

Award No. 10649
Docket No. CL-9849

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

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

INDIANA HARBOR BELT RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that:

1. The carrier violated the rules of the Clerks' Agreement when on April 30, 1955, and twenty-three subsequent dates shown in Item 2 hereof, the Carrier used a furloughed Fireman, Mr. J. W. Gurganus, to fill vacancies subject to Rule 28 of the Clerks' Agreement and

2. That the Carrier shall now be required to pay Claimants Walter S. Sellin and P. Jebson a straight time day's pay for each of the following dates:

Walter S. Sellin

April 30, May 8, May 20 to 24 inclusive, June 1, June 6, June 7, June 10 to 14 inclusive, and June 17 to 20 inclusive, all in the year 1955.

P. Jebson:

June 1, June 25 to June 28 inclusive, 1955.

EMPLOYEES' STATEMENT OF FACTS: On June 1, 1954, the Carrier hired Mr. J. W. Gurganus as an Extra Clerk-Crew Dispatcher, his name appearing on the January 1, 1955 roster of Motive Power Department Employees — Entire Road.

Mr. Gurganus worked in that capacity on various dates between June 1, 1954 and April 20, 1955.

On April 6, 1955, because of refusal of Mr. Gurganus to join the Brotherhood having jurisdiction over the class or craft of work he was performing

and was paid in lieu therefor under the provisions thereof. Here it is certain that if Andrus had not been granted a vacation he would have received pay for only nine days. In the interpretations (See page 58 of the Agreement and Interpretations thereon) by Referee Morse we find the following statement:

'The parties should never forget that the primary purpose of the vacation agreement was to provide vacations to those employes who qualified under the vacation plan set up by the agreement. Any attempt on the part of either of the Carriers or the labor organizations to gain collateral advantages out of the agreement is in violation of the spirit and intent of the agreement.'

"Here, in view of our announced conclusions, it is apparent that Andrus is attempting to gain collateral advantages growing out of the agreement, in violation of its spirit and intent."

CONCLUSION:

Summarizing, Carrier maintains it did not violate the provisions of its basic Agreement with the Organization when it rehired Mr. Gurganus, a furloughed fireman, and subsequently assigned him to the position of a clerk-crew dispatcher to fill temporary vacancies created by regular incumbents laying off for one reason or another. Upon being rehired Mr. Gurganus assumed the status of a new employe, and as such was subject to the provisions of the basic Agreement as a clerk-crew dispatcher and not as a fireman.

Accordingly, Carrier requests Organization's claim herein be denied in their entirety.

All data and arguments herein contained have been presented to the Organization in conference and/or correspondence.

(Exhibits not reproduced.)

OPINION OF BOARD: The parties agree that the date of June 1, 1955 specified for Claimant Jebson should be corrected to June 21, 1955.

The Carrier hired J. W. Gurganus in a fireman position on June 19, 1953. On September 14, 1953 he was furloughed from that position, which is outside the coverage of the subject agreement between the Carrier and the Clerks' Organization. On June 1, 1954 the Carrier hired Gurganus as an extra clerk-crew dispatcher at Blue Island, Illinois. He Worked in that capacity on various dates thereafter and his name was placed on the January 1, 1955 seniority roster of clerical employes in the Motive Power Department. On April 20, 1955 the Carrier terminated Gurganus after he had been cited by the Clerks for having failed to comply with the terms of the Union Shop Agreement between the subject parties. It is agreed that he had failed to become a member of the Organization within 60 calendar days of his employment as a clerk and after 30 days of such compensated service, that following notice from the Carrier concerning

the citation for non-compliance he did not avail himself of the right to a hearing on the matter, and that his employment as a clerk was properly terminated on April 20, 1955.

On April 30, 1955 the Carrier re-employed Gurganus as an extra-clerk-crew dispatcher to fill a one day vacancy and on the subsequent (corrected) claim dates through June 28, 1955, he also served in this capacity to cover assignments of employes who were absent or on vacation. On the last day he worked as an extra clerk-crew dispatcher Gurganus was recalled to service as a fireman.

It is the Organization's contention that the Carrier's re-employment of Gurganus as a clerk following his termination on April 20, 1955 was in violation of the parties' basic agreement and their Union Shop Agreement. The Carrier responds that it was entitled to re-employ Gurganus on April 30, 1955 just as it has the right to rehire any other individual who has been previously dismissed for disciplinary or any other reason, and that upon his rehire Gurganus again acquired the protection afforded by the Clerks' agreement.

Section 1 of the parties' Union Shop Agreement provides that all employes of the Carrier subject to the rules and working conditions agreements between the parties "shall, as a condition of their continued employment subject to such agreements, become members of the organization party to this agreement representing their craft or class within sixty calendar days of the date they first perform compensated service as such employees . . ." — subject to other provisos not pertinent here. Since Gurganus did not comply with the prescribed condition, he was barred from "continued employment" subject to the Carrier's basic agreement with the Clerks. Yet ten days after he was terminated from employment covered by this agreement the Carrier re-employed him for assignments within the jurisdiction of the agreement.

We do not think the ten day interval here involved permits the Carrier to validly contend it did not continue to employ Gurganus as an extra clerk. Undoubtedly, there were gaps of equal length in his compensated service before his termination on April 20, 1955, since he was used only as an extra man. The fact that he lost his seniority at the time of his termination, and thus was hired on April 30, 1955 as a new employe, has no bearing on this case. The governing language of the Union Shop Agreement speaks of continued employment, not continued seniority.

We are of the opinion and find that the Carrier violated the parties' Union Shop Agreement in the subject instance. The claim will be sustained, with the correction of the June 1, 1955 date for Claimant Jebson as indicated above.

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 Carrier violated the Agreement.

AWARD

Claim sustained as indicated in the above Opinion of Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of June 1962.

DISSENT TO AWARD NO. 10649, DOCKET NO. CL-9849

Award 10649 correctly recognizes that Claimant's "employment as a clerk was properly terminated on April 20, 1955", but incompatibly concludes that his re-employment as a new employe ten days thereafter constituted "continued employment" in violation of the Union Shop Agreement. For this reason Award 10649 is in error and we dissent. The severences of employer-employe relationship became complete when Claimant's employment was terminated, and, therefore, his subsequent re-employment as a new employe was proper (Award 4195). Claimant's re-employment was, in fact, a new status of employment (Award 5191).

/s/ W. H. Castle

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ D. S. Dugan

/s/ T. F. Strunck

LABOR MEMBER'S REPLY TO CARRIER MEMBERS' DISSENT TO AWARD NO. 10649, DOCKET NO. CL-9849

The Dissent is nothing more than a reiteration of arguments made previously, which were rejected by the Board on the adoption of Award 10649. The Award properly interprets the governing agreement by holding that:

"The governing language of the Union Shop Agreement speaks of continued employment, not continued seniority."

Carrier's action in the re-employment of Gurganus was an attempt to evade the Union Shop Agreement through a subterfuge, as it is clear that

Gurganus never intended to become a bona fide employe of the Carrier. Also, see Award 9916 (Begley) in support of this view.

The Awards (4195, 5191) relied upon by the Dissenters are clearly distinguishable and, consequently, have no bearing on the instant case. Neither of these disputes involved the Union Shop Agreement.

Award 10649 properly determined the dispute in accordance with the pertinent facts and governing Union Shop Agreement.

/s/ J. B. Haines

**J. B. Haines
Labor Member**