

Award No. 13477

Docket No. CL-13606

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Daniel Kornblum, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
THE NORTHERN PACIFIC TERMINAL COMPANY
OF OREGON**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5224) that:

(1) The Carrier violated the terms of the Clerks' Agreement when it appointed E. F. Knoche to Relief Clerk Job No. 123 and required him to occupy the position from September 6 to September 12, 1961, and,

(2) Carrier shall now be required to compensate E. F. Knoche a day's pay at Truckman rate (\$19.77 per day) for September 6 and 7, 1961; a day's pay at Store Clerk rate (\$19.62 per day) for September 8, 1961; a day's pay at Oil House Clerk rate (\$19.62 per day) for September 11 and 12, 1961; and for the difference between straight time rate paid and time and one-half rate for September 9, 10, 16, and 17, 1961.

EMPLOYEES' STATEMENT OF FACTS: Claimant E. F. Knoche has a seniority date of May 16, 1956. At the time of Carrier's action which brought about this dispute, he was on the Mail and Baggage Department Extra Board, having exercised displacement rights to go onto the board on March 11, 1961, upon being displaced from a regularly assigned position by a senior employee.

Under date of August 28, 1961, Carrier issued Bulletin No. 3797 advertising for bid a temporary vacancy on Relief Clerk Job No. 123 in the Ticket Office, due to the extended illness of the regular incumbent, Audrey Hough. Bids for this vacancy closed at 4:00 P. M. on Friday, September 1, 1961. Said bulletin reads as follows:

**"THE NORTHERN PACIFIC TERMINAL COMPANY
OFFICE OF MANAGER
B U L L E T I N**

Position of Relief Clerk, Job 123 in the Ticket Office. Work week: Wednesday through Sunday. Days off: Monday and Tuesday.

#3797
Portland, Ore.
Aug. 28, 1961
Nature of vacancy:
Account illness
Audrey Hough.

OPINION OF BOARD: The dispositive facts are not in dispute. The issues are (1) whether the Carrier had the right under Rule 10 (c) of the Clerks' Agreement to appoint the Claimant against his will to the temporary vacancy in question (occupied by Claimant for five working days, from September 6 through 10, 1961), and (2) even if the Carrier had no such right, whether the Claimant suffered any material loss by reason of the appointment.

The vacancy, indefinite in duration, was caused by the long-term illness of the regular incumbent of the position, Relief Clerk, Job 123 in the ticket office. The Carrier bulletined the vacancy for bidding, but no bids were received. The Carrier then appointed the Claimant to the vacancy notwithstanding that there were employees in his seniority group junior to him in the Carrier's service, including some on the Mail and Baggage Department Extra Board where the Claimant had been working. The Carrier felt it had the unconditional right to make the appointment under the provisions of Rule 10 (c), which reads as follows:

"(c) In event no applications are received on bulletined positions, such positions may be filled by appointment."

Standing alone it would seem clear that the Carrier correctly interpreted and applied this Rule to the situation at hand. In other words, in making appointments under the circumstances envisioned by the Rule, the Carrier is unhampered by any restrictions or qualifications of employee seniority and could, if it chose, appoint its most senior employee to the unbid vacancy. The difficulty with such an interpretation is that it reads the Rule in *vacuo*, divorced entirely from other apposite provisions of the Agreement. Thus, it ignores Rule 7 of the Agreement which provides:

"Employees declining promotions or declining to bid for a bulletined position shall not lose their seniority."

Stated differently, Rule 7 means that the Carrier is not free to disregard seniority prerogatives simply because any or all of the employees decline to bid for a bulletined position. Yet the net effect of the Carrier's interpretation of Rule 10 (c) is, in practical result, to strip from the term "seniority" some of its contractual attributes under this Agreement.

What then are some of the attributes of "seniority" under the Agreement? Rule 4, for example, provides in part that seniority shall be a factor in making "Promotion, Assignments, and Displacements under these rules" (Emphasis ours.) But as the Carrier would have it, if nobody bids for an assignment then, under Rule 10 (c), it is free to ignore any factor of seniority in making the assignment. In light of the Agreement read as a whole such a construction is untenable, and, therefore, to the extent that this claim is botched on objection to such a construction it is well taken.

The issue of the damages, if any, sustained by the Claimant is another matter. The record shows that the vacancy to which Claimant was assigned for the several days in question paid rates of pay all higher than any of the Extra Board assignments which Claimant says he would have received had he then remained on the Extra Board. Moreover, if the Claimant had stayed on the Extra Board during the period involved he would not have received any pay for the two Saturdays and Sundays in claim, much less the premium pay he now seeks. The reason is that as a Clerk on the Extra Board he would not have worked at all on those week-ends. In short, by working the disputed

assignment, even though against his will, Claimant made more money in wages than he would have earned in the position he was forced to leave and to which shortly thereafter he was returned.

The monetary claim must therefore, be denied because of failure to prove any damages. See e. g., Awards 10963 (Dorsey), 10511 (Dolnick), 12024 (O'Gallagher), 12937 (Yagoda).

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 Employees involved in this dispute are respectively Carrier and Employees 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 violated to the extent indicated in the Opinion.

AWARD

Claim 1 sustained.
Claim 2 denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of April 1965.