Award No. 11073
Docket No. CL-9483

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

UNITED TRANSPORT SERVICE EMPLOYES

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: Carrier violated Rules 2 and 10 of the current Agreement between the Southern Pacific Company and the United Transport Service Employes, when in the last half of June 1956, they refused to permit Red Cap Porter J. Hunt to exercise his seniority for eight (8) hours work that was available but was permitted to be performed by a junior employe.

Claim is for eight hours per day for each day, and time and one-half for all six and seven day weeks for Red Cap Hunt for each week worked, until proper adjustment of assignments of Red Cap service is made at Davis, California.

EMPLOYES' STATEMENT OF FACTS: Carrier, beginning on or about June 15, 1956, established Red Cap assignments at Davis, California for less than eight hours per day when work was available for eight-hour assignments. (See our Exhibit A) Claimant Hunt was assigned to a part-time assignment of less than eight hours. Claimant Hunt protested the assignment and requested that he be permitted to work eight hours per day in as much as there was eight hours work available. Carrier denied claimant's request.

POSITION OF EMPLOYES: It is the position of the employes that the Company violated Rule 2 of the Agreement. Specifically, that part that reads as follows: "Where service requirements are intermittent, except as otherwise agreed to, eight hours actual time on duty within a spread of thirteen (13) hours shall constitute a days work." The time service began at Davis was 6:40 A.M. and ended at 11:00 P.M. The service was assigned in such a way that a junior employe was working while claimant Hunt was idle and available. The Jobs were set up as follows:

Job 1 — 6:40 A.M. to 9:40 A.M. then 6:15 P.M. to 9:15 P.M.

Job 2 — 9:00 A.M. to 11:00 A.M., 5:00 P.M. to 7:00 P.M., and 9:00 P.M. to 11:00 P.M.

It is to be noted that work was available for Job 1 from 9:40 A.M. until 11:00 A.M. and from 5:00 P.M. to 6:15 P.M., which if Carrier had permitted claimant to perform, claimant would have earned more.

CONCLUSION

The carrier asserts that it has conclusively established that the part-time assignments at Davis were established in accordance with Paragraph (d) of Rule 2 of the current agreement and that the instant claim is without merit or agreement support and requests that said claim, if not dismissed, be denied.

All data herein have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

The carrier reserves the right, if and when it is furnished with the submission which has been filed ex parte by the petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the petioner in such submission, which cannot be forecast by the carrier at this time and have not been answered in this, the carrier's initial submission.

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to June 15, 1956, Carrier employed two Red Cap-Station Porters at Davis, California, an outside point. The positions and hours of employment were:

Position No. 11—6:20 A. M. to 10:20 A. M.—4 hours

6:00 P. M. to 10:00 P. M.—4 hours

(8 hours service within a spread of 15 hours and 40 minutes.)

Position No. 14—9:30 A. M. to 10:30 A. M.—1 hour

5:30 P. M. to 12:30 A. M.—7 hours

(8 hours of service within a spread of 15 hours.)

Effective June 16, 1956 the above two positions were abolished and two new positions were established with hours of service as follows:

Position No. 11—6:40 A. M. to 9:40 A. M.—3 hours

6:15 P. M. to 9:15 P. M.—3 hours

(6 hours of service within a spread of 14 hours and 25 minutes with one period of release.)

Position No. 14—9:00 A. M. to 11:00 A. M.—2 hours

5:00 A. M. to 7:00 A. M.—2 hours

9:00 P. M. to 11:00 P. M.—2 hours

(6 hours of service within a spread of 14 hours with 2 periods of release.)

Claimant was the incumbent of Positions No. 11 both before and after the date of change. Position No. 14, after the change, was assigned to a Red Cap-Station Porter with less seniority than Claimant.

Petitioner contends that after the change Carrier was contractually required to arrange the hours of employment of the Porters, at Davis, so as to provide 8 hours of work per day for the senior Porter, Claimant herein. Carrier

replies that the contract authorizes it to establish part time assignment positions.

The pertinent provisions of the Agreement are:

"HOURS OF ASSIGNMENT

"Rule 2. Hours of assignment, in meeting service requirements, may be made under following conditions:
(Emphasis ours.)

"Continuous Service Basis—Full Time

"(a) Eight (8) consecutive hours, or eight (8) hours, exclusive of meal period, shall constitute a day's work.

"Intermittent Service Basis—Full Time

"(b) Where service requirements are intermittent, except as otherwise agreed to, eight (8) hours actual time on duty within a spread of thirteen (13) hours shall constitute a day's work.

NOTE: Under this rule, and any agreed extension of spread, except for meal period, time will be counted as continuous in all cases where the interval of release from duty does not exceed one (1) hour.

"(c) At outside points, service requirements shall govern the maximum spread of intermittent full-time assignments, which shall be as reasonable as practicable according to circumstances.

"Part Time Assignments

"(d) Part time employes may be regularly assigned to serve a prescribed number of hours not less than two (2) at one or more periods of the day (or night) to take care of peak service requirements; they will be paid on basis of actual time required to be on duty at straight time rate. Time will be counted as continuous in all cases where the interval of release from duty does not exceed one (1) hour."

It is to be noted that the Recital of Rule 2 uses the word "may"—indicating, prima facie, that what follows is permissive, not mandatory.

The Carrier argues that under Rule 2 it may create positions, insofar as herein material, either on a Continuous Service Basis—Full Time; or, Part Time Assignments "may be regularly assigned." (Emphasis ours.) Further, there is nothing in Rule 2, or any other provision of the contract, which makes mandatory the scheduling of hours of employment as between two Porters so as to provide an 8 hour day for the senior Porter.

Petitioner advocates for an interpretation of Rule 2 which would compel Carrier to schedule 8 hours a day of work for the senior Porter as a condition precedent to establishing a Part Time Assignment for work required of a Porter in excess of 8 hours a day, but less than 8 hours. It says that to construe Rule 2 otherwise would make nugatory the seniority rights vested in the employes by Rule 10 of the Agreement.

The respective arguments of each of the parties, herein, when considered, separately, appear logical. But, however, when you compare one with the other, it leads only to the conclusion that the Agreement, in its text, does not, without doubt, fully support the contention of either party.

The record contains no extrinsic evidence—such as, history, tradition or custom; or, the positions taken by the parties during the collective bargaining negotiations leading to the execution of the Agreement—which would aid this Board in determining the intent of the parties. Consequently, we find that Petitioner has not satisfied its burden to prove its case by a preponderance of clear and convincing evidence.

Carrier raised an issue as to whether the Claim, as filed by Petitioner, satisfies the requirements of Rule 19(b) of the Agreement. In view of our decision on the merits, we find it unnecessary to resolve this issue.

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

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 25th day of January 1963.