Award No. 13706
Docket No. CL-14139

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

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

PACIFIC FRUIT EXPRESS COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5394) that:

(a) The Company violated the Agreement between the parties effective June 1, 1952, when on August 26, 1962, at Roseville, California, it failed to call Iceman P. E. Tafoya to a vacancy on a position of Iceman; and,

(b) The Company shall now be required to allow Mr. P. E. Tafoya eight (8) hours' compensation at pro rata rate of Iceman.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement bearing effective date June 1, 1952, (hereinafter referred to as the Agreement) between the Pacific Fruit Express Company (hereinafter referred to as the Company) and its employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter referred to as the Employes) which Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

1. On August 26, 1962, Mr. J. L. Martinez, regularly assigned to Iceman Position No. 5487, hours 3 P.M. to 11 P.M., laid off account illness. The Company did not fill the vacancy notwithstanding the fact that Mr. P. E. Tafoya (hereinafter referred to as the Claimant) was the senior qualified unassigned employe available, and entitled to be called thereto under the clear and unambiguous provisions of Rule 6(a)3, among others, of the Agreement.

2. By letter dated August 27, 1962, Mr. Milton W. Lockwood, Local Chairman, filed claim with Mr. E. J. Nelson, Plant Manager, for eight hours' pay at Iceman's rate alleging violation of Rules 6(a)3, 28 and 30, among others, of the Agreement.

On September 6, 1962, Mr. Nelson denied the claim based on the following reasons:

> "Maximum crews employed. On August 19th we received cancellation of main orders (Initial icing of empties for Mendota melons).

of the Agreement are clear and unambiguous and do not lend themselves to the meaning the Organization seeks.

CONCLUSION

The Company has conclusively shown herein that the claim of the Organization in this Docket is entirely lacking in merit or Agreement support and should in all respects be denied and it requests this Honorable Board to so order.

(Exhibits not reproduced).

OPINION OF BOARD: This incident took place at Roseville, California, when on August 26, 1962, the regular assigned Iceman, with hours from 3 P. M. to 11 P. M., laid off from this shift. The Company did not fill the vacancy and the Organization regards this as a violation of its agreement with Carrier, dated June 1, 1952, when it failed to call the senior qualified unassigned employe to fill the incumbent's vacancy.

The Organization contends that the incumbent laid off account of illness; that Claimant was the senior qualified unassigned employe, available and entitled to be called to fill the vacancy under the clear and unambiguous provisions of Rules 6 (a) 3, 28, and 30 of the Agreement. Pertinent portions thereof, are:

"BULLETINING POSITIONS

"Rule 6.

(a) 3. New positions or vacancies of thirty (30) calendar days or less duration, shall be filled whenever possible, by the senior qualified unassigned employe who is available . . ."

"ICE PLANT AND PLATFORM FORCES—REGULAR

"Rule 28.

(a) The maximum number of regular assignments consistent with the requirements of the service will be established."

"EXTRA BOARDS

"Rule 30

Extra boards regulated by the local supervisors and local chairmen will be maintained for Class 3 employes at each point."

Carrier asserts that neither the incumbent or the Claimant made their whereabouts known or were available for a call; that it is the prerogative of management to determine number of employes necessary to satisfy requirements of service on any particular day; mere existence of an assigned position does not obligate management to fill the position; there is no provision in the Collective Agreement prohibiting management from blanking positions at anytime and that Rule 6 must be read as a whole providing for bulletining procedure.

From evidence presented upon the property, it appears Carrier complied

with and was not in violation of Rule 28 (a). Although the Carrier abolished a total of 34 jobs as bulletined on August 19, 20, 25 and 28, the incumbents position was not abolished on the day in question, and was in existence and maintained by the Carrier to meet the requirements of service under Rule 28 (a). That the position was in existence is shown in the Carriers denial letter of the Organizations claim on September 6, 1962. It reads in part:

> "Maximum crews employed . . . Management would have worked Mr. J. L. Martinez, but believe it unreasonable **to fill a vacancy created by the assigned employe** himself when there was no work for the man." **(Emphasis ours.)**

There is no basis for this Board to discuss Rule 30—"Extra Boards". The record does not show Claimant "assigned to" the Extra Board or that the extra board was not properly set up. The Employes base their claim on Rule 6 (a) 3, that Claimant was the senior qualified **"unassigned employe"** who was available and the Company was obligated to call him and fill the vacancy under Rule 6 (a) 3.

Carrier specifically contends that the iceman position in dispute and other Rule 1, Section (d) positions were excluded from the bulletin provisions by Rule 6 (a) 1:

> "These rules will govern the hours of service and working conditions of all of the following class of employes, subject to the exceptions noted below:
>
> (d) Other employes employed in and around offices, stations, storehouses, ice plants and platforms."

Rule 6 (a) 1 reads:

* * * * *

> "1. Positions included in Rule 1, Section (d), will not be bulletined, but notices of new positions or vacancies will be posted on bulletin boards at the location involved. Employes desiring such positions must file their applications for some within three days and preference will be given to senior qualified employes . . ."

The Carrier asserts, therefore, the remaining provisions of Rule 6 (a), particularly the provisions of paragraph 2 and 3, have no bearing whatever on such position and are inapplicable. We agree.

We find that paragraph 6 (a) 3 is not mandatory, under the rule, to fill the vacancy in dispute. Rule 6 (a) Bulletining Positions, sets forth the manner in which positions will be filled to protect the seniority rights set forth in 6 (a) 3. The method is to be by notice, for the position in dispute, as outlined for iceman in 6 (a) 1: "Employes desiring such positions must file their application for the same within three days and preference will be given to senior qualified employes."

Carrier does not dispute that Claimant was the Senior qualified unassigned employe at the time the vacancy occurred on August 26, 1962. Under Rule 6 (a) 3, Claimant was not guaranteed that when the incumbent laid off, Carrier was mandatorily required to place the Claimant in the incumbents' position during his absence. Nor does it bear on the matter of whether or not

a position must be filled each and every day. (Award 6889) Rule 6 (a) 3 is clear in this respect that, "New positions or vacancies of thirty (30) calendar days or less duration, shall be filled, whenever possible, by the senior qualified unassigned employe who is available . . ." (Emphasis ours.)

In Award 6889, the Board held:

". . . If Employes intended this rule to read that Carrier was directed to fill such a vacancy then the proper wording was not inserted in the rule, as the sentence now reads it relates exclusively to the bulletining and does not include a mandatory direction that the position shall be filled."

Award 12686 held:

" 'That guarantee runs personally to the incumbent of a position rather than impersonally to the job itself. That quite aside, there is nothing in the Agreement which makes mandatory the filling of a position when its regular occupant absents himself * * *' "

There being no provision in the Collective Bargaining Agreement, prohibiting management from blanking the position in question, we find no violation of the Agreement.

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 30th day of June 1965.

LABOR MEMBER'S DISSENT TO AWARD 13706, DOCKET CL-14139

Award 13706 is totally in error in interpreting Rule 6 (a) 1 as the only way to fill a Class 3 position and 6 (a) 3 as a "permissive" rather than a "mandatory" rule inapplicable to vacancies in Class 3.

For clarity Rule 3, which sets out the classes referred to herein, reads as follows:

"Rule 3—SENIORITY CLASSES

Seniority classes shall be as follows:

Class 1. Employes as defined in Rule 1, except sections (c) and (d).

Class 2. Employes included in Rule 1, section (c).

Class 3. Employes included in Rule 1, section (d)."

We were here concerned with a Class 3 position; specifically, a vacancy of thirty (30) days or less duration which occurred in a Class 3, or Rule 1 (d), position. We were asked to determine the right of the Claimant, the senior qualified unassigned Class 3 employe, to either fill the vacancy or be paid in lieu thereof because Carrier failed to use him.

Rule 6 captioned "Bulletining Positions" has as its sole function the establishment of procedures for "filling" positions or vacancies. These procedures are clearly spelled out in the several paragraphs thereof and should have been reconciled and construed together. Paragraph (a) requires that:

> "All new positions or vacancies shall be promptly bulletined on bulletin boards accessible to all employes affected, except as provided in Paragraph 1, 2, and 3 of this rule. * * * ."

Paragraph 1 is shown in pertinent part in the Award. It will not be repeated here. Suffice it to say that it deals with the procedure for advertising or posting notices of new positions or **vacancies of over thirty (30) days duration** in the specific class (Class 3) here involved. It is a substitute method for bulletining Class 3 positions only.

Paragraph 2 reads:

> "Positions or vacancies of thirty days or less duration; or positions established for special work, other than regular routine work, including positions in connection with loading seasonal perishable traffic, of ninety days or less duration, may be filled without bulletining."

and deals with filling "short" vacancies, without reference to "Class", and "special" positions of ninety (90) days or less duration. The sole purpose thereof, after all the language is considered, is contained in the last phrase stating that such positions "may be filled **without bulletining.**" (Compare Award 6889).

Paragraph 3, contrary to the Carrier's arguments and the Referee's findings, deals specifically with the matter that was supposed to be under consideration by the Board. That is, filling vacancies of thirty (30) calendar days or less duration. Paragraph (a) previously discussed, by excepting paragraph 1, 2, and 3, stipulates that such vacancies, regardless of classification, will not be bulletined. Therefore, paragraph 3 treats and deals with **the filling** of vacancies of thirty (30) calendar days or less duration. It is not limited by its terms to only those normally required to be bulletined under paragraph (a) nor only those under paragraph (a) 1 or (a) 2, but rather to positions or vacancies of thirty (30) days or less duration **in any class.** It specifically states that such vacancies "shall be filled, whenever possible" and proceeds to spell out clearly by whom they shall be filled i.e., "by the senior qualified

unassigned employe who is available", he being restricted as spelled out in the rule regarding service in excess of eight hours in a calendar day and 40 hours at straight time in his work week. Paragraph 3, because it treats and deals specifically with the situation involved in this claim, is quoted in full so that all may see that it is not limited by its terms to Class 1 and 2 positions but applies with equal force to Class 1, 2, and 3 positions and vacancies.

"Rule 6—Bulletining Positions

3. New positions or vacancies of thirty (30) calendar days or less duration, shall be filled, whenever possible, by the senior qualified unassigned employe who is available and who has not performed eight (8) hours work on a calendar day; an unassigned employe will not be considered as being available to perform further work on vacancies after having performed five (5) days or forty (40) hours of work at the straight time rate in a work week beginning with Monday, except when such unassigned employe secures an assigned position under the provisions of Rule 6 or returns to the extra list from a position to which he was assigned, in which event he shall be compensated as provided for in Rule 31, Sections (d) and (e)."

It is noted that the Referee underscored **"whenever possible"** as though that phrase had particular significance to him but did not elaborate thereon. However, in view of the entire Rule 6 and the specific language of paragraph 3 thereof, together with the fact that "Carrier does not dispute that Claimant was the Senior qualified unassigned employe at the time the vacancy occurred on August 26, 1962", it is obvious the Referee entirely misconstrued the plain provisions of the Rule which clearly sustained the Employes position.

The Award is totally in error. The Referee apparently made no attempt to reconcile the various rules but chose, instead, to interpret one dealing specifically with the filling of vacancies of thirty (30) days or less duration as being inapplicable to Class 3 positions. The Referee should not have read such a restriction into the rule. The Award is clearly in error and creates a hopeless and irreconcilable conflict between the various rules of the Agreement. I therefore dissent.

D. E. Watkins, Labor Member

7-27-65

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 13706, DOCKET CL-14139 (Referee Mesigh)

With scholarly perception the Referee in this case has read the controlling Agreement as a whole, harmonized the pertinent provisions, and given effect to the clearly manifested intention of the parties.

What the Claimant and the Dissenter sought to do here is obvious. They extracted a part of a sentence from an ordinary bulletin rule and sought to read it in isolation in order to expand on its manifest purpose, thereby imposing unintended and improper restrictions on management. To have sustained this claim, the Referee would have had to violate the very same elementary rules for the interpretation of contracts which the Dissenter now falsely accuses him of violating.

The Dissenter asserts that the award is in error in ruling: (1) that Rule 6 (a) 1 is the only way to fill Class 3 Positions, and (2) Rule 6 (a) 3 is "permissive" rather than "mandatory" insofar as blanking a position is concerned. Since this claim must fall under the second ruling in any event, we will not dwell on the first ruling other than to note the obvious fact that in order for the Dissenter to arrive at the meaning which he attributes to Rule 6 (a) 1 he is compelled to add to that rule the words **"vacancies of over thirty (30) days duration."** These words, upon which the Dissenter places such great emphasis, do not appear in the rule and this Board cannot insert them **(Awards 7296, 8219, 9198).**

Turning to the Dissenter's second and main point, Rule 6 (a) 3 certainly contains mandatory language pertaining to the procedure to be followed when a position is filled. But the issue in this case is whether this bulletin rule creates a mandatory guarantee that Carrier will not blank this laborer position. The simple question is, did this unassigned Claimant have an absolute guarantee under Bulletin Rule 6 (a) 3 that Carrier would not blank the laborer position when the regularly-assigned occupant of the position absented himself and his services were not required?

The absurdity of the claim becomes apparent when we review the guarantee rules of the Agreement, for there we find that the regularly-assigned occupant himself had no guarantee whatever against Carrier blanking this position whenever business permitted. The minimum weekly guarantee rules (Rule 17-b and the note thereto) expressly except the hourly-rated laborer positions from all of the guarantees therein provided. Thus, if the regularly-assigned occupant of this position had been available but had been withheld from service on this date and his position blanked because of the absence of work, he would have had no possible claim for he was expressly excepted from the weekly guarantee provisions of the Agreement.

Reading guarantees into bulletin rules would almost inevitably lead to gross inconsistencies, as is the case here. Since the regularly-assigned employe, by express exception in the Agreemnt, has no guarantee that his position will not be blanked on days that his services are not required, we would indeed have rare inconsistency in the Agreement if it prohibited the blanking of the position on days when the regular employe himself lays off and his services are not required. As sole support for the contention that such a guarantee exists in favor of the unassigned employe, Petitioner cites the bulletin rule. It is well established that such an ordinary bulletin rule is not a guarantee rule, and that absent some express provision in the Agreement to the contrary, Carrier may blank regularly bulletined positions. **Awards 13175, 13161, 12686, 12358, 7256, 6889, 6142, 1633, 1412.**

The arguments advanced by the Dissenter are unsound when the Agreement is read as a whole, and such arguments have been consistently and repeatedly rejected by this Board. In denying that bulletin rules created a guarantee against blanking positions, we ruled in **Award 12358** (Dorsey):

> "It is axiomatic that all prerogatives inherent in management, except to the extent circumscribed by law or contract, remain vested in a carrier. Absent either of such circumscriptions, the determination of its manpower requirements is within the sole judgment of Carrier. Here, we have only to consider whether Carrier's right to exercise its judgment, to fill or let stand vacant a position, is impaired by the Agreement.

"Rules 56 and 57 of the Agreement, **supra,** establish procedures to which Carrier is required to adhere in bulletining new positions or vacancies. **The sense of the Rules is that new positions or vacancies can be filled by Carrier only in compliance with the procedures agreed to therein. These Rules, neither literally or by implication, can be construed as * imposing an obligation on the Carrier to fill a vacancy. To construe the Rules as prayed for by Petitioner, 'we would have to read into/them/that which is not contained therein'—this would be beyond our power.** Award No. 10888. Therefore, we will deny the claim."

In addition to the clear intent of the Agreement which we have discussed, there is a public policy which deserves mention in this case. The objective of the claim is to impose an unreasonable penalty on efficient operation. It is not denied that cancellations by shippers had eliminated the need for many laborers. Carrier shows that if Claimant had been on duty there would have been no work for him to perform. Add to this the undenied fact that Claimant had been absent without leave from his previous assignment on the days immediately preceding, hence according to Carrier was not available, and it becomes apparent that the demand for a day's pay to Claimant is simply a demand that an unreasonable penalty be imposed on efficient operation. In prosecuting such a claim, or in seeking in any other way to so penalize Carrier for operating efficiently, the employes are overlooking their own obligation as well as that of Carrier under law and public policy to foster economical and efficient service.

/s/ G. L. Naylor
G. L. Naylor

/s/ R. A. DeRossett
R. A. DeRossett

/s/ W. F. Euker
W. F. Euker

/s/ C. H. Manoogian
C. H. Manoogian

/s/ W. M. Roberts
W. M. Roberts