

Award No. 10694
Docket No. CL-9574

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jerome A. Levinson, Referee

PARTIES TO DISPUTE:

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

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(CHESAPEAKE DISTRICT)**

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

(a) That the Carrier violated the terms of Clerks' Agreement when during the period July 13, 1956 -- August 8, 1956, it used Duane Eldon Reed, a student at Tulane University to perform work covered by the Clerical Agreement to the disadvantage of regular clerical workers fully covered by said Clerical Agreement, and

(b) That C. E. Bunnell, a regular Yard Clerk at Peru, Indiana, Yard be paid a day's pay each for July 29; August 3 and 4, 1956, account failure and refusal to call and use Bunnell instead of Reed on each of said dates.

EMPLOYES' STATEMENT OF FACTS: The locale of this dispute is Peru, Indiana, a town of approximately 14,000 population.

In the Spring of 1955 Mr. Duane Reed was graduated from the Peru High School, winning a college scholarship. Effective May 17, 1955, the Carrier employed Mr. Reed as an "extra" employe at Peru. Mr. Reed performed service as an extra employe until September 6, 1955, when he resigned from Carrier's service and entered Indiana University September 17, 1955. Mr. Reed entered Tulane University January 30, 1956.

Again on June 8, 1956, the Carrier employed Mr. Reed to perform extra work during his vacation from the University. Mr. Reed worked as an extra employe on July 13, July 29, August 3, and August 4, 1956, "resigning" effective August 8, 1956 and returning to Tulane University at the beginning of the 1956-57 school year.

The Carrier failed to notify the Division and Local Chairmen of Mr. Reed's employment as required by Rule 12 (i), hereinafter quoted.

Between June 8, 1956, when Mr. Reed was rehired, and July 13, 1956, when he was first used to work a temporary vacancy, there were vacancies

Reed accepted all calls and did all work for which he stood in accordance with Rule 12.

Reed's status as a student on summer vacation in no manner violates Rule 12 or other rules of the controlling agreement.

The claim should, therefore, be denied in its entirety.

All data contained in this submission have been presented in conference or by correspondence with the Employee representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier employed Duane Reed May 17, 1955 as an extra employe at Peru, Indiana, after his graduation from high school and receipt of a college scholarship. He performed service until September 6, 1955, when he resigned and entered Indiana University September 17. He entered Tulane University, New Orleans, Louisiana, January 30, 1956. Carrier again employed Reed on June 8, 1956 to perform extra work, during his summer vacation. He worked as an extra employe on Sunday, July 29, and Friday and Saturday, August 3 and 4, the days here complained of. He resigned August 8 and returned to Tulane University that Fall.

Claimant was regularly assigned to position of Yard Clerk No. A-54, with work days Monday through Friday 8:00 A.M. to 4:00 P.M. His rest days were regularly assigned to Relief Position No. A-105. On Sunday, June 29, 1956, the employe regularly assigned to the latter position worked as yardmaster and Carrier used Reed to work the position. On the other two days in question, occupant of another Yard Clerk position likewise performed service as yardmaster and his position was filled by Reed. Claimant filed time slips for three days' pay at time and one-half, payment was declined, and Carrier adhered to its position on appeal.

On the property, Petitioner maintained that since Reed was a medical student at Tulane University intending to return to school for the Fall term, with Carrier's knowledge, he was not a "bona fide employe" and Carrier violated Rule 12(e) and (f) of the Agreement between the parties effective November 1, 1955. Carrier maintained it hired Reed as a bona fide employment date (extra) clerical employe pursuant to Rule 12(a).

Sections (e) and (f) of Rule 12 were in pertinent part as follows:

"(e) Extra employes without seniority shall be required to protect all work for which they stand except as provided herein. Such extra employes may for good and sufficient reason be given permission by the proper officer to be off not to exceed fifteen (15) days in any calendar year. If the employe desires to be off in excess of fifteen (15) days in any calendar year he must secure permission in writing from the proper officer approved by the Division Chairman. Such employe will not be permitted to mark off to engage in other employment. Persons holding regular positions elsewhere will not be employed on work covered by this agreement, except that extra employes without seniority who do not stand to work for a period of fifteen (15) days may be permitted to engage in regular employment elsewhere by agreement in writing between the proper officer and Division Chairman, but when they again stand for work

under this agreement they must return and protect such work unless they are permitted to continue in such outside employment temporarily by agreement in writing between the Division Chairman and the proper officer of the Railway Company . . . Extra employees failing to comply with the provisions of this section unless prevented by sickness or other unavoidable cause, will be considered out of service."

"(f) Only bona fide employees who are brought into service and made a part of the clerical craft or class will be permitted to perform work under this agreement. . . ."

The Board has determined two prior disputes between these parties involving somewhat comparable elements. Award 8280 concerned a woman, also an employment date extra clerk, who resigned from (and was replaced in) her previous regular employment in a dress shop but was used there as an extra when not working for Carrier. In its denial award, the Board rejected a claim that she was not required to protect all work for which she stood because she was allowed to fill vacancies on only one trick.

Award 9464 concerned a school teacher whom Carrier employed each summer as an extra clerk. The Board stated that he had no regular employment "from May 25, 1952 and held himself available, to be called every day to protect all extra work that he was qualified to perform." Petitioner argued that the teacher was not a bona fide employee and asserted it was "common knowledge" (not denied by Carrier) that he held a contract for the year beginning in September 1952 at the same school where he taught the year previous. Carrier argued that he had no regular employment and was unemployed during the summer months. The Board accepted the latter as factual and made it the basis for decision.

Reed's status may be compared to that of the school teacher, for when employed in 1956 he too was on summer vacation and he actually returned to school in the Fall. At the same time, in the absence of express implementation of the meaning of the term "bona fide employee" other than the concept of "regular employment elsewhere" in Rule 12(e), the Board is mindful of the admonition of Award 5078, even without a provision similar to Rule 12(f), against use of the hiree who "does not approach the position with the desire, intention and expectation to become an employee subject to call and assignment at all times". Yet that award concerned the hiring of persons on Saturdays only and these "through the very nature of their casual and intermittent relationship can never acquire a status on the seniority roster". See also Award 4495 concerning two soldiers then in the army and not subject to use except for limited hours; and Awards 6260 and 6999 concerning the use of full time employees of outside ventures.

On the other hand, the parties did not expressly prohibit the use of students as such, as extra employees during summer months, nor undertake to say that an extra employee would be employed over any specified minimum length of time before being considered bona fide. Furthermore, in explanation of Petitioner's assertion that Carrier used Reed during a period commencing July 13, 1956, Carrier listed 14 days on which he worked as Yard Clerk, from July 13 through August 7 including seven consecutive days in August and each of three tricks — at least some evidence of his availability pursuant to Rule 12(e). Finally, the record does not demonstrate that Reed accepted employment as an extra, temporarily at least, with a state of mind other than bona fide, that is, "in good faith; without fraud or deceit; authentic; genuine" (dictionary definition).

The Board therefore concludes that the record does not support the claim Reed was not a bona fide employe, and that the claim should be denied.

Before the Board for the first time, so far as the record would indicate, question were raised whether Carrier had complied with the requirement of Rule 12(i) of the Agreement that it notify the Division and Local Chairman of the district affected, as to the employment date of Reed when hired; and whether Reed was permitted to absent himself from Carrier service in violation of Rule 12(e). It is arguable that the latter question is germane to whether Reed was a bona fide employe. However, he did resign in 1955. In view of this, and since these two positions were not advanced and evidence was not brought to the other party's attention while the case was in progress on the property, the Board feels it should not consider them in reaching its decision.

Also, for the first time before the Board, Carrier urged that the Union Shop Agreement stamped Reed as a bona fide member of the craft or class by virtue of the requirement that he join the organization as soon as he should work 30 days within 12 consecutive calendar months. It then was urged in behalf of Petitioner that Reed could not be made a part of the clerical craft or class without becoming a member of the Organization pursuant to Section 1 of the Union Shop Agreement. It is arguable that this factor too is relevant and pertinent to a discussion whether Reed was a bona fide employe. However, this feature also was not discussed on the property, and the Board feels it should not be considered here.

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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of July 1962.