

Award No. 11712

Docket No. TE-10145

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

TENNESSEE CENTRAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Tennessee Central Railway, that:

1. The Carrier violated the Agreement when on February 16 to February 24, inclusive, 1956, Monday through Friday, it transferred the regular assigned agent at Silver Point, Mr. E. E. Miller, from the Silver Point agency to work as agent at Double Springs, failing to fill the temporary vacancy at Silver Point and blanking the position of agent at Silver Point on February 16, 17, 20, 21, 22, 23 and 24, 1956.

2. The Carrier shall compensate the senior extra employe idle who is covered by the Agreement between the Tennessee Central Railway Company and The Order of Railroad Telegraphers, namely, Mr. H. G. Penrod, for February 16, 17, 23 and 24, 1956, and Mr. C. W. Tarpley for February 20, 21 and 22, 1956, these employes being the senior extra employes idle on the dates mentioned, for eight hours each day at the rate of \$289.85 per month.

3. The Carrier violated the Agreement when on April 2, 1956, it transferred Agent E. E. Miller at Silver Point to Double Springs to work as agent due to the absence of the agent at Double Springs, Mrs. Judd, and the Carrier left the position of agent at Silver Point vacant. Claimant Tarpley was the senior extra employe idle and was entitled to work the position as agent at Silver Point. This claim is for April 2, 1956, and each day thereafter so long as the position of agent at Silver Point is blanked; however, if Mr. Tarpley does not remain the senior extra employe idle during the entire period of this vacancy, then whoever is the senior extra employe idle is to be paid, and in the event there is no extra employe idle who is covered by our Agreement, the senior employe is to be compensated.

4. The Carrier shall compensate the claimant at the rate of \$289.85 per month, for eight hours each day, Monday through Friday each week, so long as the position of agent at Silver Point is blanked.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect a collective bargaining Agreement entered into by and between the

in the claim presented as required by Article V of the Agreement and Memorandum dated August 21, 1954 setting forth the manner in which claims and grievances must be filed and handled, in view of which the instant claim has no standing and it should be accordingly dismissed.

This case is without merit from any standpoint and should be dismissed or denied in its entirety.

Carrier is making this submission without having been furnished copy of Employees' petition and respectfully requests the privilege of filing a brief answering in detail the ex parte submission on any matters not already answered herein, and to answer any further or other matters advanced by the Petitioner in relation to such issue or issues.

All data submitted herein has been presented in substance to the duly authorized representatives of the Employees and is made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: There are two separate claims. In Claim No. 1 it is shown that E. E. Miller was the regular assigned agent at Silver Point, Tennessee. Mrs. W. W. Judd was the regular assigned agent at Double Springs, Tennessee. Both were agent positions covered by the Agreement. Claimants were extra employees on the Telegraphers' seniority roster.

On February 16, 17, 20, 21, 23 and 24, 1956, E. E. Miller filled a temporary vacancy position as agent at Double Springs, Tennessee, while Mrs. W. W. Judd was absent because of illness. Carrier blanked the agent's position at Silver Point for the same days and the position was not filled.

Petitioner filed a claim on behalf of H. F. Penrod, an extra, qualified, available employe for February 16, 17, 23 and 24, 1956, and on behalf of C. W. Tarpley, an extra, qualified, available employe for February 20 and 21, 1956. The claim is based on Carrier's alleged violation of Rule 17 (g) of the Agreement which reads as follows:

"When a temporary vacancy or position of less than thirty (30) days occurs, it will be awarded to the oldest available employe on the extra board, provided he is qualified."

On April 24, 1956, Carrier's General Superintendent wrote to Petitioner's General Chairman, in part, as follows:

"You quote Rule 17 (g) which provides for use of available extra employes to fill short temporary vacancies, provided they are qualified.

In my opinion, there was no violation of this rule. Neither Mr. Penrod nor Mr. Tarpley is qualified to handle an agency."

Appeal of the claims was made to Carrier's Supervisor of Wages who, on July 18, 1956, wrote to Petitioner, in part, as follows:

"It is not felt that the blanking of this position was in violation of any of the rules of the agreement or that an extra man, even if

qualified, has any contractual rights to a position which is not worked. As information, my investigation shows that Mr. Tarpley was engaged in continuing his training period on the dates claim is made in his behalf. Attention is also called to the fact that it was held in Third Division Award No. 6288, Clarksville case, that there is no requirement upon the Carrier to have regularly assigned employee to perform duties in a temporary position, and in instant case there were no duties to perform at Silver Point."

Claim No. 2 involves the same agent positions at Silver Point and Double Springs, Tennessee, which were held by the regular assigned employees E. E. Miller and Mrs. Judd, respectively. On April 2, 1956, E. E. Miller was transferred from his regular agent's position at Silver Point to the agent's position at Double Springs, to work there during the absence of Mrs. Judd. While Mr. Miller was working at Double Springs, his regular position at Silver Point was blanked.

Petitioner filed a claim on behalf of C. W. Tarpley "for April 2, 1956 and each day thereafter so long as the position of agent at Silver Point is blanked; however, if Mr. Tarpley does not remain the senior extra employee idle during the entire period of this vacancy, then whoever is the senior extra employee idle is to be paid, and in the event there is no extra employee idle who is covered by our Agreement, the senior employee is to be compensated." E. E. Miller was used as agent at Double Springs from April 2, 1956 to May 1, 1956. During that time, Miller's regular position at Silver Point was blanked and it was not filled.

In reply to Petitioner's General Chairman's letter presenting Claim No. 2, Carrier's General Superintendent wrote, in part, on April 17, 1956, as follows:

"No extra employee qualified to handle an agency was available when we were notified during the morning of April 2 that Mrs. Judd, Agent at Double Springs, was ill and would have to be absent indefinitely. As the Silver Point agency was handling virtually no business and there was no real need for an agent there, we instructed Mr. Miller to close the station at Silver Point and protect the Double Springs agency until further notice.

The agreement contains no prohibition against blanking positions and in my opinion, there could be no violation unless someone entitled to work was denied the opportunity to perform it. Under the agreement, rights to positions are conferred only on employees qualified to discharge the duties of the position and since Mr. Tarpley was not qualified, his claim will have to be respectfully declined."
(Emphasis ours.)

Carrier contends that (1) there was "no qualified extra employee available for the relief of Mrs. Judd at Double Springs on these occasions," (2) that "business at Silver Point having all but disappeared, Agent Miller was used until she (Mrs. Judd) recovered sufficiently to resume her duties," (3) that, under the holding in our Award 6288 "there is no requirement upon the Carrier to have regularly assigned employee to perform duties in a temporary position," (4) that the Agreement contains no rule prohibiting Carrier to blank a position and (5) that Claim No. 2 does not mention the dates for which claim is made on behalf of Claimant Tarpley in accordance with the provisions of Section 1 (a) of Article V, of the August 21, 1954 Agreement.

It is necessary that we first dispose of the procedural question. Claimants are named and the dates are specifically noted in Claim No. 1. In Claim No. 2, the Claimant is named with the date commencing April 2, 1956 and to continue for "so long as the position of agent at Silver Point is blanked." It also states that if Claimant does not remain the senior available, extra employe during that period, that whoever is the senior available, extra employe should be paid. This complies with the requirements of Section 1 (a) of Article V, of the August 21, 1954 Agreement.

This Division has established the principle that a claim is valid where Claimants can be easily ascertained and readily identifiable. The claim for February 16, 17, 20, 21, 23 and 24, 1956 name the Claimants. There can be no question about compliance with Article V of the August 21, 1954 Agreement. The claim for the vacancy commencing April 2, 1956 also names the Claimant. If Mr. Tarpley should, during that period, no longer be the senior, available, extra employe entitled to fill the vacancy, the proper senior, available, extra employe can be easily ascertained and readily identifiable from Carrier's records.

The issue in dispute should be decided on the merits.

The record does not support Carrier's position that no qualified, extra employe was available. On April 24, 1956, Carrier stated that neither "Mr. Penrod nor Mr. Tarpley is qualified to handle an agency." On July 18, 1956 Carrier wrote that "Mr. Tarpley was engaged in continuing his training period on the dates claim is made in his behalf." Carrier's highest appeal officer did not question the qualification of Claimant, H. T. Penrod.

The undisputed fact is that Tarpley performed his services satisfactorily during his employment and that he worked at various stations, in various positions, including four days as Agent at Silver Point prior to April 2, 1956. Irrespective of that, however, the Carrier has failed to show that Penrod and Tarpley were not qualified.

In the absence of proof to the contrary, it is presumed that Penrod and Tarpley were qualified. There is no evidence in the record that Claimants did not have sufficient ability to perform the work of an Agent. Mere assertions that they did not have such ability is not evidence of their qualification. There is enough evidence in the record to justify the conclusion that Claimants were qualified. This presumption is not overcome by any affirmative evidence.

It is no defense that the station at Silver Point was blanked because business there "all but disappeared." Carrier has the right to abolish a position, but it has no right to blank it unless there was no qualified, available employe to fill that position. This is admitted by the Carrier in the letter of April 17, 1956 wherein Carrier's General Superintendent said that in his opinion a position may be blanked "unless someone entitled to work was denied the opportunity to perform it." Claimants were entitled to the work and they were "denied the opportunity to work it."

Award 6288 (McMahon), upon which Carrier heavily relies, is not applicable. In that case the Carrier used a clerk to perform the duties of an Operator who was sick. There was no qualified Operator available. An emergency existed. Although we denied the claim, we said:

"It is conceded by the Carrier that a technical violation of the Agreement has been committed in assigning such position to the

Cashier, outside the work included in the Scope Rule. We agree that such action by the Carrier was of itself a technical violation, but that it was done by Carrier acting in good faith and not an attempt by Carrier to willfully or arbitrarily deprive employes coming under the Telegraphers' Agreement from performing work which rightfully belonged to them and we are of the opinion that Carrier, having discretion to act in an emergency as here existed, did so without actually depriving any of its employes compensation, since none of them suffered any resultant loss."

The factual situation and the reasons for the findings in Award 6288 bear no resemblance to the facts in this case.

In the absence of a contract provision prohibiting the blanking of a position, Carrier may do so, providing no qualified, available employe is deprived of the right to fill the position. Carrier may not, by blanking a position, accomplish the same result as by abolishing a position. Blanking of a position creates a temporary vacancy of that position which must be filled in accordance with the terms of Rule 17 (g).

For all of the reasons above stated, we conclude that there is merit to the claims.

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 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 Carrier violated the Agreement.

AWARD

Both claims are sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of September 1963.

CARRIER MEMBERS' DISSENT TO AWARD 11712, DOCKET TE-10145

Our dissent to Award 11713 is by reference made a part of this dissent.

On two separate occasions, the Agent at Silver Point was used to fill temporary vacancy at Double Springs, due to sickness of the regular occu-

pant and no qualified extra agent available. The claims in this Docket TE-10145 are the same as those in Dockets TE-8815 (Award 10458) and TE-10029 (Award 11713), but in this case the claims were filed and progressed in behalf of two named claimants and anonymous claimants for unspecified dates.

It was carrier's position that the two named claimants, Penrod and Tarpley, were being used to perform extra work on operator and operator-clerk positions but they were not qualified relief agents, and therefore, under the applicable rules, were neither available nor involved. Carrier's position was fully substantiated by the fact that petitioner did not question the use of the Agent at Silver Point (under Rule 14) instead of Penrod or Tarpley (under Rule 17) to fill the initial temporary vacancy at Double Springs. There was no evidence whatever that carrier's judgment of claimants' qualifications was arbitrary or capricious. Carrier was clearly under no contractual obligation to use either of these two claimants as relief agent.

Moreover, even on the basis of the majority's erroneous conclusion that Penrod and Tarpley were qualified the claims filed in their behalf made them "the employees involved." Since they were the only named extra board claimants, and there was no evidence that anyone else was involved in the claim, the majority should have confined the claim to the extent these two claimants were adversely affected by the claimed violation and dismissed the vague, indefinite and unproved claims of unnamed claimants as not meeting the specificity required by Article V-1(a) of the August 21, 1954 Agreement. Under Rule 17, when "the oldest available employe on the extra board" is used to fill a temporary vacancy, he is entitled to remain on that assignment until the regular occupant returns, at which time he reverts to the extra board and becomes "available" for other temporary vacancies in accordance with his seniority and qualifications.

For these reasons, we dissent.

R. A. DeRossett

R. E. Black

W. F. Euker

G. L. Naylor

W. M. Roberts