

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Paul C. Dugan, 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-6061) that:

(a) The Southern Pacific Company violated terms of the Clerks' Agreement at Klamath Falls, Oregon, when:

1. It failed and refused to move J. R. Decker on January 13, 1963, to his newly assigned position awarded by bulletin,
2. It failed and refused to accept holddown application submitted by J. R. Morley who desired to occupy Mr. Decker's former position, effective January 13, 1963, the date it should have been physically vacated;

(b) The Southern Pacific Company shall now be required to allow J. R. Decker the earnings of Position No. 59, Abstract Clerk, rate \$20.4524 per day, for January 13, 14, 15, 16, 17, 20 and 21, 1963;

(c) The Southern Pacific Company shall now be required to allow J. R. Morley the earnings of Position No. 46, Transit Clerk, rate \$20.6924 per day, for January 13, 16, 17, 18, 19 and 20, 1963.

EMPLOYEES' STATEMENT OF FACTS: There is in evidence an Agreement bearing effective date October 1, 1940, reprinted May 2, 1955, including subsequent revisions, (hereinafter referred to as the Agreement) between the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) and its employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as the Employees) which Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

4. Based on the premise that (1) Carrier improperly delayed placement of Clerk Decker on his new assignment and (2), thereby denied Clerk Morley's request to hold down a position temporarily, Petitioner presented and appealed two separate claims on the property, which were handled respectively, as follows:

CLAIM a - b

Petitioner's Statement of Claim identified as Items (a)1 and (b) was initially handled by letter dated February 4, 1963 (Carrier's Exhibit A), from Petitioner's Division Chairman to Carrier's Division Superintendent, submitting claim in behalf of J. R. Decker (hereinafter called Claimant Decker) for the applicable earnings of Position No. 59, Abstract Clerk, for each date January 13, 14, 15, 16, 17, 20 and 21, 1963, account not being placed on that position on those dates after being awarded to him by Carrier's Assignment and Vacancy Notice No. 3 of January 10, 1963.

By letters dated March 6 and 28, 1963 (Carrier's Exhibit B), Carrier's Division Superintendent denied the claim and by letter dated April 17, 1963 (Carrier's Exhibit C), Petitioner's Division Chairman gave notice that the claim would be appealed.

By letter dated April 26, 1963 (Carrier's Exhibit D), Petitioner's General Chairman appealed the claim to Carrier's Assistant Manager of Personnel, and by letter dated February 2, 1965 (Carrier's Exhibit E), the latter denied the claim.

CLAIM a - c

Petitioner's Statement of Claim identified as Items (a)2 and (c) was initially handled by letter dated February 4, 1963 (Carrier's Exhibit F), from Petitioner's Division Chairman to Carrier's Division Superintendent, submitting claim in behalf of J. R. Morley (hereinafter called Claimant Morley), for the applicable earnings of Position No. 46, Transit Bill Clerk, for each date, January 13, 16, 17, 18, 19 and 20, 1963, account his request to hold down Position No. 46, Transit Bill Clerk, under provisions of Rule 34(c) was declined.

By letters dated March 6 and 29, 1963 (Carrier's Exhibit G), Carrier's Division Superintendent denied the claim, and by letter dated April 17, 1963 (Carrier's Exhibit H), Petitioner's Division Chairman gave notice that the claim would be appealed.

By letter dated April 26, 1963 (Carrier's Exhibit I), Petitioner's General Chairman appealed the claim to Carrier's Assistant Manager of Personnel, and by letter dated February 8, 1965 (Carrier's Exhibit J), the latter denied the claim.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier advertised and bulletined vacant Abstract Clerk's Position No. 59, on January 2, 1963. This position was awarded on January 10, 1963 to Claimant J. R. Decker who occupied Position No. 46. On January 13, 1963, Claimant J. R. Morley, occupant of Position No. 47, requested Carrier to "hold down" said Position No. 46. These claims were

filed on behalf of said Claimants because of Carrier's failure to assign Claimant Decker to Position No. 59 on January 13, 1963 and for Carrier's failure to accept Claimant Morley's application for "hold down" of Position No. 46, effective January 13, 1963.

The Organization contends that applying Rules 33(a), 34(b), 34(c) and 35 in conjunction with one another, made it mandatory upon Carrier to immediately move Claimant Decker to his new assignment of Position No. 59 inasmuch as Claimant Morley was available to cover the resulting vacancy of Claimant Decker's Position No. 46.

Rule 33(e) provides as follows:

"(e) Assignments will be made and notices issued within eight (8) calendar days after closing date of receiving applications and successful applicant will be placed on position as soon as practicable, provided however, that if said applicant is not placed on his newly assigned position within fifteen (15) calendar days from the date of assignment notice, he shall be paid the established rate of either his newly assigned position or the position on which he works, whichever rate is the greater, and in addition thereto a penalty allowance of one dollar (\$1.00) per work day until placed on his newly assigned position."

Rule 34(b), the pertinent part thereof, states:

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

Rule 34(c) the pertinent part thereof, reads as follows:

"(c) If a qualified unassigned employee is not available, position will be filled by the senior assigned employee who makes written application therefor and is qualified for such vacancy . . ."

Rule 35:

"When an employee makes application for and is awarded a position, his former position will be considered vacant and advertised."

Carrier's defense rests on the contention that Rule 33(e) expressly permits Carrier to withhold placement of Claimant Decker in this instance within 15 days after the date of assignment inasmuch as it was "impracticable" to assign Claimant Decker to Position No. 59; that Carrier then could not accept Claimant Morley's "hold down" application for Position No. 46 due to the fact that there was no qualified unassigned employee available.

Under the facts in this matter, it is undisputed that there wasn't an unassigned employee available to file either Position No. 46 held by Claimant Decker or Position No. 47 assigned and filled by Claimant Morley (See Organization's rebuttal brief, record pg. 56). Therefore it was not "practicable" or feasible for Carrier to assign Claimant Decker to Position No. 59 on January 13, 1963, the date the Organization contends said assignment should have been effected. When Carrier was able to effectuate the assignment of Claimant

Decker to Position No. 59, it was within the 15 day period permitted by Rule 33(e) without penalty.

Further, no employe was available to fill Claimant Morley's Position No. 47 inasmuch as the record is void of any evidence of written application of a senior assigned employe for said Position No. 47. Therefore Carrier was unable to move Claimant Morley from Position No. 47 to Position No. 46 in absence of such application.

Therefore, in view of the foregoing, it is the opinion of this Board that the Agreement was not violated and the Claim must be denied.

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 28th day of October 1968.

LABOR MEMBER'S DISSENT TO AWARD NO. 16689, DOCKET CL-16636

Sufficient pertinent facts and rules are set out in the Opinion of Board so that the absurdity of relying on the unavailability of a qualified unassigned employe as grounds for rejecting a written application under 34(c) is there for all to see.

It is equally absurd to state in the penultimate paragraph that the next claimant could not have his rights under 34(c) granted because no other employe had made a 34(c) application.

The claim urged by the Organization, based on the rules and the facts of record, should have been sustained.

It has been said that when one does not wish to do something one excuse is as good as another. However, such "reasoning" should not have prevailed in Award 16689, Docket CL-16636; is improper at all times wherein rules are to be observed; and is particularly improper when one is charged with the responsibility of interpreting agreements. The "excuses" offered in this Award make it believable that there was an old law on the books to the effect that "When two trains shall meet at a crossing both shall stop and neither shall proceed until the other has departed."

The Award is in error and I dissent.

D. E. Watkins
Labor Member
11-25-68