Award No. 11530
Docket No. CL-11636

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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

1. The Carrier violated the Clerks' Rules Agreement at Savanna, Illinois when it used an employe regularly assigned and working in Seniority District #138 to perform work in Seniority District #48 on one of his rest days at the straight time rate of pay to avoid calling an available regularly assigned employe in Seniority District #48, wherein the work occurred, at the overtime rate of pay.

2. The Carrier shall now be required to compensate Employe F. Vannini for eight (8) hours at the time and one-half rate of Icing and Heater Inspector Position #61 for December 8, 1958.

EMPLOYES' STATEMENT OF FACTS: The following positions were in effect in Seniority District #48 at Savanna, Illinois on December 8, 1958:

Pos. No.	Title	Occupant	Hours of Service	Rest Days	Rate of Pay	Rel. On Rest Day
F-30	PFI	L. Moore	7 am - 4 pm	Sat & Sun	19.7533	Yes
61	IHI	J. Tucibat	7 pm - 4 am	Tues & Wed	17.44	"
60	IHI	F. Vannini	7 am - 4 pm	Sun & Mon	17.44	"
	Rel	B. Adams	Various	Thur & Fri	Various	

Employe L. Moore is the regularly assigned occupant of Perishable Freight Inspector Position F-30 at Savanna, Illinois. His hours of service are from 7 A.M. to 4 P.M. Monday through Friday and his rest days are Saturday and Sunday.

Employe L. Moore was assigned a week's vacation from December 8 through December 14, 1958. PFI Position F-30 was not included within a regularly assigned vacation relief assignment.

employe making such request the provisions of Rule 9(g) obligated the Carrier to assign him to fill the temporary vacancy on Position 61 or subject itself to a claim from employe Graham.

On the other hand, Claimant Vannini did not request the temporary vacancy in question and in the absence of any such request on the part of Claimant Vannini the Carrier was in no way obligated to use him on said temporary vacancy nor is he entitled to any payment in connection therewith.

Although foregoing his right, **and obligation,** to request the temporary vacancy on IHI Position 61 on December 8, 1958 Claimant Vannini nevertheless subsequently submitted time claim for payment at the time and one-half rate of IHI Position 61 for December 8 on the basis that Rule 9(g) was a nullity and that the Carrier was required to fill the temporary vacancy on an overtime basis and consequently was required to call him for same under the provisions of the overtime rule. Under the circumstances here present there is no schedule rule or provision which would require the Carrier to "call" and use Employe Vannini, a regularly assigned employe with a position of his own, to fill the temporary vacancy on IHI Position 61 on an overtime basis in lieu of using Employe Graham, who had requested the temporary vacancy in accordance with the provisions of Rule 9(g), at the straight time rate of pay. There is no provision in the schedule agreement which requires the Carrier to fill temporary vacancies on an overtime basis. Many Board Awards have held that the Carrier is at no time required to have work performed on an overtime basis when same can be accomplished at the straight time rate.

Assuming, purely for the sake of argument, that in connection with the temporary vacancy with which we are here concerned no employe had made request for same and there was no furloughed employes available, then even under those circumstances there is no schedule rule or provision which would have prohibited the Carrier from employing someone to fill the temporary vacancy and we vigorously maintain that under those circumstances the Carrier would have been under no obligation to call Claimant Vannini on the basis of overtime to fill IHI Position 61 on December 8, 1958 in preference to hiring someone to fill the temporary vacancy for which there had been no request and for which there were no furloughed employes available. One of the inherent rights of the Carrier is to employ and there exists no provision by which the Carrier has contracted away that right. However, as Employe Graham made request for the temporary vacancy on IHI Position 61 on December 8, 1958 it is the Carrier's position that the temporary vacancy was filled in accordance with the provisions of Rule 9(g) which is not only applicable but fully controlling in the instant case and there cannot possibly be any basis for the claim of Employe Vannini.

There is no basis for this claim. There has been no violation of the rules. The Carrier respectfully requests that the claim be denied.

All data contained herein has been presented to the employes and made a part of the question here in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Immediately prior to and on December 8, 1958 Carrier maintained the following positions in Seniority District No. 48:

Position No.	Title	Occupant	Hours of Service	Rest Days
F-30	PFI	L. Moore	7 A.M. - 4 P.M.	Sat. & Sun.
61	IHI	J. Tucibat	7 P.M. - 4 A.M.	Tues. & Wed.
60	IHL	F. Vannini	7 A.M. - 4 P.M.	Sun. & Mon.
	Relief	B. Adams	various	Thur. & Fri.

L. Moore, Perishable Freight Inspector Position F-30, commenced his five work days of vacation on Monday, December 8, 1958. B. Adams, Relief Perishable Freight Inspector, requested and was assigned to fill the vacation vacancy on Position F-30. J. Tucibat, Icing and Heater Inspector Position #61, asked for and was assigned to Adams' Relief Position. There was no furloughed employe in District No. 48 available to fill Icing and Heater Position #61. Carrier assigned to G. Graham, regularly assigned to a position as Ice House Laborer in Seniority District No. 138, to fill the vacancy of Position #61 in Seniority District No. 48. Graham's regular rest days in his regular assigned position in Seniority District No. 138 were Monday and Tuesday.

Petitioner contends that Claimant, who occupied Position #60 in Seniority District No. 48, was available because Monday, December 8, 1958 was one of his rest days and that he should have been assigned to work that day at time and one-half rate, and not Graham, whose seniority was in District No. 138.

Positions of "Icing and Heater Inspectors" are classified in Group 2 and "Laborers employed . . . in ice houses" are classified in Group 3 of Scope Rule 1. Rule 2 states that "Perishable Freight Inspectors" and "Icing and Heater Inspectors" are in Seniority District No. 48 and "Ice House Laborers" in Savanna are in Seniority District No. 138.

In Employes' Reply to Carrier's Submission it is said:

> "It is the contention of the Employes that the work on the day involved was not accomplished at the straight time rate within the framework of the Agreement but in violation thereof."

Monday, December 8, 1958 was a rest day for Graham as well as for Claimant and there is no denial in the record that Graham was paid at the straight time rate for his work on that day. But that issue is not before us. We have no claim of Graham, for additional four hours at the straight time rate, to consider. Petitioner admits that: "Since the claim is not predicated thereon, it is unnecessary to rule thereon . . ." Whatever Carrier's motive may have been to use Graham instead of Claimant is material only as related to the terms of the Agreement as it affects the Claimant.

Many Awards of this Division are cited by Petitioner which generally hold that an employe may not be transferred from one seniority district to another in violation of the Agreement. They are not applicable because the facts and circumstances upon which these Awards were predicated are dissimilar to the facts in the present dispute. In Award 5927 (Parker) claim was made by the regular occupants of Perishable Freight Inspector positions for time and one-half rate for work performed on their rest days by an employe from another seniority district. We properly sustained the claim. In Award 10224 (McDermott) the regular occupant of the position requested pay for his rest day because an employe from another seniority district replaced the regular relief occupant who was ill that day. Award 11039 (Boyd) sustained a claim of regular assigned relief employe who was not assigned to work the

rest days of a vacation vacancy which he requested. Instead, Carrier assigned a furloughed employe who had worked the five previous days on that vacancy.

Claimant here is not the regular occupant of Position #61 who was deprived of the right to work his rest day in the absence of a regular relief employe or when the rest day is presumably blanked but work is performed. If we were considering a claim by Tucibat because an employe from another seniority district worked on his rest days, the Awards cited by Petitioner would be relevant for consideration. The same would be true if we were considering a claim for time and one-half pay for rest days after an employe had already filled the five days of the temporary vacancy.

The vacancy for Position 61 was for five consecutive work days starting Monday, December 8, 1958. Claimant, who was regularly assigned to Position 60, was only available for work on Monday, December 8, and not the other four consecutive work days because they were also work days of his regular position. No claim is made that Claimant requested the temporary vacancy of Position 61.

Rule 9 (g) provides:

> "New positions or vacancies of thirty (30) days or less duration shall be considered as temporary and may be filled by an employe without bulletining; if filled, the senior qualified employe requesting same will be assigned thereto."

This rule required Claimant to request the filling of the entire Position 61 vacancy. A request to fill the position for only one day (Claimant's rest day) is not sufficient. Monday, December 8 was a regular scheduled work day for Position 61. In Award 7298 (Carter) wherein we considered a comparable claim, we said:

> "In any event, claimant never requested assignment to the temporary vacancy, although he appears to have requested to work his rest days, Saturdays and Sundays. Under the rules, **he is required to request assignment to the position, not a part thereof.** We are of the opinion, therefore, that Coffey was properly assigned to work the relief position formerly assigned to Gier when it became vacant on January 7, 1953. Coffey had no Group 2 seniority and could attain none until he met the conditions set forth in Rule 3-A-1(c)." (Emphasis ours.)

It is clear that Claimant was not available to fill the temporary vacancy on Position 61. Since there were no other employes in District No. 48 available to fill that vacancy, Carrier had the right to assign Graham who had requested the temporary assignment even though his regular position was in Seniority District 138.

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 did not violate the Agreement.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1963.