Award No. 8128
Docket No. TE-7139

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA

(Texas and New Orleans Railroad Company)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Pacific Lines in Texas and Louisiana (Texas and New Orleans Railroad) that:

1. The Carrier violated the Agreement between the parties signatory thereto when it refused to permit Telegrapher-Clerk B. B. Hudspeth, regularly assigned second shift "VA" Office, El Paso, Texas, to move up in the office on a temporary vacancy on first shift hours, 7:59 a. m. to 3:59 p. m., while the regularly assigned employe was on vacation, and

2. The Carrier shall now be required to compensate Telegrapher-Clerk B. B. Hudspeth for a day's pay at the straight time rate for October 26, 27, 28, 29 and 30, 1953, because of its violative act.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement between the Southern Pacific Line in Texas and Louisiana (Texas and New Orleans Railroad Company) and its employes as represented by The Order of Railroad Telegraphers bearing date of December 1, 1946, together with such supplements and memoranda including the 40-hour week agreement effective September 1, 1949.

The facts in this case are simple. As indicated in the statement of claim there is a telegraph office on Carrier's railroad at El Paso, Texas, designated for operational purposes as "VA" Office, the complement of which is as follows:

1st trick telegrapher-clerk, regular occupant C. H. Fisk.

2nd trick telegrapher-clerk, regular occupant B. B. Hudspeth.

3rd trick telegrapher-clerk, regular occupant not identified.

At about 3:55 p.m. on October 16, 1953, Claimant B. B. Hudspeth, the regular occupant of the second shift telegrapher position, advised Chief Dispatcher P. E. Gray by telephone, of his desire to move up in the office to the temporary vacancy, to be created by Mr. Fisk, regular occupant of the first

9. The claim if allowed would do violence to the Vacation Agreement and practices thereunder and would produce "an unfair, inequitable, and unreasonable result" in violation of Referee Morse's interpretations, supra.

10. That the Third Division has denied clearly analogous claims in Awards 5192 and 5461, which are quoted in part above, and are obviously controlling here.

For the reasons shown, this claim is entirely devoid of merit or validity and should be denied.

The substance of all data and argument included in this submission has been made known to the employe's representative in handling this case on the property, either by correspondence or in conference.

(Exhibits not reproduced.)

OPINION OF BOARD: Claim is here made in behalf of one B. B. Hudspeth, classified as Telegrapher-Clerk and ordinarily assigned to second trick, for a day's pay on the enumerated dates, account of his allegedly being improperly denied his contractural right to fill temporary vacancy on the first trick at the same office or station.

Rule 14(D) reading as follows is relied upon by the Organization:

> "14(D) When a temporary vacancy occurs, employes at station affected will be permitted to move up and the extra employe placed on the last position temporarily vacated; provided, however, no claims for time lost on account of these changes will be allowed."

The Organization took the position that the above quoted rule contains no restriction or limitation on an employe's right to move up to fill any temporary vacancy which occurs except that the employe so moving up must be located at the station where the temporary vacancy occurs. It is further asserted that the "vacancy" in question is not controlled by the Vacation Agreement.

The Respondent asserts that Article 12(b) of the National Vacation Agreement rather than the Rule 14(D) of the basic agreement is here controlling inasmuch as the temporary vacancy was brought into being by virtue of the regular occupant of the position being on vacation. It was asserted that the said provision of the Vacation Agreement decrees that the absence of an employe from his position shall not be considered as, or interpreted to be, a "vacancy," under any agreement. It was further pointed out that no other qualified employe was available to fill claimant's regular position and further that the claimant here, in effect, was only required to provide relief on his own position.

The record reveals that claimant was qualified to fill the first trick position, the regular occupant of which was on vacation at the time in question. That this is true is evidenced by the fact that the respondent does not raise the point. That claimant had seniority entitling him to the position when Rule 14(D) alone, is considered is true for the same reason.

We are of the opinion that a "vacancy" as such, is not created under the Vacation Agreement. Also noted is that Article 12(b) states that they are not to be so considered **"under any agreement".** As we have held in numerous awards, such a "vacancy" is not one (subject to certain exceptions not pertinent here) that must be filled. The Carrier, subject to these same exceptions, has the sole and unilateral right to determine whether or not the position of an employe will be filled. When this determination is (as here) in the affirmative we look to the Vacation Rule and not to other rules of the Agreement for the method to be followed.

Absent the use of regular relief employes (where the application of seniority is immaterial) the rule provides only that: "effort will be made to follow the principle of seniority." This portion of the rule cannot be construed to mean that the principles of seniority must be followed in each and every instance where a regular relief employe is not used. We are of the opinion that the record in this particular case indicates an effort on the part of the Respondent. No violation exists.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived hearing on this dispute; and

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 Carrier did not violate the agreement.

AWARD

Claims 1 and 2 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 15th day of November, 1957.