

Award No. 9813

Docket No. CL-9447

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Joseph E. Fleming, Referee

PARTIES TO DISPUTE:

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

WESTERN FRUIT EXPRESS COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that the Carrier violated the rules of the current agreement,

1. That during period August 13 to August 31, 1956 inclusive, when D. A. Moynihan, regularly assigned Inspector on first shift 7:00 A. M. to 3:00 P. M. at Interbay Yard, was on his vacation, the Carrier used an official, Mr. M. W. Hoyle, Agent, to perform the work normally assigned to the Inspector's position.

2. That, as a penalty for the rule violation, Mr. J. H. Moynihan, regularly assigned to Relief Inspector, rate of pay \$333.01 per month at Interbay Yard, who applied for and was denied opportunity to work the vacation vacancy of D. A. Moynihan from August 13 to August 31, 1956 be additionally compensated a day's pay at the rate of \$333.01 per month attached to the first shift Inspector's job.

EMPLOYEES' STATEMENT OF FACTS: On or about August 10, 1956 Mr. J. H. Moynihan learned that Mr. D. A. Moynihan was going to start his vacation on August 13, 1956. Mr. J. H. Moynihan immediately addressed a message to the supervisory agent, Mr. M. W. Hoyle, requesting that he be allowed to perform this work as provided in accordance with the provisions of the current agreement. The agent informed Mr. J. H. Moynihan that there would be no vacancy as the work would be taken care of by older employees during the time that Mr. D. A. Moynihan was off on vacation. Instead of the work being performed this way, the supervisory agent, Mr. M. W. Hoyle, an official entirely outside of the agreement, performed the work of this position.

POSITION OF EMPLOYEES: There is in existence an agreement between the Carrier and the Organization containing the following rules:

"SCOPE—Rule 1 (As amended by agreement July 29, 1949)

Employees Affected. These rules shall constitute an agreement between the Western Fruit Express Company and its employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and shall govern the hours of service

(k) 3. A person other than a regularly assigned relief employee temporarily hired solely for vacation relief purposes will not establish seniority rights unless so used more than 60 days in a calendar year. If a person so hired under the terms hereof acquires seniority rights, such rights will date from the day of original entry into service."

CARRIER'S POSITION

1. Rule 68—Vacations—is self-executing. The Company did not violate that Rule when it chose not to employ a vacation relief worker or allow Reliefman J. H. Moynihan to double over during the period August 13 to August 31, 1956, when Inspector D. A. Moynihan was on vacation.

2. Reliefman J. H. Moynihan was regularly employed on his relief assignment during the period August 13 to August 31, 1956. The salaries of the positions being the same, he suffered no loss of pay by not being taken off of his relief assignment and assigned to Inspector D. A. Moynihan's position during that period. There was no vacancy in D. A. Moynihan's position while he was on vacation. There has been no allegation of burden to any one by reason of not filling the vacationing employee's position, and no such allegation could be supported. The Vacation Rule states that the Company shall not be required to provide a relief worker under the circumstances.

CONCLUSION

It is respectfully requested that the claim be denied.

All relevant argumentative facts and data herein have heretofore been made known to the Brotherhood.

OPINION OF BOARD: Inspector D. A. Moynihan went on a vacation starting August 13, 1956. On August 10, 1956 Mr. J. H. Moynihan requested that he be allowed to perform Mr. D. A. Moynihan's work while he (Mr. D. A. Moynihan) was on vacation. The Agent informed Mr. J. H. Moynihan that there would be no vacancy as the work would be taken care of by older employees during the time that Mr. D. A. Moynihan was on vacation. Instead of the work being performed in this way it was performed by Agent Hoyle, who was not covered by the Clerk's Agreement. Claimant relies on Rule 68 (e). While it is true that Carrier "shall not be required to provide such relief workers", the Rule does not permit them to have the work done by an outsider.

Carrier next contends that the Claimant suffered no monetary loss and that the work done by Mr. Hoyle was negligible. This claim is primarily to enforce the scope of the Agreement and not for work performed. Employees who have lost work should be made whole, but where Agreement is breached claim is primarily to enforce the scope of the Agreement and not for work performed.

Nor is the amount of work performed material to the decision in this case. As was said in Award 1611 "to condone a seemingly slight violation would tend to undermine the basic structure of seniority rights".

The claim should be allowed.

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 Carrier violated the Agreement.

AWARD

Claim allowed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 7th day of February, 1961.

DISSENT TO AWARD NUMBER 9813, DOCKET NUMBER CL-9447

The problem dealt with in Award 9813 was subject solely to Rule 68, as amended, which provides in clear and positive terms that absences on vacation will not constitute vacancies in positions under this Agreement. It provides, also, the specific conditions under which an effort is to be made to observe the principle of seniority. In addition, specific penalty provisions are expressly included in Rule 68, as amended. Inclusion of such conditions must be taken as exclusion of all others.

Accordingly, there was no vacancy here and Claimant possessed no right under the pertinent provisions of the Agreement to exercise his seniority. Thus, the basic structure of seniority rights was not involved in this case.

In light of the explicit provisions of Rule 68, Award 9813 is in error and we dissent.

/s/ J. F. Mullen

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ W. H. Castle

/s/ D. S. Dugan

LABOR MEMBER'S ANSWER CARRIER MEMBER'S DISSENT TO AWARD NO. 9813, DOCKET NO. CL-9447

It is understandable why the Dissenters desire to confine the instant dispute to Rule 68 and thereby evade the force and effect of other rules of the Agreement.

Rule 68 is a general rule relating to vacations and provides that the Company will provide vacation relief workers, except under certain conditions not here pertinent. Nowhere in Rule 68 does it provide that the work of a vacationing employe may be performed by an employe or subordinate official outside the scope of the Clerks' Agreement, as was the case here.

The position in dispute was a 7-day position, relief being furnished on the rest days of the regular assignment. Rule 23½(d) is a special rule governing the filling of seven (7) day positions. The Rule provides, in part:

"It is understood seven (7) day positions will be filled seven (7) days per week."

There are no exceptions to the above quoted provision. Consequently, carrier's failure to fill the position for the full eight hours each day the regular occupant was on vacation, violated this Rule. Further, the seniority provisions of the agreement were violated by Carrier's refusal to allow claimant to exercise his seniority thereto and the Scope Rule was violated by allowing the Agent to perform the work. See Third Division Award 5657.

In Panel Argument, Carrier Member referred to Award 6311, Referee Elkouri, which is here controlling, even though Rule 68 could be interpreted in the manner contended by the Dissenters. In that Award, the Board said:

"* * * It is too well established to warrant citation that a special rule governs over a general rule."

Rule 23½ is a special rule requiring that 7-day positions be filled 7-days per week and would, therefore, prevail over Rule 68. However, there is nothing in Rule 68 that allows carrier to blank positions during vacation periods by permitting a non-scheduled employee or "outsider" to perform the work of the vacationing employee.

The Dissenters assertion that "specific penalty provisions are expressly included in Rule 68", which would exclude others, is unsound and untenable in view of the involved circumstances. Rule 68 has no bearing on the proper application of the Scope, seniority provisions and Rule 23½ of the Agreement. Therefore, the award of damages here was proper and in accord with a long line of awards on this Division. See "Labor Members' Answer to Carrier Members' Reply to Labor Member's Answer to Carrier Members' Dissent to Award No. 9546, Docket No. CL-9218.

Award 9813 properly disposed of the issues before the Board by sustaining the Employees' claim.

/s/ J. B. Haines

J. B. Haines
Labor Member