

Award No. 4617

Docket No. CL-4488

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John M. Carmody, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the Division Committee of the Brotherhood that:

(a) The Management violated the provisions of the Rules Agreement, effective May 1, 1942, and of the Extra List Agreement, effective January 23, 1933, Stores Department, Cleveland, Ohio, Cleveland Division, May 22 to 31, 1947, in the use of D. R. Pettet as an extra clerk.

(b) G. A. Shultz, a regular clerk, be allowed 64 hours at punitive rate on account of being deprived of overtime work to this extent. (Docket C-366)

EMPLOYEES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as the representative of the class or craft of employees in which the claimant in this case held a position and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employees between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e) of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

The claimant in this case is an employe holding a regular position covered by the Scope of that Rules Agreement having seniority standing in Group 1 on the Cleveland Division of the Carrier.

There is an Extra List Agreement, effective January 23, 1933, still in effect on the Cleveland Division, which covers the handling of extra work accruing to Group 1 or clerical employes. A copy of this Extra List Agreement is attached as a part of Employees' Exhibit "A".

This Extra List protects extra clerical work on all points on the Cleveland Division in all departments. There is no provision in the Extra List Agreement that Extra List positions will be advertised.

Mr. D. R. Pettet was employed as an Extra Clerk on May 12, 1947 and was used as an Extra Clerk in the Stores Department at Cleveland, Ohio to

Rule 4-A-1 defines what constitutes a day's work, and the method of computation for service performed in excess of a day's work, as well as the method of compensating extra employees, and employees paid on a tonnage or piece work basis, who are required to work beyond the limit of their regular eight-hour tour of duty. It clearly can furnish no support in this claim since the Claimant has been properly compensated for all work performed during the period in question in accordance with that rule.

The Carrier submits that the work in question performed by Clerk D. R. Pettet between May 22nd and May 31, 1947, was extra work accruing to the extra list on the Cleveland Division; that the work was properly assigned thereto in accordance with the mutual understanding between the parties as to the operation of that extra list; and that his use did not constitute a violation of the extra list agreement nor any other provision of the applicable agreement; that under the circumstances herein cited the Claimant was not deprived of any work to which he had a demand right. Therefore, the claim of the Employee is without merit and should be denied.

III. Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, is Required to Give Effect to the Said Agreement and to Decide the Present Dispute in Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First subsection (i) confers upon the National Railroad Adjustment Board, the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions". The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employee in this case would require the Board to disregard the Agreements between the parties thereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has shown that under the applicable agreement the Claimant was not entitled to be used on the extra work in question; that the use of Clerk D. R. Pettet, an employee coming within the Scope of Agreement and assigned to the extra list on the Cleveland Division was properly used as extra clerk on the dates in question; and that his use did not constitute a violation of the extra list agreement of January 21, 1933, or any provisions of the applicable master agreement.

It is, therefore, respectfully submitted that the claim is not supported by the applicable agreement, or the agreement of January 21, 1933, establishing the extra list on the Cleveland Division and should be denied.

(Exhibit not reproduced.)

OPINION OF BOARD: The facts in this case are not in dispute. They are set forth in a Joint Statement of Relied upon Facts which appears in the record.

There also is in evidence, in addition to the Schedule Agreement, an "extra list" agreement dated January 23, 1933, which we quote in full because so much of this dispute arises out of the interpretation placed upon it by the parties.

"THE PENNSYLVANIA RAILROAD
CENTRAL REGION
Cleveland Division

Cleveland, Ohio
January 23, 1933

In accordance with the provisions of clerical regulation 5-C-1, an extra list is hereby established for clerical employes on the Cleveland Division, and the following understanding will apply in the handling of extra work accruing to employes coming within the scope of the Regulations for the Government of Clerical Forces under the jurisdiction of General and Division Superintendents.

1. A clerical employe displaced from a regular position in the exercise of seniority or abolishment of position may, in lieu of accepting furlough, make written application to the General Superintendent within the time limit prescribed in Regulation 3-C-1 for placement on the extra list.

2. An employe making application for placement on the extra list will be governed by the provisions of Regulations 3-C-1 and 3-H-1 and his assignment thereto will be subject to qualifications and availability.

3. In the handling of the extra list, the senior qualified employe available will be considered first out for all extra work and will hold the position to which assigned until its termination or, if advertised under the provisions of Regular 2-A-1, until the date filled by regular assignment, after which the employe will return to the extra list subject to call in seniority order.

4. The above understanding abrogates any extra lists previously in effect and the manner of operating same, and may be cancelled or modified upon fifteen (15) days written notice by either party to same.

/s/ H. B. Hogue
Local Chairman, Clerical Forces

/s/ J. A. Appleton
General Superintendent"

This "extra list" agreement was made at the depth of what is commonly termed the "great depression" when business of this and other carriers had fallen off to such an extent that large numbers of employes were being furloughed. It was made, as the terms clearly indicate, to give as much protection as possible, under the cruel circumstances of that depression, to furloughed employes for any employment that might become available, regular or extra. Nowhere is the purpose more clearly stated than in the words of the Carrier in this submission:

"It will be noted that the extra list in question was negotiated during the period of the economic depression then prevalent throughout the country, at which time there were a large number of employes subject to furlough. The Agreement gave to the employes who were then unable to hold a regularly assigned position, the option of selecting the extra list in lieu of accepting furlough. The only restriction that applied to such option was that the employe must make written application for placement on the extra list within the period prescribed in Rule 3-C-1. This is clearly set forth in paragraph 1 thereof, which is here reproduced for the convenience of the Board.

'1. A clerical employe displaced from a regular position in the exercise of seniority or abolishment of positions may, in lieu of accepting furlough, make written application to the General Superintendent within the time limit prescribed in Regular 3-C-1 for placement on the extra list.' (Emphasis supplied.)"

It represents a humane effort to relieve distress. It does not appear to have been conceived or executed, at that time, to provide a procedure for recruiting new employees, nor would one familiar with the surrounding conditions in January, 1933, expect the parties to be planning for recruitment of new employees. It was made for one purpose; it appears to have been used in later years, with business recovery, for another and different purpose.

At precisely what point the Carrier began to use it to build up an extra list by recruitment of new employees is not clear in the record. The Carrier says, "Such new employees who were not assigned to vacancies on regularly assigned positions, were placed on the extra list in accordance with the mutual understanding between the parties. In fact, at the time the instant claim arose there were seventeen employees on the extra list, Cleveland Division, all of whom had entered service subsequent to the effective date of the extra list agreement."

A list supplied by the Carrier, reveals twenty-two names, five of persons placed on the list in September, 1946, and seventeen during 1947, all of whom appear to have been given seniority rights as of the date they entered service. By what right is not clear.

The "mutual understanding" referred to by the Carrier must have been an oral one; there is no document in evidence covering it nor its terms. The Organization denies there is any such understanding.

Obviously under normal business conditions new employees must be recruited and trained for service. Provision is made for this in Rule 3-A-1 (c). We quote part of it dealing with "a new employee" as follows:

"Such an employee shall acquire seniority on the date he is awarded a bulletined position and his seniority will date from the day on which his pay started in that seniority district."

It is not clear from the record whether the name of the temporary clerk, D. R. Pettet, ever was placed on the extra list. His name does not appear among those of the list of twenty-two furnished by the Carrier as having been engaged and given seniority status as of the day they entered service in 1946 and 1947. Mr. Pettet was employed on May 12, 1947 and began service on May 20, 1947, as a clerk in the Yard Office. From May 22 to May 31, 1947, he was assigned to assist in the taking of an inventory in the Stores Department. He had not acquired seniority under Rule 3-A-1 (c), Awards 4049, 1646, 2426, 3860, 4037, 4278, nor had he acquired seniority even if his name, not reported here, had appeared on the extra list. Merely assigning seniority to a new employee without regard to the governing rules can hardly be held to meet essential requirements.

The Claimant, G. A. Shultz, held seniority by virtue of regular assignment to a bulletined position in the Stores Department as a clerk. Many of those employed in taking the inventory, including the clerks, worked overtime. Shultz worked twenty-two hours overtime. He claims pay for 64 hours at overtime rate, the hours that Pettet worked. Shultz did not work any of them. Whether as a practical matter he could or would have worked any of them if Pettet had not been assigned to do some of the work is not material here; Shultz' claim constitutes a penalty against the Carrier for allowing Pettet, without seniority under the Schedule Rules or the extra list agreement, to do it. Such penalties have been approved by the Board in numerous Awards 685, 2282, 3390, 4370, 4539 and others. We repeat, Shultz worked and was paid for his regular hours and twenty-two hours overtime. We shall sustain the claim at pro rata rate. Award 3587.

In sustaining this claim we observe that the Organization is not wholly free from blame for the confusion that appears to have developed with respect to the manner in which the extra list agreement of January 23, 1933, was being interpreted during the period under review. If that special agreement has outlived its usefulness, as the record indicates, the way has been open, to

both parties, by specific provision in the agreement itself, to cancel or modify it on fifteen days' notice. That is an option; failure to exercise it, however, does not justify violation by either party or improper use of the instrument while it remains in force.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to the dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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.

AWARD

Claim (a) sustained. Claim (b) sustained at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of October, 1949.