

Award No. 5620
Docket No. CL-5592

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson—Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
CHICAGO AND NORTH WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that:

1. Carrier violated and continued to violate its agreement with the Brotherhood when on January 28th, 1950 and again on January 30th, 1950 and on each succeeding Saturday and Monday thereafter, until Saturday September 23rd, 1950, when this practice was discontinued, it brought in and worked persons from the outside, persons without established seniority and who held no right under the agreement between the parties, and failed and refused to permit employees:

R. Remsik	Seniority date	8-15-27
G. Gallagher		1-1-30
M. Andrysiak		6-1-30
J. Klybor		6-2-30
M. Azzolin		10-1-30
J. Johnson		10-18-30
J. Falbo		4-6-31
A. Wisniewski		10-10-30
W. Smith		1-2-31
A. Soder		3-1-31
E. Gruebnaw		4-1-31
M. Liebold		6-1-31
J. Sajdak		10-1-31
H. Deno		8-11-32
W. McInerney		3-20-33
D. Noonan		3-23-33
J. Soderman		4-9-33
S. Korack		4-15-33
M. O'Donnell		4-27-33

on January 28th, 1950, and employees:

R. Delaney	Seniority	1-2-30	C. McKenna	5-4-36
R. Picciareello		5-1-33	E. Kalinas	7-28-36
M. Monahan		5-13-33	L. Chiappetta	9-10-36
W. Paladna		5-24-33	A. Pierce	10-7-36
R. Liebold		7-15-33	J. Heck	10-16-36
C. H. Jacobs		8-4-33	J. Canopa	8-13-37
F. Heisterman		8-30-33	J. Maljan	9-1-37
R. Kococinski		12-7-33	H. Stateman	4-19-38

J. McGahon	Seniority 4-16-33	J. Falls	1-23-34
F. Pogasnik	5-13-33	E. Janz	2-19-34
J. Stutas	5-20-33	J. Siggins	4-6-34
A. Wargas	7-1-33	F. Madura	9-8-34
R. McCarthy	8-3-33	R. Pluemer	10-2-34
J. Chiappetta	8-11-33	J. McAlly	4-2-35
E. Burns	9-6-33	S. Kosak	8-1-35
D. Franks	1-2-34	C. Harant	10-5-35
J. Harley	1-2-34	G. Klein	11-1-35
J. Marke	2-7-34	J. Ortman	2-2-36
R. Zipp	3-15-34	R. Vastola	2-17-36
R. Lemke	7-9-34	A. Tranka	4-29-36
E. Young	9-21-34	P. Solber	6-12-36
S. Pohaski	10-6-34	J. Kalitowski	8-3-36
E. Gardner	4-8-35	A. Picciariello	9-11-36
R. McClung	8-20-35	W. Kaiser	10-26-36
J. Jurshenas	10-9-35	P. Zarr	12-2-36
A. Kunkas	12-9-35	C. Fisher	8-18-37
V. McBrien	2-5-36	J. Chernak	10-7-37
A. Sommerfield	4-3-36	J. Cibario	9-10-38

on January 30th, 1950, with established seniority, who were available and ready to perform this work, to work on their designated rest days and be paid for same.

2. That the Carrier shall now be required to compensate the employees listed in above paragraph four (4) hours pay for the first two (2) hours and time and one-half for the next six (6) hours, total thirteen (13) hours pay at straight time on the days listed, as provided for in the agreement between the parties, and

3. That the Carrier be required to compensate employees who were entitled to work by reason of their seniority, in a like manner on each succeeding Saturday and Monday, when work was performed by persons who had no seniority or rights under the agreement, until this practice was discontinued the week of September 18th, 1950, when a work week of five days, Monday to Friday inclusive was established and work on Saturday given to employees entitled to such work, under the terms of the agreement in effect between the parties.

EMPLOYEES' STATEMENT OF FACTS: Prior to the week of January 23, 1950, the Wells Street Freight House of the Chicago & Northwestern Railway System at Chicago, Illinois operated on a five day week basis, and all employees were regularly assigned a work week of five days, Monday to Friday inclusive, such employees having a guaranteed work week of five days each week, under an agreement in effect between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes and the Chicago and Northwestern Railway System, covering this operation, dated August 21st, 1947, effective September 1st, 1947, and revised effective September 1st, 1949.

Effective with the week of January 23rd, 1950, management, without conference and agreement with the employees, changed their operation to a six day week, Monday to Saturday inclusive, the positions were bulletin and assigned on a five day basis, either Monday to Friday inclusive, (Rest Days Saturday and Sunday); or Tuesday to Saturday inclusive, (Rest Days Sunday and Monday).

Starting with Saturday, January 28, 1950, management brought in nineteen (19) persons off the street, namely:

Griffin	Hernandez	Cuddy	Karwoski	Gauthier
Rogers	Phillips	Carpenter	Laurie	McLaughlin
Frantz	Wolfe	Lake	Legg	Reimer
Kapitke	Cole	O'Keefe, Jr.	Arnett	

At no time in handling the claim on the property have the employees furnished documentary evidence that those who may have been employed on Mondays and Saturdays to supplement the organization or to fill vacancies were not bona fide employees under the provisions of schedule rules applicable or that they did not establish a seniority date in line with the provisions of rule 3. It is further the position of the carrier that:

(1) There was no violation of any schedule rules in the employment of this so-called transient employee to supplement the organization at Wells Street Freight Station, whether such transient employee be hired to supplement the organization as established Monday, Tuesday, Wednesday, Thursday, Friday or Saturday of any given week.

(2) That unless and until the employees can prove by documentary evidence that there was a violation of schedule rules or practices as established and recognized, they have no bona fide claim.

(3) That the organization in the collection of dues daily from these so-called transient employees recognized them as bona fide employees and entitled to employment, whether such employment be on a Monday, a Saturday or any other day of the week.

(4) At no time have representatives of the organization furnished any names of persons whom they claim did not have the right to employment on a Monday or a Saturday and who, apparently it is their contention, usurped the earning power either of those employees working Monday through Friday or those employees working Tuesday through Saturday.

All data used in support of the carrier's position has been previously submitted to the authorized representative of the employees.

OPINION OF BOARD: Prior to September 1, 1949 Carrier assigned its employees engaged in the handling of National Carloading Corporation business at the Wells Street Freight Station on a six-day basis. With the institution of the 40-hour week after September 1, 1949 those forces were assigned on a five-day basis until the week of January 23, 1950 when the Carrier put into effect a six-day operation with a portion of the regularly assigned employees being assigned to work Monday through Friday and another portion Tuesday through Saturday. Claim is made by the Employees on behalf of those regularly assigned employees who were on rest day status on given Mondays and Saturdays when the Carrier employed so-called transient labor to supplement the force. The claim terminates with the date of September 23, 1950 when the operation was changed back to five days and work on Saturdays was given to employees with established seniority. It appears that these so-called transient employees were hired on a day to day basis being paid at the close of that day and re-hired as needed on the same basis. Carrier contends that they are bona fide new employees and cites Rules 2 and 3 of the Agreement in support of its contention. The said rules provide as follows:

"2. Seniority of an employee begins at the time his pay starts on positions under the scope of this agreement. Where two or more employees enter upon their duties at the same hour on the same day, their names shall be shown upon the seniority roster in the order in which engaged. Seniority applies in the district in which employed.

3. Employees voluntarily leaving the service will forfeit all seniority and if they reenter be considered as new employees."

There is no question that the work performed by these "transient" employees was work within the Scope of the Agreement between the Carrier and its employees represented by the Brotherhood of Railway and Steamship

Clerks. The work, therefore, belonged to employees acquiring seniority under that Agreement. To permit of its performance by outsiders neither holding nor acquiring seniority rights under the Agreement while there are employees holding seniority rights available to perform the work even though it be on an overtime basis, in our opinion is destructive of the intent and purposes of the seniority provisions of the Agreement. The fact that the Agreement provides that seniority of an employee begins at the time his pay starts does not confer seniority rights upon these transients. They appeared on no seniority lists, many of them held regular positions in other types of employment and all of them terminated their "employment status" on the day it began and were again re-hired on the same basis. They were not bona fide new employees (See Awards 4495, 5501, 5558, 5078). A sustaining award is in order. However, the penalty will be allowed at the pro rata rate at straight time for eight hours instead of the thirteen hours at straight time as requested, except as to holidays which shall be at the punitive rate.

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 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 Carrier violated the Agreement.

AWARD

Claim sustained to extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 22nd day of January, 1952.

DISSENT TO AWARD NO. 5620, DOCKET NO. CL-5592.

This claim was sustained on the basis of an erroneous conclusion reading in part:

"The fact that the Agreement provides that seniority of an employee begins at the time his pay starts does not confer seniority rights upon these transients."

Seniority rosters, as this Board has stated time and again, do not create or confer seniority. However, seniority is created and conferred by Agreement rules. Rules 2 and 3 of the Agreement applicable herein, by their very unambiguous terms, confer seniority rights upon these new employees.

Each of the four awards cited by the majority as lending support to their conclusions, was based entirely upon different rules from those in evidence in this dispute, and are inapposite.

The Organization by its actions in regularly collecting dues from these employees over a period of years recognized them as such.

The Award clearly is erroneous.

(s) J. E. Kemp
(s) C. P. Dugan
(s) A. H. Jones
(s) R. M. Butler
(s) W. H. Castle

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 5620

Docket No. CL-5592

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

NAME OF CARRIER: Chicago and North Western Railway Company.

Upon application of the representatives of the carrier involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The issue involved in this request for interpretation is whether or not the monies payable under our Award include payment of compensation to employees deprived of work on rest days because of the use of transients in filling vacancies caused by regular employees laying off or being absent for other reasons on the Saturdays and Mondays involved during the period covered by the claim.

The distinction which the Carrier seeks to draw between the use of transients to fill vacancies of the nature above described and those used to "augment" the force is untenable. We sustained Item 3 of the Statement of Claim without qualification except as to measure of compensation sought and that item includes for violation of the agreement because of the performance of work by persons who had no seniority rights under the agreement. It was just as much a violation to permit the performance of work on the vacancies referred to by persons holding no seniority rights under the agreement as it was to use such persons to "augment" the force. Payment under the Award should, therefore, include compensation to employees affected by such use of transient employees.

Referee Francis J. Robertson, who sat with the Division as a member when Award No. 5620 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 19th day of January, 1953.

[1364]

**DISSENT TO INTERPRETATION NO. 1 TO AWARD NO. 5620,
DOCKET CL-5592—SERIAL 125**

The majority erroneously state:

“* * * We sustained Item 3 of the Statement of Claim without qualification except as to measure of compensation sought and that item includes claims for violation of the agreement because of the performance of work by persons who had no seniority rights under the agreement.”

That such statement is erroneous is clearly evidenced by the following statement of fact in the Opinion of the Board (Award 5620):

“* * * Claim is made by the Employees on behalf of those regularly assigned employees who were on rest day status on given Mondays and Saturdays when the Carrier employed so-called transient labor to supplement the force.”

The record in Docket CL-5592 is the basis for the Statement of Fact quoted supra. The only claim before the Board in Docket CL-5592 based on facts, evidence and argument submitted by the Organization was on behalf of employees on rest day status on Mondays and Saturdays when so-called transient labor was used to augment or supplement the force. In arriving at its Award the Board has this question and this question only for consideration.

The Award read: “Claim sustained **to the extent indicated in Opinion and Findings**” clearly showing that the claim was being limitedly sustained for employees, regularly assigned, who were on rest day status on Mondays and Saturdays when so-called transients were used to supplement the force. (Emphasis supplied).

The majority, under the guise of an interpretation, have now expanded and extended Award 5620.

We dissent.

/s/ J. E. Kemp

/s/ C. P. Dugan

/s/ W. H. Castle

/s/ R. M. Butler

/s/ E. T. Horsley