

Award No. 9489

Docket No. CL-8798

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

PARTIES TO DISPUTE:

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

LEHIGH VALLEY RAILROAD COMPANY

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

1. The Carrier violated the rules of the Clerks' Agreement when it used Russell Remaley, an employe of the Railway Express Agency at Easton, Pa. to fill the position of janitor at Easton, Pa. April 21, and 22nd, 1955, and as a freight handler on April 26, 1955 at the same station.

2. That Claimant Howard C. Romans be compensated for three (3) days' pay at punitive rate of the positions involved.

EMPLOYES' STATEMENT OF FACTS: Howard C. Romans has a Group #2 seniority dating of January 29, 1951 (Freight handler—janitor) and Group #1 dating of March 29, 1951 (Clerical) rosters.

On April 21 and 22, 1955 Mr. Romans was on a temporary assignment as baggage porter with hours of service 4 P. M. to 12 midnight (20 mins. for lunch). The janitor position has hours of service 8 A. M. to 5 P. M. (one hour for lunch).

The assignment of a 20 minute lunch period to Mr. Roman on April 21 and 22, 1955 would have enabled him to work both positions. Instead of doing this the Agent solicited Russell Remaley, an individual employed by the Railway Express Agency at Easton Passenger Station who has no employment rights or seniority under the Clerks' Agreement with the Lehigh Valley Railroad.

On April 26, 1955 the services of an additional freight handler were required at Easton Freight Station, Easton, Pa. and again the Agent solicited the same individual, Russell Remaley, employed by the Railway Express Agency at Easton Passenger Station at Easton, Pa., to work as a freight handler. One of the assigned rest days of the baggage porter position which Mr. Romans was temporarily assigned to was Tuesday, April 26, 1955. Mr. Romans was therefore available for the freight handler position at Easton Freight Station, but was not called.

assigned by virtue of the voluntary exercise of his seniority to a Group 1 position. Furthermore, the Group 1 assignment Romans selected had an assigned tour of duty beginning at 4:00 P. M., whereas the assigned tour of duty of the janitor's job he left and on which he is claiming he should have been used April 21 and 22 had a tour of duty from 8:00 A. M. to 5:00 P. M. The tour of duty of the janitor's job did not end on these days or on any other day until one hour after Romans began work on the position of his choice on these days. Thus, it can be readily seen that even if there would be merit to the Petitioner's contention in this case, which the Carrier most vigorously states there is not, Romans could not have been used to fill the vacancy on the janitor's position and been available to be used on the position in Group 1 he had chosen to select.

Again on April 26 it is the contention of claimant that when the need for an extra freight handler at Easton Freight Station occurred, Romans, who was off duty that day as one of his regular assigned rest days, should have been used for this Group 2 assignment instead of using Remaley. Romans had no right to be used on this Group 2 vacancy; he was a regularly assigned Group 1 employe at the time and there was a Group 2 extra employe available to be used, who was Remaley, and he was properly used.

After Remaley worked on April 26, 1955, he apparently decided to give up his employment with this Carrier and addressed a letter to the Superintendent under that date reading "Please accept my resignation effective at once." Remaley's resignation was accepted and his employment with this Carrier was terminated as of April 26, 1955.

The Carrier has by the record given above shown that new men were employed to fill the extra service requirements in the Easton territory evidenced by the employment of Consalone with first date of service rendered April 10, 1955, and of Remaley on April 21, 1955. Both of these individuals, as well as many others who were employed on the same basis, were employed in the regular manner and with the intent that it would be their obligation to protect all extra work that would be available to them. The fact that Remaley resigned after a few days' work is immaterial, as this occurs from time to time with the new men who are employed and, in fact, Consalone subsequently resigned at a later date also. Remaley was not hired as a day worker any more than other extra employes under the same circumstances were hired. He was hired and assumed the status of an employe on April 21, 1955, and up to the time of his resignation responded to all calls for work that were available to him with the seniority he had.

The Carrier asserts that there was no rule of the agreement in effect at the time that was violated when Remaley was hired as an extra Group 2 employe, and respectfully submits that this claim is entirely without merit and, being unsupported by any rule of the existing agreement between the parties, should be denied.

The facts presented in this submission were made a matter of discussion with the Committee in conference on the property.

OPINION OF BOARD: This controversy arose at Easton, Pennsylvania, where Carrier maintains Freight and Passenger Stations in the same building. The Railway Express Agency also is located in that building.

Claimant has a Group 2 seniority date of January 29, 1951 (Freight Handler-Janitor) and a Group 1 seniority date of March 29, 1951 (Clerical) roster at this location under the Clerical Agreement. On April 16, 1955,

Claimant filled a temporary vacancy in the Baggage Room, assigned to work from 4:00 P. M. to midnight, and remained thereon until June 5, 1955.

Since there was no extra employe, Carrier hired Russel Remaley, an employe of the Railway Express Agency, to fill a temporary vacancy on day janitor position on April 21 and 22, 1955, and to work as extra freight handler on April 26, 1955. After working that day, Remaley submitted a letter of resignation to Carrier's Superintendent.

The employes contend that Remaley was not a bona fide employe under the applicable agreement and that Claimant should be compensated for three days at the punitive rate.

The Carrier contends that Remaley was validly employed as an extra employe, that when Remaley was hired, it had no way of knowing that he would not quit his Railway Express Agency position to protect his extra work for the Carrier, and that in any event, the punitive rate is not allowable.

We recognize that Romaley's outside employment did not necessarily preclude him from becoming a bona fide employe of the Carrier subject to the terms of the agreement between the parties. See Awards 6261, 6174, 7191. However, the crucial question is whether he became such an employe.

The facts establish that he did not. At the time Remaley undertook work for the Carrier, he had more than twenty years of seniority with the Railway Express Agency. His period of employment with the Carrier covered, at the most, six days—April 21 to and including April 26—during which he worked three days. He formally resigned from the Carrier's service after work on April 26. Such a record suggests that Remaley undertook employment with the Carrier to make some extra money when his regular employment permitted it and that he had no intention of holding himself in readiness to serve subject to call and assignment at such times as would be required by the Carrier.

Remaley's more than twenty years of service with the Railway Express Agency located in the same building placed on the Carrier responsibility for making inquiry as to whether, by accepting employment with the Carrier, he intended seriously to jeopardize such a long period of outside service in order to protect extra work for the Carrier. There is no evidence that such inquiry was made or that Carrier was misled as a result thereof.

No valid basis has been shown for awarding compensation at the time and one-half rate. The claim should be sustained but with payment on a pro rata basis. See Awards 9044, 9028, 8865. 8776, 8750.

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

That the Agreement was violated.

AWARD

Claim sustained in accordance with the above Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 30th day of June, 1960.