Award No. 12397
Docket No. CL-12044

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 CHESAPEAKE AND OHIO RAILWAY COMPANY
(Pere Marquette District)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4807) that:

(1) The Carrier violated the provisions of the current Clerks' Agreement when it failed to bulletin an existing vacancy on position of Warehouse Yard Clerk at its Manistee Freight Station, Manistee, Michigan and, instead abolished that position without proper advance notice thereby denying furloughed Clerk, Mr. Warren Kolb the right to perform work to which he was entitled.

(2) Mr. Kolb shall be paid a day's pay for each work day during the period of December 11 to December 21, 1959, inclusive, as a consequence of Carrier's violation of agreement.

EMPLOYES' STATEMENT OF FACTS: On November 27, 1959, the position of Expense and Bill Clerk was advertised as a temporary vacancy account the regular incumbent was granted a ninety-day leave of absence. It was assigned to Clerk Dolinski, who held the position of Car Clerk, (Employes' Exhibit 1 and 2). Clerk Dolinski's position of Warehouse Yard Clerk, leaving his former position vacant. December 4, 1959, was the last day Clerk Lidtke worked as Warehouse Yard Clerk. From December 4, until December 21, 1959, the position remained vacant, and no advice was afforded Claimant Kolb that the position was abolished until the Carrier posted an abolishment bulletin on December 16, 1959 (Employes' Exhibit No. 5).

Proper claim has been filed and progressed in the regular manner on the property up to and including the highest officer designated by the Carrier to consider such matters but the parties have been unable to compose their dispute. The claim as set out in the Employes' Statement of Claim is properly before your Honorable Board.

In the event the Employes would rely on Rule 58 in this case, Carrier points out this rule provides only that standard bulletin form will be used to cover reduction in force. The standard bulletin form was used. Nothing in Rule 58 provides that the standard bulletin form covering the abolishment of a position will be issued promptly upon a position being blanked, or, failing, an extra employe will be paid for the blanked position on and after the date the abolishment bulletin would have been effective had it been so posted.

Carrier submits Rule 58 of the agreement as well as the other rules of the agreement were complied with and Clerk Lidtke, not claimant, would have been the employe involved had the abolishment bulletin been improperly delayed. (See Rule 15). Rule 23 (a) provides that all claims must be presented in behalf of the employe involved and accordingly claim in behalf of claimant would stand to be declined in any event.

There is attached for the record, marked as Carrier's Exhibit No. 5, copy of the abolishment bulletin dated December 16, 1959 which gave notice to Clerk W. H. Lidtke that his permanent position as Warehouse Yard Clerk (Position No. 11) was to be abolished on December 21, 1959.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are not in dispute. Clerk Lidtke, who regularly filled yard clerk position No. 11, was assigned to fill a temporary vacancy on December 7, 1959. On December 11th he was declared the successful applicant for the job he was temporarily filling which was then on bulletin. Position No. 11 was blanked from December 7th to December 21st when it was abolished under a notice issued by the Carrier on December 16th. Claimant Kolb was the senior furloughed extra employe subject to being called to perform extra work in accordance with the rules.

The Petitioner argued that the Carrier had no authority to blank the position and should have bulletined the vacancy and returned the Claimant to the position as the next senior furloughed employe, as required in Rules 15 (d) and 15 (e).

The Carrier argued that it was not required by the rules to bulletin this position because it was a short vacancy. Short vacancies are governed by Rule 10 which reads as follows:

"Rule 10 — Short Vacancies

> Positions or vacancies of thirty (30) calendar days' duration or less shall be considered short vacancies and will be filled without bulletining but in making the assignments, the provisions of Rules 7 and 15 will be observed. Where there is reasonable evidence that such vacancy or position will exist for more than thirty (30) days, it shall be bulletined in accordance with Rule 8, showing, if possible, probable duration." (Emphasis ours.)

The word "will" used in the Rule, the Carrier urged, should not be taken to be a requirement that the position be filled but merely that if it were filled it should be filled in accordance with the Rule governing Seniority. The Carrier further argued that if the position had been bulletined the Carrier would have been under no obligation to fill it temporarily while the bulletin was pending. It pointed to Rule 9, which reads:

"Rule 9 — Temporary Assignment

Bulletined positions may be filled temporarily pending an assignment, and, in the event no applications are received from employes covered by this agreement, the position may be filled by appointment, assignment bulletin being posted to cover." (Emphasis ours.)

Under this Rule, the Carrier argued, the position "may" be filled by appointment. The Carrier was thus, under no obligation to fill the position and it could, therefore, be blanked. The Carrier argued that the Petitioner acknowledged that blanking the job was proper when it abandoned its claim for the period between December 7th and 11th. Since the position was going to be abolished, bulletining the job would be an exercise in futility and unnecessary.

The Carrier also argued that if it had used all the time permitted in which to bulletin and then made an assignment on the last day permitted, it would have been after December 21st, the date on which the position was abolished and the Claimant would have had no claim.

The heart of this controversy is the right of the Carrier to blank a short vacancy. There is no rule in the agreement which permits blanking. When a vacancy occurs a Carrier is obliged to bulletin it if the vacancy is to last for more than thirty days. The rules with respect to bulletining do not, however, apply here because the vacancy was for less than thirty days. The Carrier itself determined that the vacancy would be a short vacancy and this has not been challenged by the Organization. In the absence of a challenge by the Organization the Carrier's estimate that the vacancy would be for less than thirty days must be considered as determinative of the length of the time the vacancy would take. Accordingly, none of the arguments used by the Carrier which would apply if the Carrier had bulletined the job has any relevance to this problem and must be disregarded.

The language used in Rule 10 requires that the Carrier fill such a position. The Carrier argued that if it were considered mandatory and every short vacancy had to be filled, no employe would be entitled to sick leave under Rule 47, which obliges the Carrier to allow compensation for sick time provided the employe's work is kept up by the remaining employes without additional expense to the Carrier. This argument is not relevant. We are not concerned with a position which has been vacant because the incumbent is on sick leave. Here the former incumbent now occupies another position. The Carrier's argument that the temporary assignment provided for in Rule 9, which covers the filling of a vacancy while a job is being bulletined, is also not applicable here because this job was not bulletined.

The Carrier frankly admitted that the position was not filled because business was bad and it intended to abolish the position. Carrier is permitted to abolish a job, which is the relief provided when a position is no longer needed. There is no provision permitting the blanking of a position while the Carrier debated the possibility of abolishing it.

Rules 15 (d) and (e) support the Organization's argument that the Carrier is obliged to fill a short vacancy. Rule 15 (d) and (e) read as follows:

"Rule 15 — Reducing Forces

(d) When forces are increased or vacancies occur, furloughed employes shall be returned, and required to return, to service in the order of their seniority rights. When a new position or vacancy is bulletined and is not filled by an employe in service senior to a furloughed employe who has protected his seniority as provided in Section (c) of this rule, the senior furloughed employe shall be notified and assigned to the position.

(e) Furloughed employes failing to return to service within seven (7) days after being notified (by mail or telegram sent to the address last given) or to provide satisfactory reason for not doing so, will forfeit all seniority rights and be closed out of service."

The obligation is placed on the Carrier to return the employe and on the employe to return to the job. The obligation on the employe is so binding that paragraph (e) provides that he will forfeit all seniority rights and be closed out of service if he fails to return within the prescribed time.

Following paragraph (e) the agreement provides the following:

"NOTE 1: Furloughed employes may waive their right to return to service on positions or vacancies of less than thirty days' duration by filing written notice with the officer authorized to bulletin and award positions and the local chairman. Such notice may be cancelled by similar written notice."

Note that the employe is permitted to waive his right on vacancies of less than thirty days' duration. Such language fortifies the Organization's argument that the Carrier was obliged to fill a short vacancy. Any other interpretation would render the right to return by furloughed employes meaningless. An employe who has a right to return must be returned.

The Carrier relies on the second sentence in Rule 15 (d). Since this position was not bulletined, all arguments with reference to the way bulletined vacancies were to be handled are not relevant.

Carrier argued that by withdrawing claims for the four days, December 7th, 8th, 9th and 10th, the Petitioner conceded that the Carrier may blank the position. This inference does not follow. During that period of time Lidtke was the regularly assigned employe on temporary assignment in another position. It is possible also to infer that Petitioner elected not to claim for this period because of the complications added by that fact and not because it agreed that the job could be blanked during this period of time. The failure of a Claimant to claim all the time that he might should not be construed as an admission that the Carrier's position is correct for those days omitted. It only means that the Petitioner makes no claim therefore.

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 10th day of April 1964.