Award No. 5850
Docket No. CL-5730

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul N. Guthrie, Referee

PARTIES TO DISPUTE:

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

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY

STATEMENT OF CLAIM: (1) Claim of the System Committee of the Brotherhood that the Carrier violated its Agreement with the Brotherhood when on Monday, December 11, 1950, it used one W. L. Luck, an outsider and one without seniority rights, to fill a temporary vacancy for that one day on laborer's position regularly occupied by W. Sweet, at its main store at Lafayette, Indiana, and

(2) That Ray Coulter, present Diesel Shop Counterman and former stores laborer with common seniority and regularly assigned with hours 3 P. M. to 11 P. M., Wednesday thru Sunday with Monday and Tuesday as rest days, who was available, willing, able and qualified to perform the work, be allowed eight hours at the laborer's punitive rate on account of being deprived of his rights to fill this temporary vacancy on December 11, 1950.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement in effect between the parties bearing effective date of November 1, 1944, with subsequent amendments, governing the hours of service and working conditions of employes of the Carrier represented by the Brotherhood, copies of which have been furnished the Board. This Agreement, as to certain rules, was revised effective September 1, 1949, to conform to the Agreement entered into by the parties at Chicago on March 19, 1949, which provided for the establishment of a forty-hour week. The Employes request that the entire text of such Agreements (including Supplement No. 29 of February 19, 1949—Brotherhood Exhibit "X") be considered in evidence in this dispute and treated as having been cited by the Employes. There is no provision in the Clerks' Agreement for an "extra board" and on the date involved there were no unassigned or furloughed employes to perform the work.

The Employes hereby submit the following statement of such facts as are material to the determination of this dispute.

On December 11, 1950, Mr. D. Stackhouse, Working Foreman at the Main Store at Lafayette, Indiana, assigned to work 7 A. M. to 12 noon and 12:30 P. M. to 3:30 P. M., Monday thru Friday, was absent without prearrangement for personal reasons. Under the operation of Supplement No. 29 (Brotherhood Exhibit "X"), that portion interpreting Rule 11—Sport Vacancies, Laborer W. Sweet with common seniority and same hours and

6. The employes have stated that Mr. Luck was not used by the Stores Department to fill a bonafide position pending assignment by bulletin. The implication they desire to make by such a statement is that a new employe cannot be employed and used under any other circumstances. In reply we direct the attention of the Board to Rule 11 and its agreed upon interpretation as set out in Supplement No. 29, which covers filling of new positions or vacancies of thirty calendar days or less without bulletining, under the provisions of which Mr. Luck was properly used.

7. The employes have stated that the position in question was not a bonafide new position under Rule 11 or any other rule. Again, as in the preceding paragraph the bare statement is true. But Rule 11 covers not only filling of vacancies created by establishing a new position but also temporary vacancies resulting from other causes. In paragraph two of the interpretation it is spelled out as follows, "The above applies to all temporary vacancies not subject to bulletin, whether it be due to regular man laying off or time pending assignment on a temporary or permanent vacancy under bulletin." The application of Rule 11 is not confined or restricted to a new position.

8. The employes cited Third Division Award 3275 in support of their position. It was held in Award 3275 that the agreement was violated when employes of one craft were used to perform work within the scope of another craft when employes entitled to perform it under the agreement are available. In the instant case a new employe was used to fill a temporary vacancy in accord with the rules of the agreement. Award 3275 is not pertinent or applicable.

9. The employes have mentioned Third Division Award 5240 in support of their claim and quoted the following from the opinion of the Board:

> "We find nothing in the current Agreement or the revision thereof effective September 1, 1949, that permits or authorizes work to be done by one without established seniority when there are those with established seniority available and willing to do the work."

The facts are different in the instant case from those cited in Award 5240; also, in the instant case, the Carrier has shown that the rules of the agreement on this property and the interpretation to those rules anticipate and provide for the use of new employes under the conditions existing in instant claim.

Conclusion.

The Carrier has shown that the claimant failed to make request to the proper officer to fill the temporary vacancy for which claim is made; that W. L. Luck was properly used to fill the temporary vacancy under the provisions of Rule 11 and its interpretation as set out in Supplement No. 29; that Rule 5 cited by the employes was not the pertinent rule, nor was Rule 5 violated when the Carrier filled the vacancy; that Mr. Luck was not an outsider, but when put to work he acquired an employe status; that his use did not infringe upon the rights of the claimant; and that the employment of Mr. Luck in the Mechanical Department on December 12, 1950, subsequent to the date of claim, has no bearing on the claim;

It is, therefore, respectfully submitted that the claim is not supported by the applicable rules of the agreement and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The parties are in substantial agreement concerning the relevant facts in this claim. On December 11, 1950 D. Stackhouse, a working foreman, was absent without prior notice. For that day a Mr. Sweet, a laborer, was put in Stackhouse's position. Thereupon it became necessary for someone to fill Sweet's job for the day. The Carrier designated W. L. Luck to fill Sweet's job. Luck had filed a job application

with the Carrier on December 6, 1950. However prior to the day in question he had not been put to work by the Carrier. Hence at the time of his designation to fill Sweet's job on December 11, 1950 he had neither seniority or employe status with the Carrier. Luck worked the one day, December 11, 1950, and on December 12, 1950 he was given employment as a laborer in the Mechanical Department, which job was not under the Clerks' Agreement.

The Petitioner contends that the Carrier violated the Clerks' Agreement when it designated Luck to fill Sweet's job on December 11, 1950, instead of having given the job to an employe with seniority rights under the Agreement. The Carrier contends that it acted properly in designating Luck, since no employe with seniority rights requested to be assigned to Sweet's job, as contemplated in the interpretation of Rule 11 made in Supplement No. 29. It is pointed out that Sweet requested that he be allowed to perform the Stackhouse job for the day, which request was granted. Carrier states further that had an employe with seniority rights requested to be put on Sweet's job, such request would have been granted. It is argued that in the absence of such a request the Carrier was privileged to take the action which it did in using Luck for the job. It is stated that Luck acquired employe status under the applicable rule when he began work on December 11.

In keeping with many awards of this Division (Awards 2341, 3860, 4278, 5078, 5117, 5717) it appears that the designation of Luck under the particular circumstances involved "did infringe on the right of employes who have established a seniority date," as that is contemplated in the third paragraph of the interpretation of Rule 3 (a) as given in Supplement No. 29.

While in the interpretation of Rule 11 in Supplement 29 it is provided that certain employe requests are to be honored, it does not say that the Carrier, in the absence of such a request, is privileged to take any action it wishes irrespective of other provisions of the Agreement. To make such an interpretation would make it possible for one party to the Agreement to seriously invade the rights of the other, an effect never contemplated in the adoption of the interpretation.

Under the particular facts and circumstances here involved and in view of the relevant rules, an affirmative award is justified.

In keeping with the policies of this Division the claim should be sustained at pro rata 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 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

Sustained at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 18th day of July, 1952.