Award No. 11985
Docket No. CL-11617

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Jim A. Rinehart, Referee

PARTIES TO DISPUTE:

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

NEW YORK CENTRAL RAILROAD
(Southern District)

STATEMENT OF CLAIM:

1. Claim of the System Committee of the Brotherhood that: Carrier violated the current Clerks' Agreement when it failed and refused to pay the occupant of a regularly established position to which he had been regularly assigned by bulletin, for holiday pay on Thanksgiving Day, November 27, 1958, Christmas Day, December 25, 1958, New Year's Day, January 1, 1959, and subsequent holidays.

2. That the affected employe, Mr. Keith D. Hanes, shall be reimbursed for each day, November 27, 1958, December 25, 1958, January 1, 1959, and all subsequent holidays.

EMPLOYES' STATEMENT OF FACTS: Mr. Keith D. Hanes was employed in the Division Engineer's office at Indianapolis, Indiana, on September 3, 1957, on clerical position No. 28. This position was abolished on March 7, 1958, and Mr. Hanes was furloughed, retaining all agreement rights to be returned to the service.

On June 30, 1958, Mr. L. E. Doctor, who held clerical position No. 23, rate of pay $19.473 per day, suffered a stroke (paralysis) thus creating a vacancy which was properly bulletined on October 2, 1958. Mr. Keith D. Hanes was recalled from furlough on July 7, 1958.

The vacancy on position No. 23 was bulletined to the Division Engineer's seniority roster on October 2, 1958. Mr. Hanes bid-in the vacancy and was assigned to the position on October 10, 1958.

POSITION OF EMPLOYES: The basis of claim is that Mr. Keith D. Hanes is a regular assigned employe, and is entitled to holiday pay as prescribed in Article II of the "Chicago Agreement of August 21, 1954."

CONCLUSION

The claim progressed here is merely one more of several identical claims which have been progressed to the Second and Third Divisions by the various non-operating Organizations in an effort to secure holiday pay for extra or unassigned employes while temporarily working on regular jobs. The argument advanced by the Organization that the bulletining and assignment of a temporary vacancy makes the employe so assigned a "regularly assigned" employe is illogical and without basis. An employe assigned to a temporary vacancy in writing is no more "regularly assigned" than an employe who was assigned to the job verbally. In either case, their rights to the job depend entirely on the return of the regularly assigned man or displacement by a senior employe. The bulletining of a temporary clerical vacancy as required on this Carrier is just another of several methods of filling temporary vacancies, which vary according to the governing rule in the schedules of non-operating crafts on the various Carriers. The method of assigning temporary vacancies, however, has no bearing on the status of the employe assigned — he is still an unassigned employe working temporarily on a regular job.

The vacancy involved in claim progressed here was bulletined as a "temporary vacancy" in accordance with Rule 5, and bid by claimant on the vacancy plainly indicates it was his understanding that it would be a "temporary assignment."

The above conclusion is fully substantiated by facts and evidence hereinbefore presented, awards cited and exhibits attached.

The claim herein progressed is without merit and should be denied. Carrier respectfully requests that your Board so rule.

Carrier's position has been fully explained to Organization through correspondence and conferences on the property.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a claim for holiday pay for Thanksgiving, November 27, 1958, Christmas Day, December 25th, 1958 and New Year's Day, January 1, 1959, and all subsequent holidays.

Mr. L. E. Doctor held clerical position No. 23. Claimant, Mr. Keith D. Hanes held clerical position No. 28. Position No. 28 was abolished March 7, 1958 and Hanes was furloughed, retaining all rights to be returned to service. On June 30, 1958 Doctor suffered a stroke (paralysis) creating a vacancy which was properly bulletined October 2, 1958. Hanes was recalled from furlough July 7, 1958.

The vacancy on No. 23 was bulletined on October 2, 1958. Hanes bid in the vacancy and was assigned to the position October 10, 1958. Carrier says the position No. 23 was bulletined as a temporary vacancy. Hanes' bid was for temporary assignment.

The parts of the effective agreement involved here are as follows:

"RULE 5. VACANCIES.

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

"Positions or vacancies of indefinite duration need not be bulletined until the expiration of thirty (30) days from the day of employment or vacancy.

"Positions or vacancies known to be of more than thirty (30) days duration will be bulletined and filled in accordance with these rules.

"An employe returning after leave of absence may return to former position, or may, upon return or within three (3) days thereafter, exercise seniority rights to any position bulletined during such absence. Employes displaced by his return may exercise seniority in the same manner.

"(See addendum March 1, 1944)"

"VACANCIES, RULE 5 — ADDENDUM.
"MEMORANDUM AGREEMENT.

"Under the Clerks' Agreement Rule 5 provides that vacancies or positions of indefinite duration, but more than thirty (30) days, will be bulletined.

"It has been agreed that if such vacancy is due to the regular incumbent being absent on leave, or on account of sickness or injury, such information will be shown in the bulletin. This should be in the form of a simple statement, for example:

'Vacancy is caused by absence of John Brown.'

"For absence on leave, or on account of sickness or injury, Rule 5 provides that the regular incumbent may return to his former position or within three days exercise certain rights as spelled out in the rule.

"It is agreed that if such return of the regular incumbent is ninety (90) days or less subsequent to the date of the bulletin, the employe assigned temporarily can place himself under Rule 35, that is to say, by returning to his own regular assignment as more fully set forth in the last paragraph of Rule 5; on the other hand, if the original incumbent returns after ninety (90) days from date of bulletin, the man who took the job on the bulletin will only have general displacement rights.

"Where new positions are bulletined and subsequently prove to be temporary, general displacement rights apply.

"This understanding will be effective March 1, 1944."

Claimant contends the bid in vacancy having been assigned, constitutes a "regular assignment," saying that position of vacation was of indefinite duration need not be bulletined until expiration of thirty days from date of vacancy, and that such procedure was followed.

In effect, Claimant says the position should have been bulletined as a permanent position and that such procedure was followed except it was called a temporary vacancy, but that did not change the fact and that Hanes was

actually a "regularly assigned" employe under the provisions of the agreement above quoted.

The vacancy was filled by process of bulletin because it did last more than thirty days, but that did not alter Claimant's status or make the temporary assignment permanent.

Mr. Doctor had permanent rights to the position. Those rights were protected for him by the Agreement. He had not relinquished those rights. Those rights were definite. Whether he would ever exercise those rights did not make the rights indefinite. There can be only one employe regularly assigned to a position at one time. In this case that employe was Mr. Doctor. The Claimant, in the record, admits that the filling of the vacancy was properly handled, and in our opinion, this case cannot be distinguished from the awards holding that furloughed or extra employes who are used to fill vacancies caused by the absence of regular employes "are not regularly assigned" within the meaning of the Agreement. See Award No. 11436 — Dorsey:

> "The study of the awards makes clear that an employe temporarily filling a position is not 'regularly assigned' to it."

In Award No. 8324 — McCoy, the name of the occupant of the temporary assignment was placed on the seniority roster from the date of assignment and the claim of the Telegraphers' Organization there was that such assignment was temporary and this Board held:

> "The inherent, normal, common-sense meaning of the term 'regularly assigned' supports the Organization's position that it excludes a mere temporary assignment. The employe 'regularly assigned' to the job, that is, the man whose regular job it was, was away in the Army. Morgan held it only as a substitute, not regularly. He held it no more regularly after February 12, 1951, than he had between October 30, 1950 and February 12, 1951. He was not irregularly assigned to it in one case any more than in the other. If one assignment did not confer seniority, neither did the other. Since the Carrier admits that the assignment of October 30 conferred no seniority, we must hold that neither did the assignment of February 12. For these reasons the claim will be sustained."

The facts in this case are the same as those in Award 8324 except in the reverse order of the claim, namely, that the assignment was temporary.

Claimant not being a regularly assigned employe of position No. 23, the claim for holiday pay must be denied.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December 1963.

LABOR MEMBER'S DISSENT TO AWARD 11985, DOCKET CL-11617

In Award 11985 the Referee, as have many others before him, confused the status of the position with the status of the employe.

Since early Award 7430 attempted, properly or improperly, to distinguish between "regularly assigned" and "unassigned" or "extra" employes, this Board has only been privileged to have two Referees who found it within themselves to apply the Agreement as written instead of following foolish precedent.

Award 8906, Referee Francis B. Murphy, and Award 10013, Referee Harold M. Weston, properly interpreted the rules here involved. Those Awards, by their very logic in giving common meaning to the plain language of the Agreement, far outweigh the strained interpretation followed since Award 7430.

Each employe assigned to a position who is required to take over and perform the duties thereof, observe the conditions thereof, the hours of service, rest days, etc., is subject to being displaced therefrom by a senior employe. To follow the reasoning applied in this Award would mean that none but the one senior employe would be "regularly assigned" in any given district. Such reasoning strains and circumvents the clear language of the rule designed to protect an employe against loss in earnings when, having met the requirements in the rule, he is forced to work only four (4) days in his work week because of a holiday.

The Claimant in this case was regularly assigned and, as others, was subject to being displaced by a senior employe or cut off in force reduction by the Carrier. Until those changes took place, Claimant was regularly assigned to the position and entitled to all the rights and benefits flowing therefrom.

This Award and others of a like nature which were followed here represent a miscarriage of justice and cannot be accepted as a precedent.

For the above and other reasons, I therefore dissent.

D. E. Watkins [1-29-64]