Award No. 10849
Docket No. CL-10561

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jerome A. Levinson, Referee

PARTIES TO DISPUTE:

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

HOUSTON BELT AND TERMINAL RAILWAY COMPANY

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

(a) The Carrier violated the Clerks' Agreement and the July 3, 1950 Memorandum of Agreement at the Settegast Freight Station by not calling Betty Ross, Extra Board employe, to fill vacancy on January 15 and 16, 1958, caused through rearrangement of office force. Also,

(b) Claim that Betty Ross be paid $19.09 per day, rate of Claim Investigator position, for January 15 and 16, 1958.

EMPLOYES' STATEMENT OF FACTS: On January 15 and 16, 1958, Mr. J. P. Glenn, occupant of Chief Claim Clerk position, layed off account death in his family. There was no effort made to fill the two day vacancy as required under our July 3, 1950 Memorandum of Agreement (Employes' Exhibit "A"), therefore, Division Chairman T. G. Brown filed claim on behalf of H. F. Pearson and Extra Board Clerk Betty Ross. (Employes' Exhibit "B").

The claim on behalf of H. F. Pearson was allowed but claim on behalf of Betty Ross was declined and an appeal was made to Superintendent Mr. W. L. Magee (Employes' Exhibit "C").

Mr. Magee declined the claim stating he saw no violation of the contract by blanking Pearson's position. (Employes' Exhibit "D").

Final appeal was made to the highest officer of the Carrier designated for that purpose. (Employes' Exhibits "E", "F", "G").

POSITION OF EMPLOYES: The question involved in this dispute is the application of Paragraphs (a) and (b) of the July 3, 1950 Memorandum of Agreement, known as the Extra Board Agreement. (Employes' Exhibit "A").

The first two sentences of its paragraph (b) is even more persuasive that Carrier has a right to blank jobs. Surely it could not be contended that the "employing officer" would have to satisfy himself, before deciding whether to call a replacement, whether the sickness was "bona fide", in addition to determining whether or not, by reason of a seniority and previous benefits, the employe laying off was entitled to further benefits. This would be expecting a lot of the "employing officer" when an employe called in the middle of the night to report himself sick to the extent of being unable to protect his job a few hours later.

The implication of Rule 57 seems clear that when a regular employe marks off it is optional with Carrier whether or not to blank his assignment*. Then, if successful in blanking the job, it will make certain payments to the absent employe under specific conditions, some of which might require intense and prolonged investigation to insure their existence, an investigation that might extend many days beyond the duration of the vacancy.

All data submitted in support of Carrier's position was presented to the Organization in the handling on the property.

(Exhibits not reproduced.)

OPINION OF BOARD: On January 15 and 16, 1958 Chief Claim Clerk at Carrier's Settegast Freight Station (J. P. Glenn) laid off account death in his family. Employes claimed this position was blanked, and requested (1) payment of Claim Investigator (H. F. Pearson) for difference between rates of his and Chief Claim Clerk's positions, on ground there should have been a rearrangement of regular force; and (2) payment of Claimant, assigned to extra board, on ground she should have been called to fill Claim Investigator's position. Carrier allowed the former but declined the latter. While the record does not show plainly that on both days Pearson actually moved up to the higher rated vacancy or performed duties on only one or both positions, it is sufficiently clear that the parties considered his position was blanked.

Employes relied upon Memorandum of Agreement dated July 3, 1950, entered into pursuant to Rule 25 of the Agreement between the parties, as providing a special rule imposing an obligation upon Carrier to fill the vacancy from the Extra Board. The relevant portions of these provisions were as follows:

"Rule 25. Extra Board

"(a) When it is mutually agreed, an extra board will be maintained and rules governing the manner of working extra board employes will be established in writing by mutual agreement."

"Memorandum of Agreement

* * * * *

*Except, of course, to the extent (not involved here) that Rules 6 and 10(b) of the Vacation Agreement require Carrier to provide a vacation relief worker to replace a vacationing employe.

"It is mutually agreed between the parties hereto that the following conditions will govern the filling of temporary vacancies in Seniority District No. 1:

"(a) All temporary vacancies caused by regularly assigned employes laying off will be filled by the rearrangement of the remaining regular assigned force in that office, with senior employes being given their choice.

"(b) Vacancies left after rearrangement of the regular assigned employes will be filled from the extra lists hereinafter provided."

Carrier regarded these provisions as "permissive" only, and as not denying to it the right to blank the temporary vacancy. It was argued in its behalf that the provisions merely outlined the procedure to be followed in filling such temporary vacancies it was either necessary or desirable to fill. Carrier noted that the Agreement contained no provision explicitly prohibiting the blanking of a position when its regular occupant was off. Also, it drew attention to Rule 11—Short Vacancies — which provided in relevant part as follows:

"Positions or vacancies of less than thirty (30) calendar days' duration shall be considered short vacancies and may be filled without bulletining".

Again, Carrier drew attention to Rule 57 — Sick Leave, asserting that the implication of that rule seemed clear that when a regular employe marked off account illness it was optional with Carrier whether or not to blank his assignment.

In the opinion of the Board, Employes' position must prevail. As maintained in their behalf, Rule 25, as implemented by the Memorandum of Agreement of July 3, 1950, took precedence over Rule 11 for the type of situation presented in this matter (Awards Nos. 4496 and 6278), and countervailed the absence of any provision explicitly prohibiting the blanking of a position in these circumstances. Paragraph (b) of that Memorandum is considered mandatory, upon action consistent with paragraph (a) which Carrier in effect accomplished by allowing the claim for Pearson. The fact that the expression "will be filled" is used, rather than "shall be filled", is not determinative. In this connection, the ruling in Award No. 1072 is pertinent. That Award, also concerned with a voluntary layoff situation, construed an extra board provision which lacked the directive force of paragraphs (a) and (b) of the Memorandum of Agreement of July 3, 1950. It stated in part as follows:

"The rule itself contains no language expressly imposing an obligation upon the carrier to fill temporary vacancies; but neither does it by any express words impose the obligation, soundly admitted by the carrier, to use employes from the extra board when temporary vacancies are in fact filled. Both duties are derived from the general purpose of the provisions as to the maintenance of extra boards contained in Rule 13. Under this rule these extra boards are to be maintained, not as a matter of course, but only 'when it is mutually agreed'. Such agreement would be reached, it must be presumed, when deemed of advantage to both parties. The benefit to the carrier would flow

from having one or more employes available for work at the location of the extra board at any time called for; and the benefit to the employes would flow from having the right to fill temporary vacancies at that location. The employes on the extra board have no guarantee as to the number of days per week work will be available to them; they must be assumed to have accepted the risk incident to the uncertain emergence of temporary vacancies. But if, in addition, the carrier could, as of right, keep blanked such temporary vacancies as do emerge, then the employes on the extra board would be holding themselves available at the particular location without any assurance of work whatever, even when temporary vacancies do occur, except in so far as the carrier might choose to use them. These considerations, coupled with the fact that Rule 13 expressly provides that positions on the extra board, like actual work positions and work vacancies, must be bulletined and assigned in conformity with the general rules of the Agreement pertaining to these matters, support the conclusion that under that rule employes regularly assigned to extra boards are entitled to fill such temporary vacancies as result from the voluntary layoff of the employes regularly assigned to the positions involved."

Two Awards involving the parties were cited, Award Nos. 7255 by Employes and Award No. 7256 in behalf of Carrier. In the former, claim was made that the regular occupant of a regular seven-day position should have been called to work her two rest days when the regular relief failed to report account illness. Carrier elected to fill the position, and the claim was sustained at the pro rata rate for eight-hour days. Employes cited Rule 25 and the Memorandum of Agreement of July 3, 1950, as requiring filling of the temporary vacancy, but the extra board was exhausted and the matter was determined independently of those provisions. In Award No. 7256, claim was made for reimbursement for certain senior available employes when Carrier refrained from filling temporary vacancies caused by illness of regular occupants of seven-day positions. The denial award stated that no specific provision in Rule 37 (Days' Work, Work Week and Overtime) made it mandatory upon Carrier to fill a temporary vacancy when the occupant of a position lays off of his own accord, and that the Forty Hour Week amendments did not provide a guarantee against blanking a position in those circumstances. The only reference made to Rule 25 was Carrier's assertion that it was not applicable. Thus, neither award rested upon an application of the special provisions considered here.

Several rules of other agreements, and awards thereon, concerned with a carrier's right to refrain from filling temporary vacancies in certain situations, were relied upon by or on behalf of Carrier to sustain its position. These involved a rule similar to Rule 11 (Award No. 6142); a guarantee rule similar to Rule 48(b)—(Awards Nos. 934 and 1412); or a Forty Hour Week rule (Awards Nos. 5589, 6691 and 7591). However, it did not appear that any of these situations involved a special provision similar to Rule 25 and the Memorandum of Agreement of July 3, 1950.

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

That the parties waived oral hearing;

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 violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 12th day of October 1962.