



Award Number 17257
Docket Number CL-17694

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

James Robert Jones, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6425) that:

1. Carrier violated the Clerks' Rules Agreement at Tacoma, Washington on December 8 and 9, 1966, when it assigned Car Distributor work of Position 8002 to supervising officer D. Failor, who is classified as a Special Representative to Superintendent.
2. Carrier shall now be required to compensate employee R. L. Pierce for eight (8) hours at the overtime rate of Car Distributor Position 8002 for December 8 and 9, 1966.

EMPLOYEES' STATEMENT OF FACTS: Employee L. C. Smith is the regularly assigned occupant of Car Distributor Position 80020 at Tacoma, Washington. Position 80020 is a 5-day position with assigned hours 8 A.M. to 5 P.M., Monday through Friday, with Saturday and Sunday rest days.

Employee R. L. Pierce is the regularly assigned occupant of Swing Position No. 4 at Tacoma, Washington. Swing Position No. 4 is assigned Saturday through Wednesday with Thursday and Friday rest days.

On Thursday and Friday, December 8 and 9, 1966, employee L. S. Smith was absent account of illness.

Employee Pierce who was the senior employee qualified to fill Position 80020 was available and willing to fill Position 80020 on those dates; however, in lieu of calling employee Pierce to fill the position, the work thereof was performed by Mr. Darrell Failor, the occupant of the position of Special Representative to Superintendent, which position is classified by Carrier as an Official Position. See copy of G. K. Gordon's letter of May 24, 1967, Employees' Exhibit "A".

Claim was filed with Superintendent J. J. Nentl by employee Pierce and was declined by him in his letter to employee Pierce dated January 16, 1967, see Employees' Exhibit "B". Copy of Superintendent Nentl's letter dated

CARRIER'S STATEMENT OF FACTS: The instant claim, for reasons that will be fully explained in "Carrier's Position", has not been properly handled by the Organization in accordance with the provisions of Article V of the Agreement of August 21, 1954, Section 3 First (i) of the Railway Labor Act and/or Circular No. 1 of the Board, therefore, the instant claim is barred.

Employee L. C. Smith is the regularly assigned occupant of Car Distributor Position No. 8002 which is assigned from 8:00 A.M. to 5:00 P.M., with 1 hour out for lunch, Monday through Friday with Saturday and Sunday rest days.

Claimant R. L. Pierce is the regularly assigned occupant of Swing Position No. 4 which is assigned as follows:

Saturday and Sunday—7:00 A.M. to 3:00 P.M.—Position No. 8600

Monday—12:00 Noon to 8:00 P.M.—Position No. 8604

Tuesday and Wednesday—3:00 P.M. to 11:00 P.M.—Position No. 8602

Thursday and Friday—Rest Days.

On December 8 and 9, 1966, employee Smith was absent account illness and on those two (2) days his position, i.e., Car Distributor Position No. 8002, was left unfilled or, in other words, was blanked.

The instant claim was filed in behalf of claimant Pierce alleging that on December 8 and 9, 1966 "In lieu of calling R. L. Pierce, who was observing his rest days on December 8th and 9th, 1966 and was available and qualified to perform the duties of Car Distributor Position 8002 on those dates, the Carrier assigned the work of the position to a Mr. Darrell Failor, who is presently classified by the Carrier as an official position entitled Special Representative to the Superintendent." However, contrary to the employees allegation, there was no work of Car Distributor Position No. 8002 assigned to Mr. Failor on December 8 and/or 9, 1966.

It is significant that claimant Pierce was called and used to fill Assistant Chief Yard Clerk Position No. 8603 on an overtime basis on December 8, 1966, on which date it is being claimed in the instant case that he should have been called to fill Car Distributor Position No. 8002 on an overtime basis.

Attached hereto as Carrier's Exhibits are copies of the following letters:

Letter written by Mr. S. W. Amour, Vice President-
Labor Relations, to Mr. H. C. Hopper, General
Chairman, under date of May 10, 1967Carrier's Exhibit "A"

Letter written by Mr. Amour to Mr. Hopper
under date of May 18, 1967Carrier's Exhibit "B"

Letter written by Mr. Amour to Mr. Hopper
under date of June 14, 1967Carrier's Exhibit "C"

(Exhibits not reproduced)

OPINION OF BOARD: Employee Smith is the regularly assigned occupant of Car Distributor Position 8002 at Tacoma, Washington, a 5-day position,

hours 8:00 A.M. to 5:00 P.M., Monday through Friday, Saturday and Sunday rest days.

Claimant Pierce is the regularly assigned occupant of Swing Position No. 4 at Tacoma, Washington, assigned Saturday through Wednesday, with Thursday and Friday as rest days.

On Thursday and Friday, December 8 and 9, 1966, Mr. Smith was absent account of illness.

Claimant Pierce was the senior employe qualified to fill Position 8002, and he states he was available and willing to fill Position 8002 on those dates; however, in lieu of calling employe Pierce to fill the position, Claimant contends Carrier permitted the work to be performed by Mr. Darrell Failor, occupant of position of Special Representative to Superintendent, which is classified by Carrier as an "Official Position."

This letter was written on the 59th, or next to last day, in which Claimant could present his claim before the proper officer.

Carrier contends claim was presented to the wrong officer and thus claim is barred under Article V, Section 1(a) of the Agreement effective January 1, 1955. That rule states:

"All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based."

Carrier previously notified Organization that employes in Seniority District 45 at Seattle and Tacoma stations, which includes Claimant, should present their claims in the first instance to the Agent.

Claimant says Carrier was responsible for Claimant presenting this claim to the Superintendent instead of the Agent because in another claim involving the same position as we have here, Claimant requested, through Acting General Chairman Hopper, a clarification as to which officer the claim should be presented in the first instance. Mr. Merritt in the office of Carrier's Vice President Amour advised that it should be filed with the Superintendent. This clarification occurred on March 17, 1966.

Subsequently, on July 18, 1966, Amour wrote General Chairman Hopper notifying him that the advice given by Mr. Merritt concerning the filing of claims with the Superintendent applied only to that case. In other words, Mr. Amour said the waiver granted by Mr. Merritt did not apply necessarily to this case before us or to any other cases. The pertinent language of that letter reads:

"The conversation you had with Mr. Merritt of my staff concerning the proper presentation of time claims in this particular case was inadvertently overlooked in my letter to you of May 20, 1966, file as above, therefore, you may accept in this particular case and without in any way waiving or prejudicing the remaining part of my May 20th letter and without waiving or prejudicing any position I may have taken in the past or I may take in the future along these same lines, that the instant claim for all intents and purposes will be considered as properly handled in accordance with Article V of the August 21, 1954 Agreement."

Therefore, Carrier contends the claim is barred. We do not agree. Carrier's letter of January 16, 1967, written by Superintendent Nentl, acknowledged receipt of the claim and in effect denied the claim on its merits. We feel that Claimant had a right to rely on that January 16 letter. We further believe that Carrier should not later be able to deny the claim on procedural grounds.

Therefore, we proceed to the merits of this case.

Claimant relies on Rules 1, 32 and 33 in support of this claim. These rules are as follows:

RULE 1—SCOPE

"(e) . . . Positions within the scope of this agreement belong to the employees covered thereby and nothing in this agreement shall be construed to permit the removal of positions from the application of these rules, except in the manner provided in Rule 57."

RULE 32—OVERTIME

"(g) When additional help is required for overtime work, or when the duties to be performed on overtime cannot be identified with a specific position, employees will be assigned to such overtime in accordance with seniority, fitness and ability, first from the sub-division of the department wherein the work occurs and, secondly, from the entire department."

RULE 33—SERVICE ON REST DAYS

"(c) Service rendered by an employee on his assigned rest day, or days, relieving an employee assigned to such day shall be paid at the rate of the position occupied or his regular rate, whichever is the higher, with a minimum of eight hours (8) at the rate of time and one-half."

In defense, Carrier states that Position No. 8002 was blanked on December 8-9, 1966, and the work of that position was not assigned to Mr. Failor as alleged by Claimant.

Claimant responds by offering evidence of Local Chairman Gordon that he "heard and saw the work done." Claimant also says that Carrier never refuted the contention that the work was actually "performed" by Failor. Carrier only refutes that work was "assigned" to Failor. Claimant states further that Superintendent Nentl, who would have first hand knowledge concerning the performance of the work, never denied that it was so performed by Failor.

While there can be some doubt and dispute as to the performance by Failor of the work on Position No. 8002, we feel the preponderance of evidence favors Claimant's position.

We further find that Position No. 8002 was therefore removed from the Scope of the Agreement in violation of Rule 1. We believe Claimant did have a prior right to perform the duties of that position during Smith's absence on December 8-9 as provided in Rule 32. We feel Claimant is entitled to payment of eight hours at the time and one-half rate as provided in Rule 33.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1969.