

Award No. 14086
Docket No. CL-15407

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

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

THE LAKE TERMINAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5720) that:

1. The Carrier violated the rules of the Clerks' Agreement at Lorain, Ohio, when on January 18, 19, 25, 26, February 1, 2, 8, 9, 15, 16, 22, 23, 29, March 1, 7, 8, 14 and 15, 1964, and subsequent dates, it utilized the services of a person who had no antecedent seniority to work Position No. 280, Janitor, East and West Yards, on rest days and failed and refused to utilize the services of John F. Bratek who was available and willing to work, and

2. That the Carrier shall now be required to compensate employee Bratek on the basis of eight (8) hours at time and one-half rate for each of the above dates and for each subsequent Saturday and Sunday he was available and not worked until such time as the violation herein complained of is corrected.

EMPLOYEES' STATEMENT OF FACTS: Employee J. Bratek, seniority date July 17, 1953, was regularly assigned to Position No. 280, Janitor, East and West Yards, Lorain, Ohio, on August 11, 1962. The position works seven days per week, with Saturday and Sunday as rest days for the regular incumbent. Prior to 1960, the work on the assigned rest days was included in the work assignment of a relief position and was either performed by the relief clerk or by the regular incumbent of the Janitor position Monday through Friday, in which case he was compensated for working on his regular assigned rest days on the basis of time and one-half.

The historical background of the Janitor positions follows:

Prior to February 18, 1960, there were two regular assigned Janitor positions, No. 277 assigned to the East Yard, and No. 276 to the West Yard. Position No. 279 was a Relief Janitor position who performed the Janitor work on rest days.

True, an extra employe, in order to retain seniority status must comply with Rule 23 (h), cited above, which provides in part:

... extra employes must accept the work to which their seniority entitled them.

But the penalty for failure to accept work is loss of seniority. There is no contractual prohibition against subsequent acquisition of seniority rights as an extra employe (provided, of course, no current employe's rights are violated)."

For the foregoing reasons it is respectfully submitted that this claim must be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are quite fully stated in the Record. Only as many of them as are directly relevant to this opinion will be repeated herein. The Claimant J. Bratek was regularly assigned to Position 280, Janitor, East and West Yards, on August 11, 1962. The position works seven days per week, Saturday and Sunday rest days for the regular incumbent. On January 20, 1962, D. B. McQueen, a school teacher, was hired as an extra Group (2) employe and was used to fill unassigned Group (2) Janitor Work (the rest days Saturday and Sunday of the regular assignment). His name appeared on the roster of Group (2) employes dated and posted January 7, 1963, and, also, on the roster of Group (2) employes dated and posted January 14, 1964. McQueen became a member of the Organization, March 9, 1962, and payroll deduction of his dues was executed until June 29, 1964, at which time he left the service of the Carrier.

Rule 3 (d) and (e) of the Agreement provides as follows:

"(d) Seven Day Positions.

On positions which have been filled seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday.

(e) Regular Relief Assignments.

All possible regular relief assignments with five days of work and two consecutive rest days will be established to do the work necessary on rest days of assignments in six or seven days service or combinations thereof, or to perform relief work on certain days and such types of other work on other days as may be assigned."

Rule 3 (f) of the Agreement, provides, as follows:

"7. The least desirable solution of the problem would be to work some regular employes on the sixth or seventh days at overtime rates and thus withhold work from additional relief men."

Rule 19 (a) of the Agreement provides, as follows:

"(a) An employe who has been in active service for thirty (30) days shall establish seniority as of the date his pay started in his seniority district."

It is the contention of the Claimant that the Carrier hired McQueen, a school teacher in Clearview School District to perform the janitorial work on Claimant's rest days only (Saturday and Sunday); that as he was so employed as a School teacher Monday through Friday, he was, therefore, not available to perform any extra work on those days; the Organization asserts that McQueen was wrongfully granted seniority by the Carrier, though under the Agreement he was not a bona fide employe.

To the contrary, the Carrier maintains that D. B. McQueen was an extra bona fide employe who was given a seniority date, in compliance with the Agreement, of January 20, 1962; that he had more than two years' seniority at the time the claim was initiated, that he had antecedent seniority; that his name was carried on subsequent seniority rosters without protest from the Organization; further, that the record discloses that he became a member of the Clerks' Organization within the provisions of the Union Shop Agreement, that his dues were paid up at all times and were accepted by the Organization.

Claimant is relying, in part, on Award 6999 (Carter) which involved the employment of a school teacher and in which claims were made that are comparable to the ones made in the instant case. In the Opinion of Award 6999 we find a recital of admitted facts which were the apparent basis for a sustaining award:

"It is next contended by the Organization that Rasmussen was not a bona fide employe and therefore not entitled to perform the rest day work of claimant's position. We sustain this contention. It is clearly shown by the written statements of Rasmussen himself that he had not been employed by the Carrier prior to April 21, 1951; that he was available for work only on Saturdays and Sundays; that it was understood by the Carrier that he would not be available for extra work on other days; and that he had no desire, intent or expectation of becoming a bona fide employe when he accepted the employment. Carrier says, however, that there is no instance in which any work was offered to Rasmussen which he ever refused to perform. We note, however, that Rasmussen had an understanding that he would not be called for other work. It is plain that he was employed to work the rest days of claimant's position only. He was not a bona fide employe."

It is quite significant, however, that in the Opinion in Award 6999 we find the following comment:

"The fact that an extra employe has outside employment to augment his income is not necessarily a controlling factor."

In the light of this comment, let us then consider a prior Award 6089 (Whiting) which is a denial award, arising from somewhat similar circumstances and involving a seniority rule which is similar to the one in the instant case. In Award 6089 we note the following:

"The essence of this claim is a contention that Elton Lee Corey was not a bona fide employe as he was not subject to the continuing authority of the Carrier because he was a student at Westminster College.

* * * * *

... we do not think that the fact that he subsequently went to college while employed by the Carrier can affect the bona fides of his employment. There is no evidence that he ever declined work opportunities or calls due to such activity."

It is quite apparent that McQueen was not an itinerant or transient employe working on a day to day basis. He was first employed on January 20, 1962, and began to acquire seniority on that date pursuant to the provisions of the Agreement. There was only one regular Janitorial position at the location in question at the time of his employment. There is nothing in the record which indicates he was ever called for any other assignment than on the rest days of the regular Janitor position nor does the record disclose that there was ever any occasion for calling him other than on the rest days, Saturday and Sunday. The only evidence offered in support of Claimant's claim is merely an assertion that as McQueen was employed as a school teacher he could not have accepted any assignment from Monday to Friday of any school week. Award 6999 is distinguishable from the instant case as in that award definite evidence was offered of admissions made by the school teacher which clearly indicated he was not a bona fide employe. Nothing similar to that was offered or is present here.

It was incumbent on the Claimant to establish by competent evidence that McQueen was not a bona fide employe. Mere assertions are not sufficient. Claimant has not sustained the burden of proof required.

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 Agreement has not been violated.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 12th day of January 1966