled,' instead of 'may be filled,' * * *"

Also see Awards 1754, 2792 and 5255.

Respondent Carrier takes the position that as this is a newly established position; not a vacancy on an old or existing position that Award 6719 has no application.

That the position of Assistant Rate Clerk had not yet been established on the claim dates and Carrier further states that past practice would also control. Also that Claimant did not make application to temporarily fill the position during the bulletining period as required by Rule 10 and was not qualified for appointment thereto and hence the claim has no merit.

We believe the position of the Carrier is sound in its contentions. In applying the facts to the rule we do not believe that Claimant has brought himself within the provisions of Rule 10 (a) and therefor his claim fails.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 28th day of June, 1956.