Award No. 5635
Docket No. CL-5594

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

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

WESTERN WEIGHING AND INSPECTION BUREAU

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

(a) The Bureau has violated the Agreement, effective September 1, 1949, when it failed to assign H. L. Munday, Laborer, Grain Door Department, St. Louis, Missouri, to overtime work required on his position Saturday, December 31, 1949, but instead said work was performed by L. M. Zych, Laborer, a regularly assigned junior employe, and;

(b) The Bureau shall be required to reimburse Laborer H. L. Munday for the loss of eight hours overtime work at time and one-half his regular rate.

EMPLOYES' STATEMENT OF FACTS: Mr. H. L. Munday was on December 31, 1949 a regularly assigned employe in the Grain Door Department at St. Louis, Missouri, and carried on the St. Louis Bureau District Seniority Roster. The entire Grain Door Department is assigned Monday through Friday with Saturday and Sunday as rest days. The Management assigned junior employe, Mr. L. M. Zych, and two senior employes to work on Saturday, December 31, 1949, and would not permit Mr. H. L. Munday to work when he was senior to Mr. Zych. There is an Agreement in effect between the parties, effective September 1, 1949, copies of which have been filed with the National Railroad Adjustment Board and by reference are made a part of this submission and statement of facts. Rules 34 and 35 of the Agreement in part read as follows:

"RULE 34

OVERTIME

(a) No overtime hours will be worked except by direction of proper authority, except in cases of emergency where advance authority is not obtainable.

(c) In working overtime before or after assigned hours, employes regularly assigned to positions on which overtime is required, will be worked; the same principle shall apply to working extra time on holidays.

letter which, in part, reads—"the only reason Mr. Munday was not permitted to work on Dec. 31st was because of his inability to perform the work assigned to him."

Following Mr. Raymond's letter of April 21, 1950, the subject was then referred to Mr. L. C. Bell, General Chairman, Brotherhood of Railway Clerks, Western Weighing and Inspection Bureau, System Board of Adjustment, 216 B.M.A. Building, 215 West Pershing Road, Kansas City 8, Missouri. Mr. Bell, in a letter of May 6, 1950, Employer's Exhibit No. 3, communicated with Mr. F. A. Piehl, Manager, Western Weighing and Inspection Bureau, 460 Union Station Building, Chicago 6, Illinois, appealing decision rendered by Mr. William Raymond.

There was then an extensive exchange of correspondence between the Manager of the Western Weighing and Inspection Bureau and General Chairman Bell, resulting in a conference on September 8, 1950, and at that time General Chairman Bell conferred personally with Manager Piehl; and, following this conference, Manager Piehl addressed a letter under date of September 11, 1950 to Mr. L. C. Bell, per Employer's Exhibit No. 4.

As to the basis on which this claim is predicated, the only reference made to any of the Rules in our current Working Agreement is that which is contained in the second paragraph of Employer's Exhibit No. 1, wherein it is stated—

> "Claim for overtime in behalf of Mr. H. L. Munday, as provided in Rule 34 of the Agreement now in effect between Management and Employes represented by the B. of R. C."

Rule 34 of our Working Agreement contains nine (9) separate and distinct paragraphs, all of which have their own specific application, and it is difficult to determine the particular paragraph set forth in Rule 34 that the Brotherhood believes has not been complied with.

We must assume, however, from the information available to us, that the Brotherhood's principal reliance in support of their position is that we did not work the senior employe, although we have conclusively established the fact that our reason for not doing so was because of the senior employe's lack of sufficient experience concerning the installation of grain doors for bulk grain loading; and, for us to have called the senior employe, would have interfered with the normal operations of the grain elevator who were doing the bulk grain loading on December 31, 1949.

We do not feel that Management is required to subordinate fitness and ability for seniority. Our view is supported by the various provisions contained in the Agreement between the Bureau and the Brotherhood effective September 1, 1949, which is on file with your Board. We respectfully direct attention to the following rules within that Agreement which refer specifically to seniority, fitness and ability—

Rule 6 - - - (a)
Rule 12 - - - (a)
Rule 34 - - - (d)

It is the Bureau's position that there has been no violation of the rules of our Working Conditions Agreement and that the claim is without merit and should be denied.

It is presumed that all data contained herein has been presented to the Employes.

(Exhibits not reproduced.)

OPINION OF BOARD: This case presents the question whether Claimant was properly deprived of overtime work on his position by reason of

the Carrier's determination that he was not sufficiently fit or able to perform the particular overtime work in question.

Claimant was a Laborer, Grain Door Department, where normally a Lead Man and three Laborers worked. During regular work days the work of these positions consisted of loading and unloading carloads of grain doors, clipping nails from grain doors and repairing grain doors to make them serviceable. On Saturdays and Sundays these employes were not required to report for duty unless it was necessary to install grain doors for subsequent bulk grain loading or to reclaim grain doors after carloads of grain had been unloaded. The work in question was of this latter sort.

At the Grain Door Foreman's direction an employe junior to Claimant was directed to work on a Saturday, December 31, 1949 and Claimant was advised he would not be needed. It is admitted that he was entitled to the work but for a claim by the Carrier that he lacked sufficient fitness and ability to perform it.

After displacement from a clerical position Claimant exercised his rights as a Grain Door Laborer and worked as such on November 17, 18 and 21, 1949 whereupon he exercised his rights as a Messenger and remained on that position until he was displaced after which he again exercised his rights as a Grain Laborer and worked as such on December 28, 29, 30, 1949 and January 3, 1950 whereupon he bid on a position in District Office and remained there until January 31, 1950. It is to be noted that when Claimant was denied the Saturday work in question he had performed 6 days work as a Grain Laborer.

On February 1, 1950 by reduction in force Claimant again filed a bid on a Grain Laborer position. The Grain Door Foreman declined the bid. However, upon investigation and hearing Claimant was allowed to exercise his displacement rights and was paid for time lost.

There is in the record a written statement concerning Claimant by the Leadman as follows:

> "His principle work was sweeping cars and assisting car coopers. He did not cooper any cars by himself. I tried him at coopering but he was not fast enough, delaying operations of elevators, causing them to shut off feed of grain to cars.
>
> In my opinion he was not capable of coopering cars at the end of these three days and could not qualify as a car cooper."

It is upon this specific evidence, and also upon an anonymous communication of like import from a fellow employe, that the Carrier places main reliance.

This Claimant either had sufficient fitness or ability to fill this Laborer position or he did not. If he did not, the Carrier had a right to deny his displacement rights or to permit him to fill the position and then remove him if he could not demonstrate qualifications for the position within 30 days. But it was arbitrary and capricious to give him some and deny him other work of the position which the occupant was entitled to perform under the Agreement (see Award 2341). What was done here was no different from scheduling different types of work on each of 5 days of a position and then laying-off an occupant one day each week upon the ground that he was not sufficiently qualified to perform the particular work of that day. Claimant was either in the position or out, not part way in and part way out.

In view of the fact that, upon formal investigation and hearing in February 1950, the Carrier found Claimant had sufficient fitness and ability to fill the position, we have no difficulty in finding an abuse of discretion when the Carrier denied Claimant the Saturday work on December 31, 1949. The Grain Door Foreman and the Lead Man jumped too fast both times (Awards 2427, 2534, 4026 and 5265).

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 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 was violated as above found.

AWARD

Claim sustained at the pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 1st day of February, 1952.