Award No. 10299

Docket No. CL-10292

# NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION
## (Supplemental)

George D. Bonebrake, Referee

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## PARTIES TO DISPUTE:

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

## CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

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

1. The Carrier violated and continues to violate the Clerks' Rules Agreement at Dubuque, Iowa, when it used and continues to use an outsider holding no seniority in Seniority District No. 32 to perform work covered thereby.

2. The Carrier shall now be required to compensate Employe M. E. Hanlon at the time and one-half rate of Yard Clerk Position No. 3 for eight (8) hours on each of the following days: February 8, 9, 10, 12, 15, 16, 17, 18 and 19, 1957.

3. The Carrier shall now be required to compensate Employe J. D. Hanlon at the time and one-half rate of Yard Clerk Position No. 1 for eight (8) hours on each of the following days: February 26, March 5 and 12, 1957.

4. The Carrier shall now be required to compensate Employe M. E. Hanlon at the time and one-half rate of Yard Clerk Position No. 2 for eight (8) hours on each of the following days: March 8, 11, 13, 14, 17 and 19, 1957.

EMPLOYES' STATEMENT OF FACTS: Employe M. E. Hanlon is regularly asigned to Yard Clerk Position No. 2 at Dubuque, Iowa from 7:59 a.m. to 3:59 p.m. Tuesday through Saturday, with rest days of Sunday and Monday. His clerical seniority date in Seniority District No. 32 is June 14, 1942.

Employe J. D. Hanlon is regularly assigned to Yard Clerk Position No. 1 at Dubuque, Iowa from 3:59 p.m. to 11:59 p.m. Wednesday through Sunday, with rest days of Monday and Tuesday. His seniority date in District No. 32 is September 10, 1947.

On February 8, 1957 the regular occupant of Yard Clerk Position No. 3 with assigned hours of 11:59 p.m. to 7:59 a.m. Friday through Tuesday, was absent account of illness.

than their own for which they made no request under the provisions of Rule 9 (g) and we respectfully request that the claim be denied.

8. *Had either of the claimants requested the temporary vacancies* under the provisions of Rule 9 (g), they would have been used thereon and they would have given up their own assignments during the periods they occupied the temporary vacancies. In other words, their own positions (for which Employe Rettenberger would no doubt have been used) would have become temporary vacancies and in accordance with the provisions of Rule 9 (h), they could have returned to their own positions upon leaving the temporary vacancies. *Neither of the claimants requested* the temporary vacancies under the provisions of Rule 9 (g).

**OPINION OF BOARD:** These claims are made in behalf of two Employes, M. E. Hanlon and J. D. Hanlon, who were at the time involved regularly assigned yard clerks at Dubuque, Iowa. They contend that they should have been used to perform extra service, or fill temporary vacancies, on positions other than their regular assignments, at overtime rates of pay. They claim that they should have been used, in addition to working their own respective assignments.

Beginning February 8, 1957 and continuing intermittently up to and including March 19, 1957, Carrier had used M. Rettenberger to perform the extra service to fill the temporary vacancies in question. It is Claiman't contention that they should have been used, and that the Carrier in not doing so violated the Agreement. The assignments, which are undisputed, are as follows:

Position No. 2 — 7:59 A. M. to 3:59 P. M. — Tuesday through Saturday
Rest days Sunday & Monday
Occupant: M. E. Hanlon

Position No. 1 — 3:50 P. M. to 11:59 P. M. — Wednesday through Sunday
Rest days Monday & Tuesday
Occupant: J. D. Hanlon

Position No. 3 — 11:59 A. M. to 7:59 A. M. — Friday through Tuesday
Rest days Wednesday & Thursday
Occupant: C. E. Nugent

Regularly assigned relief:

Position No. 2 — Sunday & Monday
Position No. 1 — Tuesday
Position No. 3 — Wednesday & Thursday
(*Rest day relief on Monday Position No.* 1, is included in another relief position.)

Due to the absence of Yard Clerk, Nugent, a temporary vacancy on Yard Clerk Position No. 3 occurred on February 8, 9, 10, 12, 15, 16, 17, 18 and 19, 1957. Rettenberger was used to fill the job on those dates. M. E. Hanlon claims he should have been used instead.

*On* Tuesdays, February 26, and March 5, the assigned rest days on Position No. 1, the relief clerk for J. D. Hanlon on those days was absent and Rettenberger was used. J. D. Hanlon claims he should have been used instead.

On Friday, March 8, J. D. Hanlon, occupant of Position No. 1 was absent and Rettenberger was used. M. E. Hanlon claims he should have been used instead.

On March 11, 12, 13, 14, 17 and 19 the regularly assigned relief clerk was absent and Rettenberger was used. J. D. Hanlon claims he should have been used on March 12, and M. E. Hanlon claims he should have been used on the other dates.

It is not disputed that on each day Rettenberger was used, he filled the job of a regularly assigned employe who was absent. He had first performed service for Carrier as Vacation Relief Yard Clerk as Dubuque on Position No. 3 in November, 1956. He performed less than 60 days of vacation relief that year, and under the applicable Agreement did not establish seniority performing such work. He also worked as Yard Clerk, Position No. 3, on December 12, 1956, but was not given seniority as of that date (which date is not, however, relevant here).

Rettenberger was used by Carrier on January 9, 1957, to fill a temporary vacancy on that date of a regularly assigned yard clerk. His seniority date appears as of January 9, 1957. It is a fair inference from the record, and Rule 6(a) of the Agreement, that Rettenberger's name appeared on the July, 1957, seniority roster as of that date. The Carrier states in its submission that "He was so shown on the seniority rosters issued subsequently." (R. 30). The rosters involved were not submitted, but the above statement is not denied.

Prior to the posting of the July, 1957, roster, this claim was filed, but there appears to be no other claim under Rule 6(c) that Rettenberger's seniority date of January 9, 1957, was erroneous. Such fact is not determinative of this claim, but is mentioned because Petitioner says that Rettenberger is not a bona fide Employe. Such contention is based largely on the fact that he had outside employment in Dubuque (tree and landscape gardener). As to this, Carrier stated:

> "—— Rettenberger made formal application for employment as a clerical employe in November of 1956 and spent considerable amount of his own time breaking in for yard work as he was very desirous of obtaining railroad employment as such. —— Rettenberger's father is in the tree and landscape business, employe Rettenberger only assisting his father in the performance of such work when not in conflict with the service to which entitled as a clerical employe on the basis of his seniority, but regardless of any activities he may have had as a tree and landscape gardner or any other outside endeavor, inasmuch as he fully discharged all obligations he had in performing service for the Carrier for which he stood —— "his employment relation and seniority rights are not affected. (R. 15)"

We have reviewed the record before us as to Rettenberger being or not being a bona fide employe of Carrier, and without discussing the matter pro and con, we believe, and accordingly hold, that he was at the time or times involved herein, and the circumstances here under, a bona fide employe of Carrier. The fact that he had outside employment, does not in and of itself prevent him from being a bona fide employe. As an employe he is entitled to such rights as the Agreement provides—no more, or less.

This holding does not dispose of the case, however. It only answers the contention as to Rettenberger being an "outsider". Petitioner also contends

that Carrier's use of him as an "extra" to fill the temporary vacancies was improper and in violation of Claimants' rights. Two questions are involved; (1) Whether Carrier could, under the circumstances, use Rettenberger as an "extra", and (2) Whether Claimants' seniority rights—their seniority dates are admittedly prior to Rettenberger's—were violated.

As to the first, Petitioner contends that Carrier could not employ and use an "extra" in this situation; that the Agreement does not so permit. Language expressly covering the exact point involved is not used, but we have searched the record in vain for a prohibition of such employment. On the other hand, the employment and use of "extras" is clearly contemplated. e. g., Rule 27(h) provides:

> "(h) Rest Days of Extra or Furloughed Employes
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> "To the extent extra or furloughed employes may be utilized under this agreement or practices, their days off need not be consecutive; however, if they take the assignment of a regular employe they will have as their days off the regular days of that assignment."

There are references to "extra employes" elsewhere in the Agreement, and as stated above, their employment and use in circumstances such as here are not found to be proscribed. If such Prescription were intended, appropriate language could have been used, and under the circumstances here, such language is not to be inferred.

As to the second point—violation of Claimants' seniority rights—we have analyzed the record in that regard. They claim that their rights under Rule 9(g) were violated. Such Rule provides:

> "Rule 9 — Bulletined Positions
>
> "(g) New positions or vacancies of thirty (30) days or less duration shall be considered as temporary and may be filled by an employe without bulletining; if filled, the senior qualified employe requesting same will be assigned thereto."

Petitioner argues that Claimants sufficiently did request the vacancies so as to be entitled thereto. Carrier contends on the other hand (Page 30 of record) that Claimants' requests are clearly for over time and not just for the jobs. Under the above rule (Rule 9(g)), it is true as argued by Petitioner, that it is not required that requests be in any specific form. They must, however be by an Employe "requesting same". "Same", as used herein, refers back to new positions or vacancies of 30 days or less duration. The request therefor, in this case, must be for the vacancy, and not for the vacancy at over time or for the vacancy in addition to working their regular assignments. In other words, the request for the vacancy, although it need not be in any specific form, must be unqualified.

Here it is clear, as we see it, that Claimants were seeking overtime, and not the vacancies themselves. Overtime necessarily would be referable to their respective regular assignments, and the record is barren of any indication that Claimants desired to give them up and take the ones where the temporary vacancies occurred. It would be unrealistic to infer that desire.

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 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

Upon the entire record, we find and accordingly hold that under the facts presented 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 16th day of January, 1962.