Award No. 12094
Docket No. CL-12040

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

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

THE COLORADO AND SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4806) that:

1. The Carrier violated and continues to violate the terms of the currently effective Agreement between the parties when it failed and refused to pay the occupant of a regularly established position to which she had been regularly assigned by bulletin for Holiday pay on Monday, September 7th, 1959.

2. June Widger, Steno-Clerk in Purchasing Agent's Office at Denver, Colorado, now be paid the pro rata daily rate of the position occupied, ($18.105) for the day in question, namely, Labor Day, September 7th, 1959.

EMPLOYES' STATEMENT OF FACTS: On December 8th, 1958, Notice No. 51 was issued by the Purchasing Agent advertising a temporary vacancy of Steno-Clerk in the Purchasing Department at Denver, Colorado.

On December 17th, 1958, Assignment Notice was issued assigning Miss June Widger to the temporary vacancy. (See Employe's Exhibits "A" and "B".)

While the position of Steno-Clerk was first bulletined for a period of approximately ninety (90) days' duration, Miss Widger occupied the position until January 18th, 1960, or approximately 13 months on a temporary basis, at which time the position was re-bulletined as an indefinite vacancy in line with Rule 10 due to Miss Widger bidding for and being assigned to another position in the office.

Miss Widger was denied pay for Holidays, namely, December 25, 1958, Christmas Day and January 1st, 1959, New Year's Day, although she qualified for the pay under the rules. She complained to the Chief Clerk but did not file formal claim. Evidently the Chief Clerk took note of this as Miss Widger

ment and, of course, your Board is not empowered to so do. That is why the non-operating organizations are presently endeavoring to effect such agreement change through national negotiations.

It is affirmed that all data submitted herein in support of the Carrier's position have heretofore been presented to the Organization and are hereby made a part of the question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was assigned to a temporary position created by the absence on sick leave of Mrs. Gallatin, the regularly assigned employe. She was denied holiday pay by the Carrier because she was not the "regularly assigned" employe within the meaning of Article II of the National Agreement of August 21, 1954. The Claimant argued that she was.

The Agreement does not define what is meant by "regularly assigned" and no history or tradition was submitted to clarify its meaning. This Board, however, has previously dealt with the question on many occasions and has consistently held that an employe assigned as a temporary substitute for an absent incumbent is not "regularly assigned". See Awards 11985 (Rinehart), 11176 (Dolnick), 10833 (Russell), 9676 (Elkouri), 9117 (Begley), 7721 (no referee).

The Petitioner urges that Claimant be deemed "regularly assigned" because she was appointed to her position in accordance with Rule 3, Seniority Datum and Rule 8, Bulletins. These rules have no application here since they deal with the method by which the Claimant was assigned and not with the kind of assignment. No question has been raised that Claimant was not properly assigned under the Agreement. The method of assignment cannot make a temporary assignment permanent nor deprive the absent incumbent of her rights as the "regularly assigned" employe. There cannot be more than one "regularly assigned" employe to a position.

The Petitioner cited Award 8906 (Murphy) as authority for its position. This award, while seeming to run contrary to the consistent line of awards on the subject, is distinguishable on its facts. The vacant position in Award 8906 was created when the incumbent accepted a higher rated position. The Board deemed it significant that the incumbent had caused the vacancy by accepting another assignment. It said,

> "We agree with Carrier's contention that there can be only one regularly assigned employe. . . . So when an employe takes a higher rated position thereby causing a vacancy in her position she becomes the regularly assigned employe in her new assignment and the person filling her vacancy becomes the regularly assigned employe in her new assignment and the person filling her vacancy becomes the regularly assigned employe. . . ."

In the present case, the vacancy was not created by the incumbent employe accepting another assignment, but rather because of illness. This is precisely the situation confronting the Board in Award 11985 (Rinehart), where the Claimant was held not to have been "regularly assigned" when he was appointed to fill vacancy created by the incumbent suffering a stroke.

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 24th day of January 1964.

LABOR MEMBER'S DISSENT TO AWARD 12094
DOCKET CL-12040

In railroad parlance a "bulletin" is an advertisement or notice of a vacancy, i.e., a vacant position whether it be a newly created position or an established position vacant account the former occupant removing themselves from the position. The bulletin is issued advising all concerned so that those who may wish to exercise their seniority can obtain the position. Even without spelling it out in the Agreement it is basic that failure to attract an occupant for a position in the usual bulletining process, the Carrier may, absent any prohibitions against doing so, hire a new employe and assign and/or award the vacant position to the newly hired employe. The latter is precisely what occurred in this case. Claimant was, absent applications from any senior employe, hired and assigned and/or awarded the position of Steno-Clerk, as bulletined in Notice No. 51, on December 17, 1958, and worked continuously thereon until bidding off of the position January 18, 1960. She was not, during that period, granted "holiday pay" as provided in the rules. Claim was finally, but timely, made for holiday pay for September 7, 1959. This Award evidences the result.

In Award 12094 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