

Award No. 15802
Docket No. CL-16312

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

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

THE BELT RAILWAY COMPANY OF CHICAGO

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (CL-5994) that:

1. The Carrier violated the Clerks' Agreement when it utilized the services of outsiders having no previous employment relationship or seniority, on an extra basis to relieve temporary vacancies and/or positions pending assignment by bulletin, rest day work and such extra work as may occur.

2. That employes with established seniority rights, who were available, willing, able and qualified to perform the work in question, be allowed a day's pay, at the applicable overtime rate of the position and/or work involved effective with the period here involved, namely, March 23, 1965 to and including April 11, 1965 and continuing thereafter until corrective measures are applied.

3. The names of Claimants, dates on which the violation occurred, the rates of pay involved, vacancy and/or work involved and the names of the outsiders used for the performance of the work in question have been furnished to the Carrier at all stages of handling, and are attached hereto as APPENDIX "A."

[Names of Claimants and Rates not reproduced.]

EMPLOYEES' STATEMENT OF FACTS: The Carrier performs switching and transfer service in the Chicago Switching District with line haul and other switching Carriers, and in addition serves industries along its line of railroads. It maintains yards at South Chicago, 87th Street, West 22nd Street and Clearing, Illinois. Each of the four locations are from two to twenty miles apart. Its largest car handling operation is performed at Clearing Station. It maintains office forces at different locations in Clearing such as, East and West Yard Offices, East and West Sub-offices and Agent's Central Office. Each of the locations are from one to two miles apart and collectively they are known as part of the Clearing facility.

allowed a day's pay, at the applicable overtime rate of the position and/or work involved effective with the period here involved, namely, March 28, 1964 to and including July 31, 1964 and continuing thereafter until corrective measures are applied."

COMMENT

As explained hereinbefore, the Carrier has a perfect and undisputable right and obligation to use the employees who actually performed the work on the claim dates in accordance with the provisions of Rule 19. They were in fact bona fide and permanent employees with established seniority rights, members of the union, with rights to the work prior to that of the claimants.

CLAIM NO. 3

"The name of claimants, dates on which the violation occurred, the rates of pay involved, vacancy and/or work involved and the names of the outsiders used for the performance of the work in question have been furnished to the Carrier at all stages of handling, and are attached hereto as Appendix 'A'."

COMMENT

This information was furnished to the Carrier in the form indicated in Appendix "A." (Choice of one of three individuals for each claim.)

CONCLUSION

All claims involved in this submission should be denied as they lack completely in merit and support under the rules.

(Exhibits not reproduced.)

OPINION OF BOARD: In March 1964 Carrier began to use some newly hired employees to fill temporary vacancies and/or positions pending assignment by bulletin, rest day work and other extra work. Brotherhood objected and filed claims and supplementary claims in May, June and August of 1964 which we disposed of in our Award 15801 on the basis of default by Carrier; and, Brotherhood also filed, among other supplementary claims, a claim in a letter from the General Chairman to the Carrier's Agent, Mr. Santoro, on April 12, 1965, which is the claim before us in this case. Paragraph 2 of the Claim as stated in the Brotherhood's Ex Parte Submission purports to be a "continuing claim": "... March 23, 1965 to and including April 11, 1965 and continuing thereafter until corrective measures are applied"; but, as handled on the property by the Brotherhood, by reference there to the claims involved in the case we have disposed of simultaneously with this Award 15801 it was not presented to Carrier as a "continuing claim," and, for the same reasons we set forth in Award 15801, we will deal in this case only with the violations alleged at the times specified in Appendix "A" of the Claim.

Brotherhood claims that without having sought or gotten agreement on establishing an extra board under Rule 24, Carrier failed to follow the injunctions of the Agreement in assigning employees to vacancies, rest day work, and other extra work on a series of occasions from March 23 through April 11, 1965; according to Brotherhood the work belonged to and should have been

assigned to appropriate furloughed employees or regular employees under the provisions of Rules 7, 8, 10, 11, 19, 38 and 45, and the newly hired employees should not have been assigned to it.

Carrier argued that the newly hired employees had seniority under Rule 3(a) and were properly used for the work under the other rules; Carrier argued that they were furloughed employees under Rule 19 and, as such, had a right to the work assigned to them.

The underlying issue which we must dispose of is whether Carrier, by hiring and putting to work a new employee, can give him seniority which may be exercised to entitle him to preference on the filling of the very job into which he was hired. This was the issue raised by the Brotherhood on the property as witness the following exchange of communications between the parties:

From the General Chairman's appeal of Agent Santoro's denial of the claim —

" . . . Mr. Santoro in declining payment for the claim states that the outsiders herein referred to established seniority in accordance with Paragraph (a) of Rule 3 . . .

We are not in accord, for such seniority is based upon a condition precedent to the right to assign this work to the outsiders. **Such seniority could not, in the first instance, be established by using them to perform it.**

The aforementioned rules, as well as the agreement and understanding reached in February, 1960, show a consistent intent that only employees with established seniority, such as furloughed employees and regularly assigned employees shall perform the involved work and the unilateral assignment of outsiders for the performance of same is not permissible."

From the reply of Carrier's Superintendent, Mr. Turner —

" . . . As indicated by Mr. Santoro in his reply to you on April 29, 1965, the so-called outsiders were all employees of the Clearing Agency and had established seniority under the provision of paragraph (a) of Rule 3 of the working Agreement. Seniority established in this fashion cloaks the employees under the conditions of Rule 1 — Scope, Rule 10, Temporary Assignment, Rule 11 — Short Vacancies and Rule 19 — Reducing Forces — Abolishing Positions.

You indicate that the aforementioned rules and the February 1950 agreement for filling temporary vacancies, show a consistent intent that only employees with established seniority shall perform the involved work. There is nothing in the rule establishing seniority that even remotely stipulates that establishing seniority is contingent on first holding a regular job and being furloughed or being a regular assigned employee."

From the General Chairman's appeal of the above to Mr. Sidor, Manager-Labor Relations —

" . . . We are not in accord, for the establishment of seniority under the provisions of Rule 3(a) is based upon a condition precedent to the right to assign this work to outsiders. **Such seniority could not, in**

the first instance, be established by using them to perform it. The rule is designed to cover the use of new employes in work for the performance of which there are no individuals holding seniority rights either willing, available or entitled. (Emphasis by Referee.)

There is nothing in the current Agreement that permits or authorizes the work here in question to be done by one without established seniority when there are those with established seniority available and willing to do the work."

If we deal with Carrier's argument in the most sharply precise way, we find that the sequence of events does not support Carrier's reliance on Rule 3(a): Each "new" employe, at the instant he began to work on his first assignment, had no seniority standing — his seniority began, under Rule 3(a), only when his pay started, and his pay did not start until after he had already performed some of the work of the assignment. The nicety of such hairsplitting, however, should not be necessary for good faith application of the Agreement. The Agreement is clear that, unless modified by special agreement such as the establishment of an extra board under Rule 24, the parties intended that work of the kind here in dispute be assigned to employes who had already acquired seniority when the assignments opened up and then in the order spelled out in the many rules written into the Agreement for the purpose of establishing that order of priorities.

Our recent Award No. 15492 (Zumas) dealt with basically the same issue there presented with a slightly different argument: There Carrier argued that even though a newly hired employe had not, when he started to work, yet acquired any seniority, his "employe status" obligated the Carrier assign the work to him. In finding against the Carrier there, we cited Award 4278 (Robertson) and Dockets 11 and 12 of Special Board of Adjustment No. 564, which dealt with substantially the same question.

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 violated the Agreement.

AWARD

Claim sustained except that part of paragraph 2 reading "and continuing thereafter until corrective measures are applied."

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of September 1967.

Keenan Printing Co., Chicago, Ill.

Printed in U.S.A.