

Award No. 12141
Docket No. CL-11725

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Clerks' Rules Agreement, effective May 1, 1942, except as amended, particularly Rule 2-A-3 (a), when on March 23, 1958, it denied Guiseppe Pregano the right to perform extra work as a Loader at the Produce Terminal, Pittsburgh Region, Pittsburgh, Pa.

(b) Guiseppe Pregano be compensated for eight hours' pay at the Loader's rate for Sunday, March 23, 1958, and all subsequent Sundays until adjusted. (Docket 429)

EMPLOYEES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as the representatives of the class or craft of employees in which the Claimant in this case held a position and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employees between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various rules thereof may be referred to herein from time to time without quoting in full.

Claimant Guiseppe Pregano holds a regular advertised position of Assigned Laborer at Pitcairn Enginehouse Stores Department, Pitcairn, Pa., Pittsburgh Region. The Claimant has a seniority date of August 15, 1923, on the Seniority Roster of the Pittsburgh Region in Group 2.

Due to fluctuation of work at the Produce Terminal, particularly on Sundays, Group 2 employes from various locations within the Pittsburgh Region

CONCLUSION

The Carrier has established conclusively that no violation of the Clerks' Rules Agreement resulted from its actions in not permitting Claimant to perform work as a Loader at Pittsburgh Produce Terminal and that none of its actions in the matter were otherwise improper. It follows, therefore, that the Employees' claim in this case is completely without merit and your Honorable Board is respectfully requested to deny it in its entirety.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Employees, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a record of all of the same.

All data contained herein have been presented to the employee involved or to his duly authorized representative.

(Exhibits not reproduced.)

OPINION OF BOARD: In March, 1958 Claimant held a regular assignment as a first trick Laborer in Carrier's Pitcairn Enginehouse Stores in Pittsburgh, with rest days Saturday and Sunday. His seniority date is August 23, 1923. Claimant's work qualification on his regular assignment is not involved in the instant claim.

Carrier has a produce terminal in the same city. In its Ex Parte Submission, Carrier says:

"On certain Sundays and holidays prior to September 1, 1949, the force was augmented with emergency or curbstome employees, which resulted in claims being filed in behalf of employees covered by the Clerks' Agreement at nearby 11th Street Freight Station, the Claimants contending that they were entitled to the work ahead of the curbstome employees. In disposing of the claims, the Carrier agreed that prior to using curbstome employees to perform the overflow work, it would give preference to employees covered by the Clerks' Agreement in that seniority district who made themselves available at the Produce Terminal at or prior to the designated starting times. Accordingly, notices are posted in the seniority district advising when it is anticipated such work will be available and how employees desiring the work may obtain it."

Claimant is one of the employees in the seniority district who is entitled to such extra work priority on Sundays and holidays when he makes himself available. He worked on many Sundays and holidays since 1951 as an extra employee.

On March 17, 1958, Claimant was given a written notice stating that "effective at the close of business on March 17, 1958 you are disqualified at the Produce Terminal from protecting extra work as a Loader or Piler." He made himself available on March 23, 1958 and was not used. Instead, Carrier hired a curbstome employee as a loader.

Petitioner contends that Carrier violated the Agreement and that Claimant "be compensated for eight hours, pay at the Loader's rate for Sunday, March 23, 1958, and all subsequent Sundays until adjusted.

Carrier contends that it had received various complaints from produce dealers that there were errors in sorting produce; that the errors were traced to Claimant, that Claimant was assigned to work with the most capable employees, but that the sorting errors persisted; that the Agent and the Foreman saw Claimant making sorting errors and called them to his attention. Carrier also contends that Claimant is "63 years of age and is 5 feet 5 inches tall and weighs 204 pounds. He is not capable of performing the duties in the cars in a safe manner due to his size and agility."

Claimant acquired seniority rights under Rule 2-A-3. He worked as extra loader and sorter at the Produce Terminal for about seven years. It is conceivable that an employee may become disqualified after he acquired seniority rights to a position and when that occurs he may be removed until the reason for his disqualification is removed. Under such circumstances the burden is upon the Carrier to prove that the employee is disqualified.

The record contains a copy of a letter from a broker protesting the sorting of PFE Car 94801 containing pears and PFE Car 38645 containing apples. These two cars were loaded and the produce sorted by Claimant and another employee, F. M. Gunde. There is no proof that sorting errors, if they occurred, was the fault of Claimant. It could have been the fault of Mr. Gunde or both of them. With respect to alleged sorting errors on other dates as listed in Carrier's Ex Parte Submission, there is no evidence when or what brokers made the alleged complaints. Mere assertion is not evidence.

Carrier's Exhibit C is a statement by Stanley F. Guyer who was freight agent at the Pittsburgh Produce Terminal in January, February and March, 1958. The statement is dated February 15, 1960 nearly two years after Claimant was disqualified for extra work at that terminal. Essentially, Mr. Guyer says that Claimant had none of the requirements necessary to work as a loader. The fact is, however, that Claimant continued to work in his regular position at the Pitcairn Enginehouse Stores. He was never disqualified from that position. There is no proof that the work requirements at the Produce Terminal was different.

Mr. Guyer's complaint about Claimant's work as a piler or sorter are of a general nature. There is no specific mention of time and dates. He undoubtedly refers to Carrier's general allegations for January, February and March, 1958 which we previously dismissed for want of direct and conclusive evidence.

The affidavit of J. W. Rhall dated February 10, 1960 and contained in Carrier's Exhibit D contains no statement of Claimant's work abilities. Mr. Rhall was Claimant's foreman at the Produce Terminal. He is mentioned in Mr. Guyer's statement. Yet Mr. Rhall's affidavit contains nothing to substantiate Mr. Guyer's allegations.

Carrier also argues that Claimant had a poor work record. The fact is that from 1928 to 1955 Claimant was cautioned ten times about his work performance. There was no discipline record of any kind since April, 1955. It should also be remembered that this work record concerned his regular assigned position which is not involved in this claim.

On the basis of the entire record, we hold that Carrier's action was arbitrary and capricious.

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 Employees involved in this dispute are respectively Carrier and Employees 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 is sustained.

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

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of January 1964.