Award No. 8346
Docket No. CL-8089

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

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

LOS ANGELES JUNCTION RAILWAY COMPANY

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

(a) Carrier violated the rules of the current Clerks' Agreement on January 15, 16, 22 and 23, 1955, when it did not call the senior available clerical employe to perform clerical work that was performed on an overtime basis on those days; and,

(b) Mr. Richard Fulkerson shall now be paid 32 hours at overtime rate as a result of such violation of Agreement rules.

STATEMENT OF FACTS: Mr. Richard Fulkerson holds regular assigned clerical position titled Clerk, rate $15.59 per day, hours 2:00 P.M. to 10:00 P.M., with rest days of Saturday and Sunday. Clerk Harold W. Riggins, rate $15.59 per day, hours 3:00 P.M. to 11:00 P.M., rest days Thursday and Friday, was absent account illness from January 15 to 26, 1955, and during his absence his position was not filled under the provisions of Article 5-d of the Agreement rules, but instead the work of his position was protected by working other employes on an overtime basis as necessary. Claimant Richard Fulkerson was used on an overtime basis to perform the work on Riggins' vacant position on all of the days when overtime work was necessary except on January 15, 16, 22 and 23, 1955. On these four dates Claimant Fulkerson was at home on his rest days, he was available, ready and willing to work any overtime for which he might be called. Carrier, however, instead of calling Claimant Fulkerson, used Clerk Geo. E. Moorehead, rate $15.59 per day, who is junior in point of seniority to Fulkerson, to perform the necessary overtime work on Riggins' Position on these four days. Moorehead holds a relief assignment working 7:00 A.M. to 3:00 P.M. Saturday and Sunday; 3:00 P.M. to 11:00 P.M. Thursday and Friday, and 6:00 A.M. to 2:00 P.M. Monday, with rest days Tuesday and Wednesday. Fulkerson's seniority date is April 4, 1950 and Moorehead's seniority date is July 5, 1950. Moorehead worked a full tour of 8 hours overtime on Riggins' vacant Position January 15, 16, 22 and 23, 1955.

In view of the provisions of Article 5(d) and in the absence of some rule which restricts the Carrier in filling such vacancies by appointment, there is no basis for sustaining the claim.

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

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant Fulkerson is regularly assigned to Clerk Position No. 9 Monday through Friday, 2:00 P.M. to 10:00 P.M., with Saturday and Sunday as rest days. His seniority date is April 4, 1950.

From January 15 to 26, 1955, Clerk Riggins, regularly assigned to Position No. 2 Saturday through Wednesday, 3:00 P.M. to 11:00 P.M., with rest days Thursday-Friday, was off sick. During this period there was no qualified furloughed employe available for work on Riggins' position, nor did any qualified employe make written application to fill the the temporary vacancy. Regularly assigned employes, among them Claimant, were worked overtime as needed to get Riggins' work done.

On each of dates of claim (which were the rest days of Claimant), Clerk Moorehead, having regular relief assignment on Position No. 8 working 7:00 A.M. to 3:00 P.M., on Saturdays and Sundays and having seniority date of July 5, 1950, was worked eight hours of overtime following the end of his own shift.

Employes contend that the seniority provisions of the Parties' Agreement, particularly Article 3, Paragraph (k), and Article 4 required the use of Claimant rather than Moorehead; and the former should have been paid under the provisions of Article 8 (e), the Call Rule.

Article 3, Paragraph (k) reads:

> "Seniority rights of employes covered by these rules may be exercised only in case of vacancies, new positions, or reduction of forces, or as otherwise provided in this Agreement."

Article 4 reads:

> "Employes covered by these rules shall be in line for promotion. Promotion, assignment, and displacement shall be based on seniority, fitness, and ability; fitness and ability being sufficient, seniority shall prevail."

Carrier contends that its use of Moorehead in Riggins' position on claim dates was proper under Article 5, Paragraph (d), which reads:

> "Positions or vacancies of less than 30 days' duration shall be considered temporary, and, if to be filled, shall be filled by (1) the senior qualified and available furloughed employe not then protecting another vacancy; (2) if there is no such furloughed employe available, by advancing a qualified employe in service who makes written application therefor. If neither of these alternatives produces an occupant, it may be filled by appointment."

We are unable to agree with Carrier that Article 5(d) justified its action in the instant case. The Paragraph does deal with temporary vacancies like

Riggins' and does state specifically how same are to be filled. But it contains the qualifying words, "if to be filled." That is, if the temporary vacancies are to be filled, then the remaining provisions of the the Paragraph are governing.

Was Riggins' temporary vacancy "filled" in the sense meant by the Parties when they wrote the language of Article 5(d)? We think not. Said language must have contemplated placing an existing employe or one newly hired in the vacancy; and if an existing non-furloughed employe, one who would temporarily vacate his own position. This the Carrier did not do. It did not "appoint" any existing or new employe to Riggins' temporary vacancy On the contrary the Carrier kept Fulkerson and Moorehead on their existing positions and used them overtime to get the work of Riggins' position done.

This conclusion is buttressed by the language of a subsequent Paragraph —Article 5(f)—which says that

> "Employes filling temporary vacancies will **return** to their **former** position or status upon **completion** of such temporary service." (Emphasis supplied.)

Turning now to the above-quoted provisions relied on mainly by the Employes, we are forced to conclude that neither one prohibits the Carrier from acting as it did in the instant case. Article 3(k) does say that "vacancies" may be filled by the exercise of seniority; and vacancies presumably include temporary ones. But Article 5(d) deals more specifically with temporary vacancies. Nevertheless, as in Article 5(d), the Parties were dealing in 3(k) with the **filling** of vacancies. The Riggins' vacancy was not filled in the sense contemplated by the Parties.

The same general sort of objection holds as to the applicability of Article 4. Here the question is, When Moorehead and Fulkerson worked overtime in Riggins' position, did they receive an "assignment" in the sense contemplated by the Parties when they wrote the language of Article 4? Again we think not. In our opinion the working of overtime hours in another man's position does not constitute an assignment. An employe is not assigned to more than one position. Neither Moorehead nor the Claimant were removed from their regular positions while Riggins was off sick.

The Carrier's action must be ruled proper not because of the applicability of Article 5(d) but because there is no rule in the Agreement that restricts or prohibits its right to act as it did. Article 3(k) says that seniority is to be exercised only in case of (the **filling** of) vacancies, new positions, reduction of forces, or as otherwise provided in the Agreement. As previously stated, Riggins' temporary vacancy was not filled but its work was done by employes regularly assigned to other positions. Nothing is "otherwise provided in the Agreement" that requires the Carrier to use the senior man for such overtime work. Nor does the Agreement prohibit the use of such overtime work for getting the duties of a temporarily vacant position performed.

This claim cannot be sustained.

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 respec-

tively 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

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 5th day of June, 1958.