

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21818
Docket Number CL-21635

James F. Searce, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline, and
(Steamship Clerks, Freight Handlers,
(Express and Station Employees
(Consolidated Rail Corporation
(former Lehigh Valley Railroad Company)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8094) that:

(a) Carrier violated Rules 3, 7, 8, 9, 10, 11, 26 and 43 of the May 1, 1955 Rules Agreement between the parties; also the rules of the May 17, 1956 Memorandum of Understanding governing the establishment and handling of the Coxton, Pennsylvania Extra List, by arbitrarily assigning Extra Clerk Rose M. Hogan to a vacation vacancy on the Lead Clerk position at Ashley, Pennsylvania during the period commencing Monday, July 15 and extending through Friday, August 2, 1974.

(b) Carrier be required to compensate Ms. Hogan for the extra list earnings, of which she was thereby deprived, for the dates of July 12, 15 (two claims), and 18, 1974.

OPINION OF BOARD: On July 12, 1974, the Claimant, who was the senior employee on the appropriate extra list for Clerks, reported to cover a vacancy of Caller-Messenger at the Carrier's facility at Coxton, Pa. Shortly after reporting at 7:00 a.m., she was directed to report to the Carrier's facility at Ashley, Pa. in order to cover the position of Lead Clerk, due to that incumbent's being on vacation. A junior extra list clerk was called to cover the unprotected Caller-Messenger post at Coxton.

The Carrier thereafter formally issued notification that the Claimant -

"...is to continue to work the Lead Clerk Position at Ashley, Monday to Friday, 8 A.M. to 5 P.M. to and including Friday, August 2nd, 1974. She will be available for any other work that will not interfere with the Ashley position."

The Claimant filed claims for opportunities lost as a result of the Carrier's assigning her to the Lead Clerk position as follows:

July 12 - A day's pay for period for which she was originally called (7:00 a.m. - 3:00 p.m.) as a Caller-Messenger and which she was permitted to only work 30 minutes before being reassigned to Ashley.

July 15 - Pay for two Caller-Messenger assignments, one commencing at 2:30 a.m. and the other at 5:15 p.m. Pay would be for the duration of such assignments at the overtime rate.

July 18 - Pay for a tour as Caller-Messenger at the Corton facility for the period 7:00 a.m. to 3:00 p.m.

The Claimant argues that, as senior extra clerk, she would have been available otherwise, but was forced to bypass these opportunities due to the required assignment of Lead Clerk.

The Union cites, among others, Rules 7 and 26 - Extra Lists of the Agreement and the Memorandum of Agreement "Principles for Establishing an Extra List as provided in Rule 26" as a supplement to the Agreement as the basis for the claim. Pertinent provisions are as follows:

"Rule 7 - Exercise of Seniority

Seniority rights of employees covered by these rules may be exercised in case of vacancies, new positions, reduction of forces, as provided in this agreement.

"Employees on extra lists shall fill vacancies of three (3) days' duration or less; thereafter, such positions shall be given to the senior employee within the jurisdiction of the extra list involved who applies for same in writing within the first three days."

"Rule 26 - Extra Lists

Extra lists may be established in a seniority district by mutual agreement in writing between local management and Division Chairman conforming to principles outlined in memorandum included as a supplement to this agreement."

"Principles for Establishing an Extra List as Provided in Rule 26

3. Employees assigned to this extra list will work in accordance with their seniority. On continued vacancies a senior employee assigned to the regular extra list may apply for the 'Holddown' if qualified, and the senior employee making application in writing will fill vacancy starting on the fourth day of said vacancy.

- "4. Employees missing a call or failing to accept a call for a position for which they are qualified, will be placed on the extra list twenty-four (24) hours after the starting time of the vacancy to which they missed call or failed to accept call."

The Carrier contends that it was entitled to place the Claimant in the Lead Clerk position for several reasons:

- (1) The Claimant was the only qualified person to fill the Lead Clerk position.
- (2) Rules 7 and 26 and the Memorandum relative to Extra Lists apply to "vacancies"; the filling of a position while the incumbent is on vacation is specifically identified as not being a vacancy in the National Vacation Agreement.
- (3) The National Vacation Agreement represents a specific agreement of terms and conditions as compared to the Rules which constitute a general set of provisions; in such cases, the specific terms apply.

In any case, the Carrier contends, the burden is upon the Union to make the case that the Carrier is prohibited from taking such action as it deems proper, by provisions of the Contract.

Pertinent provisions of the National Vacation Agreement are reproduced as follows:

"12. (a) Except as otherwise provided in this agreement a carrier shall not be required to assume greater expense because of granting a vacation than would be incurred if an employee were not granted a vacation and was paid in lieu therefor under the provisions hereof. However, if a relief worker necessarily is put to substantial extra expense over and above that which the regular employee on Vacation would incur if he had remained on the job, the relief worker shall be compensated in accordance with existing regular relief rules.

" (b) As employees exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their own rights as if they had remained at work, such absences from duty will not constitute 'vacancies' in their positions under any agreement. When the position of a vacationing employee is to be filled and regular relief employee is not utilized, effort will be made to observe the principle of seniority."

A review of the Awards cited and furnished in this case failed to reveal any similar circumstances to those of this case; here an obviously highly qualified clerk, occupying the senior position on an extra list is deemed to be the only qualified employee to fill the post of Lead Clerk - a contention by the Carrier which stands unrefuted by the Union - during the incumbent Lead Clerk's absence for vacation. It seems obvious such a position would pay the highest per-hour rate for the clerical craft, certainly for the shift involved (first). The Claimant assumes the position that such a "holddown" assignment deprived her of other opportunities to work at different, though possibly lower paying positions, but at least which would permit her the flexibility of accepting or rejecting such assignments. The Union points to the permissive nature of the provisions of Rule 7 and the Extra Board Memorandum of Agreement that permits the employees on extra lists the flexibility not to fill vacancies if they so choose. The Carrier points to the provision of the National Vacation Agreement which specifically excludes vacations as vacancies claiming, thus, that the flexibility in Rule 7 and the aforementioned Memorandum do not apply. The Carrier cites Award 17222 among others as support for its contention that special agreements (e.g., the National Vacation Agreement) take precedence over general agreements (e.g., the Rules Agreement). A literal reading of 12 (b) of the "Vacation Agreement" would indicate that the references to "vacancies" is intended principally to protect the rights of the incumbent; it is not suggested, however, that such language does not apply to those occupying the position on temporary bases.

The record does not indicate that the Claimant was denied her rights when she was assigned to the position of Lead Clerk; in other words, there is nothing in the record to indicate that the Claimant was denied the opportunity to refuse the Lead Clerk assignment or that, had she done so, she would have suffered some reprisal from the Carrier.

This was not an assignment designed to minimize the Claimant's income, rather it had the potential effect of maximizing it. It is true that the Rules focus the flexibility upon the employee to decide whether or not to apply for vacancies beyond the required three days duration. The Carrier's argument as to the meaning of the term "vacancy" as incorporated in the National Vacation Agreement is far less persuasive than its unrefuted contention that the Claimant was the only qualified employee available to fill this post. There is, also, a lack of evidence that the Claimant was denied an opportunity to refuse the assignment.

The Union has made a supportable argument that the Rules provide the extra list employee the flexibility and discretion to accept or reject a post offered. That such potential refusal was contemplated is made manifest by Item 4 of the Extra List Memorandum of Agreement, which is quoted herein. Such "degrees of freedom" run headlong into management's rights and obligation to direct the work force where, as is demonstrated here, the Claimant was the only qualified employee available to assume the Lead Clerk position. Based upon this narrow point, the Union's contentions are held not to be controlling.

There is, however, the matter of lost opportunities for the Claimant. Per the announcement issued by the Carrier as to the Claimant's "holddown" assignment, the Claimant was to be available "for any other work that will not interfere with the Ashley position." Nothing in the record indicated the proximal relationship of Ashley and Coxton and thus it must be assumed that they were not greatly distant from each other. Additionally, nothing was adduced from the record to indicate the span of time covered by the extra list filling of the Caller-Messenger position at 5:15 p.m., on July 15. What is apparent is that the Claimant was not offered an opportunity to fill that post and, with nothing to indicate the contrary, was available to do so. To this extent it is determined that the Carrier violated the Agreement. The Claimant shall be compensated at the appropriate overtime rate for the period of time such vacancy was filled by the junior extra list clerk on the July 15, 1974, assignment at 5:15 p.m. as Caller-Messenger. It is our opinion that the Claimant would not have been available for the pre-shift assignment that day (2:30 a.m.) and obviously was unavailable for the assignments on July 12 and 18 during the day. (It is assumed, however, that she was compensated on July 12 for the period she reported initially to the Caller-Messenger post.)

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

The Agreement was violated to the extent set forth in the
Opinion.

A W A R D

Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A.W. Pauls*
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1977.

