Award No. 16996
Docket No. CL-17354

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John J. McGovern, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY, AIRLINE 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-6341) that:

(a) The Southern Pacific Company violated terms of the current Clerks' Agreement when it refused to allow Hattie C. Balsz to occupy Engine Crew Dispatcher Position No. 102 effective 11:59 P. M., Sunday, November 4, 1962;

(b) The Southern Pacific Company shall now be required to compensate Hattie C. Balsz as follows:

1. Eight (8) hours' pay at the pro rata rate of Position No. 102 each date November 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 1962;

2. The difference between pro rata and the time and one-half rate for all time spent on other assignments on those dates; and,

3. In addition, a day's pay at the applicable pro rata rate of Chief Engine Crew Dispatcher ($22.1424 per day) for November 4, 1962.

EMPLOYES' 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 employes represented by the Brotherhood of Railway, Airline 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.

On November 4 and 5, 1962, Clerk Sproul (on Position No. 102) and Clerk Markham (on Position No. 134 – Relief No. 22), performed service as Engine Crew Dispatchers during the same hours, i.e., 11:59 P. M. to 7:59 A. M.

3. By letter dated November 21, 1962 (Carrier's Exhibit A), Petitioner's Division Chairman submitted claim to Carrier's Division Superintendent at Los Angeles in behalf of Claimant for the following compensation: (Listed as Item (b) of Employes' Statement of Claim):

> "1. Eight (8) hours' pay at the pro rata rate of Position No. 102 each date, November 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 1962;
>
> 2. The difference between pro rata and the time and one-half rate for all time spent on other assignments on those dates; and,
>
> 3. In addition, a day's pay at the applicable pro rata rate of Chief Engine Crew Dispatcher ($22.1424 per day) for November 4, 1962."

By letter dated January 7, 1963 (Carrier's Exhibit B), Carrier's Division Superintendent denied the claim. By letter dated January 8, 1963 (Carrier's Exhibit C), Petitioner's Division Chairman advised that the claim would be appealed.

By letter dated January 26, 1963 (Carrier's Exhibit D), Petitioner's General Chairman appealed the claim to Carrier's Assistant Manager of Personnel, and by letter dated March 9, 1965 (Carrier's Exhibit E), the latter denied the claim.

(Exhibits not reproduced.)

OPINION OF BOARD: The regularly assigned incumbent of Position No. 102, Engine Crew Dispatcher, was relieved for a ten day vacation commencing 11:59 P. M., Sunday, November 4, 1962 and ending Thursday, November 15, 1962. On Saturday, November 3, 1962, Claimant filed a written request to fill the above position beginning at 11:59 P. M., November 4, 1962. At that time, she was regularly assigned to Relief Position No. 20. While she was the senior regularly assigned clerk to file such a request, she was not considered "available" to fill that position on Sunday, November 4, 1962, since her regular assignment required her to fill another position on that same date. She protested against the rejection of her request, whereupon, the Chief Clerk granted her permission to be absent from her regular assignment on Sunday, November 4, and was told to work Position 102 in compliance with her request.

At approximately 10:00 A. M. on November 4, Claimant was advised that Clerk Sproul had been displaced from his regular assignment and had elected to revert to the unassigned list. The Chief Clerk stated that since Sproul was now available, he, as an unassigned employe, would be utilized on Position 102 at 11:59 P. M., November 4. He told Claimant to continue with her regular relief assignment on November 5. Hence, Claimant performed no service on her own or any other position on November 4, 1962, thus losing a day's compensation on that date, which was one of her regular workdays. She performed service on her regular assignment thereafter, working eight (8) hours each date, at the applicable straight time rate of pay of the various positions in her relief assignment.

The Petitioner alleges a violation of Rule 34 (c) of the Agreement which reads:

"RULE 34. SHORT VACANCIES

(c) If a qualified unassigned employe is not available, position will be filled by the senior assigned employe who makes written application therefore 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.

"NOTE 1. A vacancy under paragraph (c) of this rule will not be considered a vacancy available to an assigned employe unless it is known that the vacancy will exist for more than two (2) days.

NOTE 2. In the event a vacancy of known duration of more than two (2) days is filled by a regular assigned employe and a senior qualified regular assigned employe desires to displace the junior regular assigned employe working the position, he may, upon giving at least four (4) hours' notice, do so providing such displacement notice is made within fifty-six (56) hours from the starting time of the position after vacancy is first filled and the employe making the displacement shall be required to fill the vacancy at the beginning of the next tour of duty on the vacancy."

Petitioner avers that paragraph (c) was violated, since Claimant had made the written application, was qualified, and at the time she was initially assigned, there were no qualified unassigned employes. Carrier, however, defends on the basis that Rule 34(b) of the Agreement must be read in conjunction with paragraph (c) and that once Sproul became available, paragraph (b) became operational, thus rendering Claimant's application invalid. Rule 34(b) provides:

"Rule 34(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 (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 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)."

Reading both sections, it is clear that a qualified, available, unassigned employe has preference to fill these short vacancies. This is an incontrovertible fact, gleaned from even a cursory reading of Rules 34(b) and (c).

There are, however, two questions to which we must address ourselves. One is the fourteen (14) hour notice given to Claimant advising her that

the assignment was to be made to Sproul. The other is whether she, for the purpose of the Contract, did in fact have the assignment once she was told by the Chief Clerk to work Position 102.

Upon close scrutiny of the aforementioned sections, we cannot find any time limitation imposed on Carrier. Presumably, Carrier could have notified Claimant one hour before, and this, although admittedly inequitable, would still not have constituted a contract violation. Had the contracting parties intended a time limitation, they could easily have included it in the language of the rule. We make passing reference to the fact that Note 2 of paragraph (c) requires a four (4) hour notice under certain specified conditions. These are not applicable to this case, but are merely mentioned to illustrate that when the parties intended a time limitation under certain conditions, they so specified one.

Further, she never did fill the position in question. Hence, she never did have the assignment, because this term implicitly connotes the assumption of, and performance of the duties and responsibilities of the position.

We agree with Carrier that in the circumstances of this case, paragraph (b) did become operational and effectively pre-empted the handling of this dispute. Sproul was a qualified unassigned employe, and was available; in connection therewith, we call attention to the first phrase of paragraph (c). "If a qualified unassigned employe is not available." It is clear that the contracting parties intended to give him a preferential right to such positions. Claimant assumed the risk of being displaced. She did so of her own volition, to be sure, with the concurrence and approval of the Carrier. But, we cannot find wherein Carrier has violated this Agreement and we must, accordingly, deny the claim.

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 25th day of March, 1969.

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