Award No. 6761
Docket No. CL-6925

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

NORTHERN PACIFIC RAILWAY COMPANY

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

(1) The Carrier violated the Clerks' Agreement when, during the period March 29, 1949 to September 1, 1951, Gordon Heath, Ray Jensen and R. A. Sandau, furloughed employes at Missoula, Montana, were required to stand by and accept any and all vacancies on a day-to-day basis, and

(2) The Carrier shall now compensate claimants at the rate of $11.372 per day, plus all subsequent increases, for all days they were not used during that period, deductions to be made for compensation received from other sources.

EMPLOYES' STATEMENT OF FACTS: There is an agreement in effect between the parties bearing the effective date of June 1, 1946, together with subsequent amendments, governing the hours of service and working conditions of employes of the Carrier represented by the Brotherhood, copies of which agreement and amendments are on file with your Honorable Board and by mention thereof are made a part of this dispute.

The Employes submit the following statement of such facts as are material to the determination of this dispute.

On or about March 19, 1949, the forces at the Missoula Freight House were reduced about twenty per cent. Due to such reduction in forces, the claimants became furloughed employes since they did not have sufficient seniority to hold regular positions. As provided in Rule 23, claimants then filed their names and addresses with the Agent and went elsewhere to look for employment until such time as new positions or vacancies of over thirty days' duration occurred, when they would be required to accept such vacancies, subject to the provisions of Rule 15.

For ready reference we quote Rule 15 and paragraphs (c) and (e) of Rule 23.

Rule 15. Promotion Basis. Except as otherwise provided in this agreement, employes covered by these rules shall be in line for promo-

Rule 55 of the Clerks' Agreement effective June 1, 1946 has hereinabove been quoted. Rule 55(f) of the Clerks' Agreement effective June 1, 1946 applies to grievances growing out of the interpretation or application of the rules of that agreement. In the application of Rule 55(f) any claim for compensation beyond ten days prior to November 5, 1951 cannot now be considered.

It is apparent the Employes in presenting the claim contained the Carrier's Exhibit "A" made an effort to secure an arbitrary payment of large sums of money to three employes. Failing to secure an arbitrary payment of large sums of money to the three employes, the Employes apparently propose to abandon further prosecution of that claim. The Employes then presented a novel claim to this Division in an apparent attempt through this medium to secure the payment of considerable sums of money to three employes. The Employes by their own action have demonstrated the fallacy of any alleged violation of the rules of the Clerks' Agreement. It is manifestly plain that the claim presented to this Division by the Employes on December 16, 1953 is not properly before this Division for adjudication. It is equally plain that the claim presented, appealed and considered on the property in behalf of Messrs. Heath, Jensen and Sandau is without merit.

The claim presented to this Division by the Employes on December 16, 1953 should be dismissed for lack of jurisdiction; the claim presented, appealed and considered in behalf of Messrs. Heath, Jensen and Sandau should be denied in its entirety.

All data in support of the Carrier's position in connection with this claim has been presented to the duty authorized representative of the Employes, and is made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: This is purely a penalty claim wherein Claimants seek recovery on that basis for an alleged violation of one of the Rules of the Agreement.

For our purposes it may be said the claim is based upon subsections (c), (d) and (e) of Rule 23 of the Current agreement which should be quoted at length. They read:

> "(c) An employe affected by force reduction or by abolishment of a position who does not have sufficient seniority rights to secure a position will be considered as a furloughed employe. A furloughed employe must file his name and address with the proper official at the time of furlough or within seven (7) calendar days thereafter, and will advise proper official of any change in address.
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> "(d) Furloughed employes who are available at point where service is to be performed will, if qualified, be given preference on a seniority basis to extra work, short vacancies and vacancies occasioned by temporarily filling positions that have been bulletined which are not filled by rearrangement of regular forces in the office, station or facility where such work is to be performed."
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> "(e) When new positions or vacancies in positions in excess of thirty (30) calendar days occur, furloughed employes who have filed their names and addresses and who have seniority rights which entitle them to perform service will be required to return to service in the order of their seniority, subject to the provisions of Rule 15, within seven (7) calendar days after being notified verbally, or by mail or telegram sent to last address given or give satisfactory reason for not doing so."

The facts are important principally for informative purposes and a proper understanding of the issues involved, hence they can and will be briefly summarized in the light favorable to Claimants' position.

In March 1949 the forces at Missoula Freight House were reduced by the Carrier. Due to such reduction Claimants, who did not have sufficient seniority to hold regular positions, became furloughed employes. Thereupon they filed their names and addresses with Carrier and went elsewhere to look for employment until such time as new positions or vacancies of over thirty days duration occurred, when, under subsection "e" they were required to accept such vacancies. In addition it is to be noted that under subsection "d" they had the right, if available, to be called by the Carrier and given preference on the basis of seniority to extra work required on the property.

Shortly after the force reduction extra work became necessary, usually for about one day each week. Thereupon the Carrier notified Claimants of its availability and for a while some of it was performed by Claimants without protest. After a time it became apparent that such work would interfere with outside employment and Claimants protested its performance. After considerable bickering over the matter the Carrier took the position Claimants were required to perform such work when called and ultimately threatened discipline proceedings in the event they refused to perform it. The details of what happened with respect to such subject between March 1949 to August 1951 are meager and not clear. However, it can be said, that commencing as early as December 1949 Claimants' Organization Representative protested the position taken by the Carrier and at intervals made efforts to induce it to recede from that position.

: The record respecting what happened commencing August 1951 and thereafter is much clearer. On August 24, 1951, the Carrier notified Claimant Heath that employment existed at the Depot and directed him to report to the agent for placement. The next day such Claimant wrote Carrier's agent at Missoula stating he was a furloughed employe, did not have to accept or bid on any position of less than thirty days duration and definitely refused to return to work for one or two days a week or month and quit another job to do so. In the same letter he also advised that he would gladly return to work if a position of over thirty days duration showed up provided his seniority entitled him thereto. This, it may be added is the first time, so far as the record discloses, that any of the Claimants had declined to accept extra work when called. Some five days after receipt of the foregoing letter the Carrier notified Heath to report for investigation for refusal to accept the work therein mentioned and for absenting himself from duty and engaging in other business without proper authority. Pursuant to this notice an investigation was held in the office of the Superintendent with the result that no discipline was assessed against him. Instead, within a short time after the date of such hearing, which we assume to be September 1, 1951, because the claim here presented so indicates, Carrier receded from its position and ceased to insist that the Agreement required Claimants to accept extra work of the character herein involved.

On November 5, 1951, the Local Chairman filed a claim on the property which stated that Claimants had lost work as the result of the Carrier's action and claimed monetary compensation for each of them for its loss. There is some quibble respecting what happened to such claim but it may be said that later another claim, similar in monetary amounts and stating in substance it was being filed because Claimants had been required to protect short vacancies and thereby lost the chance of accepting other employment, was filed with Carrier's Chief of Personnel and ultimately denied by its highest reviewing authority; and that thereafter the instant claim was brought to this Division of the Board.

Notwithstanding it was required to give Claimants notice of extra work, if available, there can be no question that Carrier misconstrued the force and effect to be given the Agreement when it insisted Claimants as fur-

loughed employes should accept work of less than thirty days duration when notified. Even so it does not follow that action resulted in a situation where it should be assessed with a penalty under the confronting facts and circumstances.

It is true, as Claimants point out, there are Awards of this Division, with which we pause to note we have no quarrel, (1) holding that employes instructed to stand by for specific duty after working hours are entitled to compensation even though they do not work and (2) that penalties are imposed in many instances to maintain the integrity of agreements between the parties. We are not disposed to here attempt to distinguish those Awards. It suffices to say that those cited in support of the foregoing principles do not purport to deal with a situation such as is here involved and cannot be regarded as controlling precedents.

Touching the involved issue it must be remembered that the facts of record do not present a situation where the Carrier was depriving Claimants of work to which they were entitled under the Agreement or was exercising proper managerial prerogatives over which the Claimants had no control. On the contrary they disclose a situation where Carrier was misconstruing the Agreement with respect to Claimants right to refuse extra work assignments which, the terms of that instrument itself clearly reveal, they had no contractual obligation to perform as furloughed employes. Here, unlike the ordinary case, Claimants possessed, along with the Carrier, a joint obligation to see to it the Agreement was properly applied with respect to matters clearly beyond its scope and purely personal to them. i.e., their rights to perform outside work while furloughed. They could have done this by procuring other work; by refusing to work when called; by filing a grievance complaint under the provisions of Rule 55 (f) of the existing contract; or by promptly taking the action eventually taken by Heath, which would have brought the dispute to a climax. Instead of exercising any one of these prerogatives they stood idly by for months and then, after Carrier had recognized its prior erroneous construction of the Agreement by receding from its position, filed a money claim on the theory they were entitled to recover for standing by for extra work for all that period of time when, as a matter of fact, they could have taken employment elsewhere and refused calls for such work with impunity.

In the face of conditions and circumstances, such as have been heretofore related, we do not believe a monetary penalty, based on the existence of a situation for which the Claimants themselves must share partial responsibility, should be assessed against the Carrier.

In concluding this opinion it should be said the conclusion just announced is limited to what has just been stated and is in no sense to be construed as indicative of a view that Carrier's initial construction of the contract was proper or that Claimant would not have been entitled to some redress if its action with respect thereto had been promptly and properly challenged.

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

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

Claimants are not entitled to a sustaining penalty award under the confronting facts and circumstances.

AWARD

Claim denied in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 10th day of September, 1954.