Award No. 14290
Docket No. CL-15281

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nicholas H. Zumas, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5643) that:

(a) The Southern Pacific Company violated the Agreement between the parties at Dunsmuir, California, when on September 24, 1961, it failed to call Mr. E. L. Test to a vacancy on Clerk-Baggageman Position No. 9 but, instead, used Mr. D. E. Rush thereon contrary to agreed-to application of the Agreement; and,

(b) The Southern Pacific Company shall now be required to allow Mr. E. L. Test eight (8) hours' compensation at the time and one-half rate of Position No. 9 for September 24, 1961.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement bearing effective date October 1, 1940, reprinted May 2, 1955, including revisions, (hereinafter referred to as the Agreement) between the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) 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.

Position No. 16 Cashier was vacant September 20, 1961 through October 8, 1961, account vacationing incumbent. Absent of a qualified unassigned employe, W. G. Cadden, incumbent of Relief Position No. 1, was placed thereon under the provisions of Rule 34 of the Agreement.

Relief Position No. 1 with the following work schedule:

OPINION OF BOARD: The facts giving rise to this dispute are not in question. A short vacancy (less than 30 days) occurred on Relief Position No. 1 between September 20 and October 8, 1961, which included two days per week (round house clerk), two days per week (cashier), and one day per week (clerk-baggageman). The controversy arises from the filling of the clerk-baggageman position to which there was no regularly assigned employe.

Carrier filled that position with an unassigned employe who had not worked 40 hours during that week.

Petitioner contends that Carrier should have filled the position with a regular assigned employe, and alleges violation of Rule 34 (c) of the Agreement and an "understanding" dated June 12, 1957 between the Employes' Negotiating Committee and Carrier's Assistant Manager of Personnel.

Rule 34 (b) and (c), pertinent to this inquiry, is stated, as follows:

"(a) New positions and/or vacancies of thirty (30) calendar days or less duration, may be filled without being advertised, at the option of the employing officer. New positions and/or vacancies of doubtful duration, need not be advertised until the expiration of thirty (30) calendar days, in connection with which, so far as practicable, the approximate duration of the work will be given.

"NOTE: Subject to (b) and (c) of this rule.

"(b) 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 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 33 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 20, Sections (b) and (c).

"NOTE: 1. An unassigned employe placed on a vacancy or a new position having rest days of Saturday and Sunday will remain thereon until relieved by regular employe or displacement by a senior unassigned employe.

"NOTE: 2. An unassigned employe placed on a vacancy or new position having rest days other than Saturday and Sunday shall, after having performed five (5) days or forty (40) hours of straight time work in a work week beginning with Monday, be released from the position only if by remaining thereon he would work in excess of five (5) days at straight time rate in his work week. An employe so released shall be privileged to return to the vacancy from which released at the beginning of the new work week if the vacancy is then filled by a junior unassigned employe, or he may displace any junior unassigned employe, or place himself available for subsequent vacancies. If no regular employe is available and an unassigned employe is used

after having performed five (5) days or forty (40) hours of straight time work on vacancies in his work week beginning with Monday, he shall be compensated therefor at the overtime rate.

"(c) If a qualified unassigned employe is not available, position will be filled by the senior assigned employe who makes written application therefor and is qualified for such vacancy, and when assigned shall take all of the conditions of the position; if a qualified unassigned employe thereafter becomes available he may not displace the regular employe filling the temporary vacancy unless he is senior to such regular employe."

The claim of violation of Rule 34 (c) is unwarranted. There was no "written application" made by the Claimant as is required, and we need not consider it further.

The question of the June 12, 1957 "Understanding" remains.

Petitioner contends that on June 12, 1957 the parties entered into an agreement that an unassigned employe must be qualified for **all positions** included in a relief position before he can be assigned.

Parenthetically it should be noted that neither the employe assigned to the position nor the Claimant were qualified in this respect. The Carrier states that "neither the Claimant nor the unassigned employe involved were qualified for any position included in the relief position with exception to the one day fill out position in the schedule of Clerk-Baggageman, for which position the unassigned employe who had performed less than 40 hours of work in his workweek was eligible and used thereon on date involved as provided in Rule 34 (b)."

On the property, Petitioner alleged violation of the June 12, 1957 agreement styled "Memorandum of Understanding", and, alternately, "Memorandum of Agreement".

Petitioner alleged in a letter dated February 21, 1962 to Carrier that:

"In the Memorandum of Agreement reached on June 12, 1957, it was clearly set forth that . . ."

Elsewhere in the same letter:

"Further we contend the Memorandum of Agreement of June 12, 1957, clearly used the term 'unassigned' and does not apply to regularly assigned employes . . ."

Petitioner admits that such an "understanding", **in written form**, did not exist. Petitioner admits that it was an oral understanding which was never reduced to writing.

Even if there was in fact an oral understanding and it was raised in such a manner on the property as to give Carrier full notice, the record's paucity of competent and probative evidence substantiating such an alleged agreement precludes us from inquiring further into its substantive effect.

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 31st day of March 1966.

LABOR MEMBER'S DISSENT TO AWARD 14290, DOCKET CL-15281

I dissent to Award 14290, Docket CL-15281, because I cannot agree that there was any "paucity of competent and probative evidence substantiating" the agreed and accepted interpretation requiring that **unassigned employes** be qualified for **all positions** included in a relief assignment, which was what was here involved.

The oral understanding was buttressed by Carrier officers instructions of record which read in part:

> "Please instruct Chief Crew Dispatcher, also any other crew dispatcher handling **extra** clerks, that in the future when a known vacancy exists **on a relief assignment** for a period of time wherein the **extra clerk is not qualified to cover all positions of that relief assignment, the extra** clerk **will not be used thereon."** (Emphasis added)

Another read in part:

> "Recently on this Division claim was filed by the Clerks' Organization on behalf of a regularly assigned clerk who had been relieved on his rest days by an **extra clerk** who had been called to fill a vacancy **on a regular relief position,** but **who was only qualified to** work three days of the five-day **relief position.**
>
> The contention of the Organization is correct that when an **extra clerk** is called for a vacancy he must be qualified to work **all days of the vacancy or he should not be utilized on the vacancy at all.**

In this particular case, we are obliged to pay the claim **because the extra clerk was not qualified to work two days of the relief assignment, * * *.**" (Emphasis added)

And in another it reads in part:

"Question has been raised as to proper use of **extra clerks** in **filling** vacancies on regular **relief assignments** for clerical positions when such assignments relieve on more than one type of clerical position; for example, Train Clerk, one day, Car Clerk two days, and Asistant Chief Yard Clerk two days.

"When such vacancies occur, **if an extra clerk is to be called, such extra clerk must be qualified to fill all positions relieved by the relief assignment.** This applies even though it is known the vacancy will exist for only one or two days and the extra clerk is qualified to fill the positions being relieved on the days the vacancy exists. Stated another way, **unless an extra clerk is qualified to fill all positions relieved by a relief assignment, he cannot be used to fill any vacancy on the relief assignment.**" (Emphasis added)

Carrier's basis for initially declining this claim was that neither Claimant nor the extra employe were qualified to fill all positions included in the relief assignment. The Superintendent stated:

"Take exception to your letter dated November 14th, especially your interpretation of that portion referred to Memorandum of Agreement for use of **unassigned employes only.**

Regular assigned Clerk Test is only qualified to fill one position on the **Relief assignment** whereas **unassigned Clerk Rush** is **qualified to fill two positions** on the **Relief assignment,** although **neither of them are qualified to fill Cashier** position." (Emphasis added)

The highest officer held that:

"* * * this was simply a case where neither the claimant nor the unassigned employe involved were qualified for any position included in the relief position with exception to the one day fill out position in the schedule of Clerk Baggageman, * * *."

Thus the only thing which the Award points out is the value of reducing such understandings to writing so that neither party can later deny them.

As stated earlier, I felt there was sufficient evidence to support the existence of the understanding. There is also evidence that that interpretation was rejected by Carrier in this case because neither Claimant nor the extra clerk were qualified for all positions included in the relief assignment.

For the above reasons I dissent to this Award.

(s) D. E. Watkins
D. E. Watkins, Labor Member
4-29-66

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT, AWARD 14290, DOCKET CL-15281 (Referee Zumas)

It is elementary that Claimant has the burden of proving all essential elements of the claim. See **Awards 13028** (Hall), **12256** (Dolnick), **10946** (Dorsey), **10048** (Dugan), among many others.

As stated in **Award 10950** (Ray): "The burden is not on the Carrier to show that its action is authorized by some provision in the Agreement. Rather the burden is on the complaining Employes to show that the action violates some portion of the Agreement."

In this case the Claimant charges Carrier with violation of an alleged oral understanding which expressly disqualified unassigned employes from filling temporary vacancies in relief assignments under the circumstances here involved, and that is the only violation charged. The most essential element of the claim is obviously the alleged oral understanding, the existence of which is denied by Carrier.

The Employes failed to prove that the alleged oral understanding exists: their evidence is both inadmissible and demonstrably erroneous.

In all handling on the property, the Employes contended that there was a written agreement. However, in final conference they were convinced that no such written agreement existed. (This inexcusable confusion of the Employes may have been the result of a change in the office of General Chairman between the date of the alleged agreement and the date of this claim.)

Having been convinced in final conference on the property that they had no written agreement, the Employes took a new approach in their submission to this Board and claimed an "oral understanding." To prove their alleged oral understanding they submitted two types of evidence.

First, they submitted what purports to be an unsigned written report by a "negotiating committee." This alleged report to the Employes would be of no value if it were admissible, for it is purely self-serving, it does not bear any signature or other authentication, and it does not allege that any agreement or understanding was reached. It simply states that an opinion was requested and received from a Carrier officer during an informal discussion. In any event, we are precluded from considering this as evidence in this case because the record shows that it was never submitted to Carrier during handling of the claim on the property.

The other evidence submitted by the Employes purports to be copies of letters allegedly written by three of Carrier's ten Division Superintendents. These letters are also irrelevant. None of them makes any reference to the alleged understanding, and one of them is dated ten months prior to the date of the alleged understanding. These letters are also inadmissible, for they, too, were not submitted to Carrier or referred to in the handling of this claim on the property.

As a general rule, this Board will not consider such evidence when it has not been submitted to the other side during handling on the property. **Awards 9029, 10529, 11174, 12012,** among many others.

The Employes place greatest emphasis on the alleged letter of the Superintendent on the Shasta Division (the Division where the claim arose) and the dissenter quotes from this letter first. This letter is demonstrably false. The alleged author thereof was not a Superintendent of any division, much less the Shasta Division. He was only a trainmaster. He was, therefore, in no position to make an interpretation of the Clerks' Agreement, even on a local basis. Furthermore, he has no record of ever having written such a letter as that asserted by the Employes. The obviously demonstrable error of this alleged evidence of the Employes clearly demonstrates the wisdom in the rules that prohibit presentation to the Board of evidence which has not been presented to the other side and fully discussed on the property.

The Employes submit nothing else as evidence. They do resort to inneundos, alleging there have been certain payments of such claims to which they are forbidden by agreement from referring. If this allegation is true, the Employes have clearly committed a breach of confidence by violating their pledge to Carrier in making compromise settlements. However, we must assume the allegation itself is false, for it was never during handling on the property and Carrier emphatically denies that there is any truth in it.

The record is thus completely barren of any admissible proof that the parties ever made the disputed oral understanding on which the claim is expressly based. In these circumstances, the Board had no alternative but to deny the claim, irrespective of its views concerning the validity of an understanding. See **Awards 2140** (Thaxter), **5057** (Kelliher), **10442** (Gray) and **13154** (McGovern) on the treatment this Board has accorded such oral understandings.

/s/ G. L. Naylor

/s/ R. A. DeRossett

/s/ C. H. Manoogian

/s/ W. M. Roberts

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