# Award No. 5843
# Docket No. CLX-5795

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

John W. Yeager, Referee

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## PARTIES TO DISPUTE:

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

## RAILWAY EXPRESS AGENCY, INC.

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

(a) The Agreement governing hours of service and working conditions between the Railway Express Agency and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective September 1, 1949, was violated when A. J. Landry, furloughed chauffeur, New Orleans, Louisiana, was denied the right to seek his seniority level and perform work on an overtime basis between the hours of 5:30 A. M. and 1:00 P. M., December 16, 1950, and

(b) He shall now be compensated for 8 hours' pay at time and one-half rates at the rate of $256.93 basic per month.

EMPLOYES' STATEMENT OF FACTS: A. J. Landry is a bona fide, furloughed chauffeur at New Orleans, Louisiana, with seniority dating from February 20, 1942.

Employe J. DiMaio possesses seniority at New Orleans, Louisiana dating from February 13, 1946. September 20, 1949, DiMaio became furloughed as result of force reduction and registered (Rule 19) to the effect that he would be available for call for all extra, relief and substitute service, in accordance with his seniority rights. He immediately thereafter secured full-time employment with the Southern Pacific Transport Company at New Orleans, and henceforth was not available for extra, relief or substitute work, except on calendar Saturdays and Sundays, which were the established days of rest of his position with the Southern Pacific Transport Company.

October 27, 1950, A. J. Landry became furloughed as result of a force reduction, and also registered to the effect that he would be available for call for all extra, substitute and relief work in keeping with his seniority rating. At all times since October 27, the date he became furloughed, Landry has responded to all calls given him, at all hours of the day, for extra, substitute and relief vehicle service.

During the work week for furloughed employes beginning December 11, 1950, Landry was called and performed a minimum of 8 hours' work on December 11, 12, 13, 14 and 15. December 16 he was again available for

The contention of Employes in this case that furloughed employe DiMaio should be denied the rights accorded him by Rule 19 because subsequent to being furloughed he secured some work elsewhere is an entirely new approach. It has heretofore always been recognized that furloughed employes may and do seek employment elsewhere during the period they are awaiting call to return to express service, and that the obtaining of such outside employment in such circumstances does not and has not served as a reason for denying a furloughed employe his right to be called under the provisions of Rule 19, or that his failure to respond to calls for extra work on occasion relieves the Carrier of the obligation of calling him. To deny furloughed employe DiMaio his rights under Rule 19 would be tantamount to removing him from the service. The only way in which a furloughed employe may be so removed is when he fails to return to service within seven days after being notified or called to fill a new position or vacancy which has not developed an applicant, fourth and fifth paragraphs of Rule 19 reading:

> "When a new position or vacancy is bulletined and is not bid in and awarded to an employe on the roster in a seniority district or to an employe through the application of Rule 21, the senior furloughed employe on that roster will be called to fill the position as provided in this rule. Where there are no furloughed employes, the senior employe on the employe status roster (Rule 20) will be called to fill the position.
>
> Employes failing to return to service within seven (7) days after being notified (by mail or telegram sent to the last address given) or give satisfactory reason for not doing so, will be considered out of the service. * * *"

In the field, in support of its contention that furloughed employe DiMaio should be denied his rights under Rule 19 to be called for extra work, Employes cited Decisions E-1481 and E-1608 of Express Board of Adjustment No. 1 holding that one who is in full time employment with an employer other than the Carrier cannot be a bona fide employe of the Carrier. That the facts in the cases covered by those decisions bear no resemblance whatever to the facts in the instant case will be readily apparent when it is considered that in the case covered by Decision E-1481 some work was given to one R. J. Lindley, employed as Clerk in the Texas Civil Court at Houston, Texas. Lindley was what the Organization termed a "two-job" man, and held no seniority rights under the Agreement. DiMaio is not a "two-job" man in the sense used to describe Lindley. DiMaio is an employe of the Carrier, furloughed to be sure, but retaining his seniority rights in accordance with the Agreement. Decision E-1608 covered the hiring of students attending school under the G.I. Bill of Rights. The Referee in that case held that students were not bona fide employes, as previously found by Referee Wenke in Award 3763. Neither decision cited has any precedent value in support of an attempt to deny a bona fide furloughed employe the right to be called for extra work in accordance with his seniority.

The stand taken by the Employes in the case of Furloughed employe DiMaio is at variance with the entire concept of Rule 19 and the rights of furloughed employes thereunder to be called in accordance with their seniority. No violation of either Rule 19 or 45-A (j) has been shown and the claim in behalf of furloughed employe Landry for 8 hours pay at time and one-half rate for work performed by DiMaio on December 16, 1950, should be denied.

All evidence and data have been considered by the parties in correspondence and conference.

(Exhibits not reproduced.)

**OPINION OF BOARD:** A. J. Landry on whose behalf the claim is made is a furloughed chauffeur. J. DiMaio is also a furloughed chauffeur. The

seniority of DiMaio is junior to that of Landry. On December 16, 1950 DiMaio was called to and did work. Landry contends that he should have been called. For failure to receive a call he claims compensation at the rate of time and one-half for the day at his basic rate.

The facts are that Landry had worked the previous five days and had 40 hours work that week. This being true, by the terms of Rule 45-A(j) he was not entitled to a call to this work unless there was no available extra or unassigned employe who had not had 40 hours of work that week and unless the regular assignee of the position was not available.

Rule 45-(j) provides:

> "Work on Unassigned Days. Where work is required by the management to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases, by the regular employe."

It is not authentically known whether or not the regular employe was available. DiMaio was in the status of an unassigned employe on the roster. The Organization does not contend that he did not have seniority on the roster and it does not seek herein to have him displaced. The effect of its contention is that on being furloughed he obtained outside regular employment and in consequence was not available, which was known to the Carrier, in recognition of which the Carrier make a notation to that effect on its records, and further that he had responded to but few calls during the period of his furlough.

Attention has not been called to any provision which permits the Carrier for any reason to remove a furloughed employe from the seniority roster or to deny it the right to call such a one because of one or any number of calls and findings that the employe is unavailable for response to the call.

It appears therefore that unless and until DiMaio surrenders his rights to his seniority or in some proper manner has them taken away he is entitled to be called as was done in this instance.

**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

The claim has not been sustained.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 30th day of June, 1952.