

**Award No. 9619**  
**Docket No. CL-9446**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Oliver Crowther, Referee**

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**PARTIES TO DISPUTE:**

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

**THE VIRGINIAN RAILWAY COMPANY**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that the Carrier violated the Clerical Agreement dated April 15, 1946.

1. When on August 28, 1955, the Carrier (The Virginian Railway Company) employed an employe (V. R. Neill) for extra work in Groups 1 and 2, who had a regular position at Roanoke Weaving Mill, Roanoke, Va., working 6 days per week on the second shift, which deprived regular employes of the Carrier of work that rightly belong to them.

2. That the Carrier (The Virginian Railway Company) shall now be required to compensate the following employes a day's pay at the rate of the caller for the following days:

J. A. Whittaker for August 28, and September 2,  
1955

B. N. Sowder, for September 1, 1955

R. P. Rowland, for September 3 and 6, 1955

R. T. James, for October 5, 1955

**EMPLOYEES STATEMENT OF FACTS:** On August 28, 1955 the Carrier employed a Mr. V. R. Neill, for extra work in Groups 1 and 2, at Roanoke, Va., knowing that he had a regular position at Roanoke Weaving Mill, Roanoke, Va., on the second shift 6 days per week and that he did not have any intention of becoming a bona-fide employe as when on September 9th, 1955, he failed to respond to a call account of working his other position and in accord with our Rule 26 (third) he forfeited his seniority of this date, but the Management failed to comply with this rule and on September 17, 1955,

ployes who perform work for other companies on their off duty time and the carrier takes no exception to such work as long as it does not interfere with their service for the railway. In Neill's case there is considerable doubt as to whether he was given a proper call on September 9th and it is obvious that he was anxious to secure a permanent position with the carrier as soon as possible because he bid in a job at the first opportunity and took it although it meant moving some 250 miles away. Such action is certainly proof that Neill hired out as a bona fide employee.

Inasmuch as Neill was, on each date of claim in this case, a bona fide employee hired to perform extra work under terms of Rule 2(d) the claims in this case are without merit and should be denied.

All data in connection with this submission have been furnished representatives of employees.

(Exhibits not reproduced.)

**OPINION OF BOARD:** As we view it our opinion and decision must be based upon our interpretation of facts. That being true we set forth facts upon which there is little if any disagreement and then mention evidence upon which there seems to be some conflict.

The ultimate fact to be determined is: was Vernon R. Neill a "bona fide" employee during period of claim"? We shall attempt to confine our opinion to applying the evidence to the ultimate facts to be determined.

At the time Neill applied for clerical employment he had steady outside employment six days per week, Monday through Saturday. Carrier hired him August 28, 1955 to perform Groups 1 and 2 extra work in Seniority District 11. After being employed by Carrier, Neill continued his other job. He responded to calls for duty on five dates between that time and September 9. On September 9, 1955 he did not respond to a call for duty. Subsequently, he responded to calls for duty whenever called except upon September 17, 1955, until Carrier terminated his employment per Rule 2(d) for failure to respond to the call of September 9 at the request of organization. Carrier allowed and paid that part of organization's original claim encompassing work done by Neill from September 9, 1955 to September 28, the day he was discharged for not answering call on September 9.

Neill was later re-employed by Carrier, worked October 5, 1955 and thereafter responded to all calls to duty until November 3, 1955 when he was assigned to a permanent clerical position as Barney Yard Clerk and Assistant Weighmaster at Sewells Point Coal Piers in the vicinity of Norfolk, Va., more than two hundred miles from his home in Roanoke, Va. That was and is a Group 1 position in the same Seniority District No. 11. Neill bid for and accepted that assignment and so far as the record shows is still there. The main conflict in the evidence concerns the call to work and Neill's failure to respond on September 9. The evidence of both parties upon this point is set forth in the transcript of investigation held in General Yardmaster's Office, Roanoke, Va. at 9:00 A. M., September 28, 1955.

We do not set forth here all conflicting testimony contained in the transcript of investigation held in General Yardmaster's Office, Roanoke, Va.

We do not set forth here all conflicting testimony contained in the transcript but do summarize the conflicts pertinent to this inquiry.

**Organization:**

Yard Clerk Binkley working the second shift September 9 telephoned the home of Neill, "... some lady answered the phone. I don't know who she was but I asked for Mr. Neill to call in to report at 11:00 and the lady said Mr. Neill wasn't there, that he was working. I think she was wrong about me not telling her that this was the Virginian Railway and that I wanted him for the 11:00 caller job. I asked her if there was any way to get him here by 11:00 P. M. and she said that he would have to come home and change clothes so I told her I guess I better get somebody else." Binkley did not know to whom he was talking but we are satisfied that it was with Neill's wife.

In answer to another question Binkley stated: "That is right, because she explained that he didn't get off until 11:00 P. M. and that he would have to come home and change clothes and it would be after 11:00." The obvious effect of that testimony is that Neill was at the time of Binkley's telephone conversation with his wife working his regular shift on his other job and that his wife told Binkley that Neill could not, because of that fact, report for work with the carrier until after 11:00 P. M.

**Carrier:**

Neill's testimony is to the effect that his wife had taken other calls for him and that he had reported for duty in response to them; that on the occasion mentioned he did not receive notice of a call; that if he had received the call he would have reported for service at 11:00 P. M.; that the call to his wife on September 9 did not state the name of the caller or the carrier but merely asked for him, and was told he was not home—then the caller hung up. A portion of the testimony could not have been within the personal knowledge of Neill but presumably was related to him by his wife.

It is not necessary to resolve the minor conflicts of testimony. We are willing to assume for the purposes of this opinion that Binkley actually talked to Neill's wife by telephone and that he may have told her that he wanted Neill to report for duty with the Carrier at 11:00 P. M. From Binkley's testimony it is clear that the wife, not Neill, during that call indicated that Neill could not report until some time after 11:00 P. M. and that Binkley during the same conversation said that he "better get somebody else". That decision was made by Binkley in the course of the one telephone call to Neill's wife. Obviously Neill could not have known of the call to work until after that decision was made.

Circumstances surrounding the failure to report on September 17 are not shown in the record but we are justified in assuming that a call was made. Neill was away from home and did not report for work. It may well be that the telephone call on that occasion was similar to the one related by Binkley on the former occasion.

Organization's contention that Neill was not a bona fide employee on the dates claimed is based on two points:

1. He was at the times mentioned a full time employee of another employer.
2. His failure to answer calls on two occasions indicated that he was not a bona fide employee but merely wanted to pick up addi-

tional money by working times not required by his other employment.

We treat those two points in order.

1. The Board is of the opinion that one may be a bona fide extra employe although simultaneously holding a job with a different employer if the circumstances indicate that he will accept such extra employment when called upon. An additional factor to be considered is whether the extra employe evidences a desire to become a full time employe.

It is reasonable that one holding a job not to his liking will hold it as a means of livelihood until he can get regular employment in a field or with an employer that he prefers. One means of obtaining a preferred job is by doing extra work until a regular job is available in that field or with that employer. Neill by the record evidenced his desire to become a regular employe of Carrier. He chose to protect himself and his family by retaining his job while seeking regular employment with Carrier by way of extra employment. We are of the opinion that Neill, when employed as an extra, although still employed on his regular job, was a bona fide extra employe of Carrier.

2. Failure to answer calls.

Neill did not answer two calls (September 9 and September 17). He did not receive the call September 9. The circumstances of call September 17 are not clear. Neill's wife took the call of September 9 and reported to the caller that he would not be able to report until after 11:00 P. M. She gave that information without getting in touch with Neill. Neill testified that he would have reported for work had he received the call. The implication is that had he received the call he would have left his other work early in order to report for duty with Carrier at the time indicated. The same is reasonably probable of the call on September 17 in absence of evidence to the contrary.

It appears that Mrs. Neill, as it sometimes happens to many other men, gave answer for her husband. The fact that a man's wife gave answer for her husband does not in our opinion, prove that the man was not a bona fide extra employe. Even if the wife were authorized to answer for the husband we do not believe that that fact necessarily determines that he was not Bona Fide.

Failure to report for work may well be grounds for discharge in many occupations. It was so held in the present case. It does not necessarily follow that an employe discharged upon proper grounds was not before the fact giving rise to discharge a Bona Fide employe nor that after a rehiring he was not a Bona Fide employe.

We accept the undisputed fact that Neill held a full time job with a different employer and that he did not respond to two calls September 9 and September 17. Even without considering Neill's testimony that he would have responded we do not believe that either of those facts or both of them taken together indicate a lack of bona fides in applying for and accepting extra employment. On the other hand we believe that Neill by his actions demonstrated his desire and intention to be a bona fide extra employe with intent to become a regular employe.

**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 Employee involved in this dispute are respectively Carrier and Employee 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 has not been violated.

**AWARD**

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of THIRD DIVISION

**ATTEST: S. H. Schulty**  
Executive Secretary

Dated at Chicago, Illinois this 2nd day of November, 1960.