Award No. 6259
Docket No. CL-6067

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

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

THE SALT LAKE UNION DEPOT AND RAILROAD COMPANY

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

(a) That Carrier violated rules of the Clerks' Agreement when on the specific dates named in Section (b) hereof it utilized the services of H. W. Edwards, an employe of the Geneva Steel Company at Salt Lake City and one holding no rights to perform work normally attached to positions designated in the Scope Rule of our Agreement with the Carrier, as an Usher on the rest days of the employe assigned to the position of Usher No. 4 at the Salt Lake City Union Depot; and

(b) That A. C. Buxton, regularly assigned to position of Usher No. 4, hours 4:30 A. M. to 12:30 P. M. rest days Friday and Saturday, shall be paid eight hours at time and one-half rate for each day, Friday, December 8, Saturday, December 9, Friday, December 15, Saturday, December 16, Friday, December 22, Saturday, December 30, 1950, Saturdays, January 6, 13, 20, 27 and February 3, 1951; also R. G. Eva, who was regularly assigned to position of Usher No. 4 February 16, 1951, shall be paid eight hours at time and one-half rate for Saturday, February 17, 1951, account Messrs. Buxton or Eva not being permitted to work the hours of Usher No. 4 assignment on the above stated rest days when a legitimate relief employe was not available and an outside party, H. W. Edwards, named in Section (a) hereof, employed by the Geneva Steel Company, except on Friday and Saturday, was used to work the hours of position of Usher No. 4.

EMPLOYES' STATEMENT OF FACTS: A. C. Buxton, seniority date July 20, 1948, was assigned to position of Usher No. 4, hours 4:30 A. M. to 12:30 P. M., rest days Friday and Saturday, by bulletin dated September 27, 1949. Employes' Exhibit No. 1. Buxton continued to occupy this position until February 8, 1951, when he entered the armed forces of the United States of America pursuant to the Selective Service Act of 1948. R. C. Eva, seniority date February 18, 1949, was assigned to the above described position of Usher No. 4 by bulletin dated February 16, 1951. Employes' Exhibit No. 2. Eva continued to occupy this position until March 15, 1951, when he entered the armed forces of the United States of America pursuant to the above stated Act.

The Agreement of March 9, 1949, covering a work week of 40 hours consisting of five days of eight hours, effective September 1, 1949, provides, Article II, Section 1 (e), that:

> "All possible regular relief assignments with five days of work and two consecutive rest days will be established to do the work necessary on rest days of assignments in six or seven-day service or combinations thereof, or to perform relief work on certain days and such types of other work on other days as may be assigned under individual agreements. Where no guarantee rule now exists such relief assignments will not be required to have five days of work per week.
>
> Assignments for regular relief positions may on different days include different starting times, duties and work locations for employes of the same class in the same seniority district, provided they take the starting time, duties and work locations of the employe or employes whom they are relieving."

and provides only that all regular relief positions will be assigned a work week of five days with two consecutive days off in seven. An unassigned or extra employe working less than five days per week cannot be considered as having a regular relief position. The fact the above quoted rule covering the 40-Hour Week regarding regular relief positions is silent regarding extra employes is convincing that the rule has no bearing on or application to extra employes working less than 40 hours or 5 days per week as a red cap or usher.

It is the Carrier's position in this case that Mr. Edwards, who sought employment with the Carrier, filled out the prescribed application for employment forms, passed the requirements of the Medical Department and established seniority when he commenced work December 8, 1950, as an extra usher or red cap was hired in accordance with established rules and standards. He was in every sense a bona fide employe employed to work as an extra usher or red cap and as such established seniority under the plain reading of paragraph (a) of the seniority rule in the Memorandum of Agreement, pages 30, 31 and 32 of the Clerks' Agreement of June 1, 1941, as reissued May 1, 1946. When Mr. Edwards had no desire to protect the extra usher's work which was on February 17, 1951, he was discharged just as is any other employe who fails to protect his assignment, if the circumstances justify discharge.

The fact that Mr. Edwards, while working for the Carrier, was an employe of the Geneva Steel Company, does not in any manner support the claim. There is no rule in the current agreement or any settlement in connection therewith which provides that an employe of the Carrier cannot work, or hold employment rights with another company.

The Carrier asserts no rule of the agreement was violated in the case at issue and the claim has no merit and should be denied.

All data in support of the Carrier's position have been submitted to the Organization and made a part of this particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute arises out of the Carrier's use of H. W. Edwards to perform the duties of usher position No. 4 at its Salt Lake City Union Depot on certain rest days of that position as set forth in (b) of the claim. Edwards was, at the time, an employe of the Geneva Steel Company at Salt Lake City and performed this work on the rest days of that position. Claim is here made by the System Committee in behalf of the regular occupant assigned to the position during the period involved, being from December 8, 1950 to February 17, 1951, inclusive. It is made for eight hours at time and one-half for each day Edwards

worked, the theory being that Claimants were entitled to perform this work by reason of the provisions of Rule 36(f) of the parties' effective agreement since Carrier had no extra or unassigned employes available.

Carrier had four positions of Usher or Red Caps at its Salt Lake City Union Depot. After the forty hour week went into effect this created eight rest days as they were seven day positions. One regular relief assignment of five days' work was established pursuant to Rule 31½(e). This left three days unassigned. Carrier had no extra or unassigned employes available. It hired Edwards, who had had no previous employment with it and therefore no seniority, for the sole purpose of performing some of this unassigned rest day work.

Rule 36(f) provides:

> "WORK ON UNASSIGNED DAYS. Where work is required by the Company 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."

The question arises, can Carrier meet the requirements of this rule by hiring outsiders as extra employes solely for that purpose? This Division has apparently answered this question both ways. See Case No. 1 of Award 5558 and Award 6094. In view of that fact it would seem proper to reconsider the question.

With the advent of the Forty Hour Week Carrier obtained the right to stagger the work week of its regularly assigned employes in a class in accordance with its operational requirements and, as a result thereof, is only required to establish such relief assignments in six and seven day services as the work it finds necessary to have performed on such rest days may require. This created a very substantial change in regard to rest day work and the right thereto.

Work on rest days, if necessary to be assigned to relief, should, in so far as possible, be assigned to a regular relief assignment with five days of work. See Rule 31½(e). If it is not part of an assignment, then it may be performed; first, by an available extra or unassigned employe who will otherwise not have 40 hours of work that week and, finally, if neither of the foregoing is possible, by the regular employe. See Rule 36(f).

Rule 36(f) specifically relates to the working conditions here presented and is controlling thereof. We hold the language, "an available extra or unassigned employe who will otherwise not have 40 hours of work that week," has reference to those persons who were employes of the Carrier when need for having the work performed arose. This is the holding in Case No. 1 of Award 5558 which we think is correct. This language does not permit Carrier to employ outsiders solely for that purpose when need for having work performed under this Rule arises.

Case No. 1 of Award 5558 holds that this rule means an employe holding seniority who is not working or one who has worked less than 40 hours of work that week. In this respect it is true that the Seniority Rule of the parties' agreement provides: "Seniority begins at the time employe's pay starts . . ." But this provision does not help Carrier because such seniority was a condition precedent to its right to assign this work to Edwards. Such seniority could not, in the first instance, be established by using him to perform it. We do not hold that Carrier cannot augment its forces when need therefor arises. What we do hold is that before a person can be used to perform work that is subject to the quoted language of Rule 36(f), he must have been an employe of the Carrier prior to the time need for such work arose and that he cannot be employed by Carrier, after need therefor arises, solely to perform it. Since that is the situation here, we find Carrier, in

having Edwards perform this work, violated Rule 36(f). However, in view of the many holdings of this Division in like situations, the claim will be allowed on a pro rata basis. See Awards 4495, 5240 and 5620 of this Division. As stated in Case 1 of Award 5558—

"The penalty for work lost is the pro rata rate of the position under the current awards of this Board."

As stated in Case 1 of Award 5558:

"The hiring of persons without any seniority rights for less than five days per week to perform relief work belonging under an agreement because the work was not a part of an assignment under Rule 17(f) (here 36(f)) could, if sustained, cause serious injury to the rights of employes holding seniority under a collective agreement. No such result was intended by the 40 Hour Week Agreement."

We need not discuss the situation arising from Carrier's use of A. K. Thomas, a student at Utah University, as no claim is made based thereon. Whether or not his use was in violation of the agreement is a question not before us but, even if it is true that no protest was made against his use, that fact would not constitute a practice that is controlling here.

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 Carrier violated the Agreement.

AWARD

Claim sustained but on a pro rata basis.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 17th day of July, 1953.

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The majority admits that "it is true that the Seniority Rule of the parties' agreement provides: 'Seniority begins at the time employe's pay starts—.'"

However, the conclusion is then made that:

"—before a person can be used to perform work that is subject to the quoted language of Rule 36(f), he must have been an em-

ploye of the Carrier prior to the time need for such work arose and that he cannot be employed by Carrier, after need therefor arises, solely to perform it."

Rule 36(f) simply provides that when work is 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—." This Rule does not determine under what conditions persons hired by the Carrier **become** extra employes, nor how or under what conditions persons hired by the Carrier obtain seniority rights—these are matters covered by other rules of the basic agreement.

The seniority rule provides that when a new employe is hired by the Carrier his seniority begins at the time his pay starts—it does not limit such seniority to pay earned in work other than work on an unassigned day. Likewise Rule 36(f) does not provide that the "extra" employe to whom it refers must have already earned seniority in some other type of employment before he can be used on an unassigned day. These restrictions have, in effect, been written into these rules by the majority. The majority states that it does not hold that the Carrier is precluded from augmenting its forces "when need therefor arises." The need in this case was obvious and yet the majority holds that the Carrier cannot augment its force for the purpose of performing work on a day which is not a part of any assignment. Where—in Rule 36(f) or elsewhere—can such a restriction be found?

The majority holds that "before a person can be used to perform work that is subject to the quoted language of Rule 36(f), he must have been an employe of the Carrier prior to the time need for such work arose." Presumably if Edwards had been hired on December 7 instead of December 8, 1950, and had performed some other type of extra work for one day, the Carrier could then have used him to perform the work involved in this case without penalty. No such condition can be found in Rule 36(f), or any other rule of the agreement.

The award of the majority represents an attempt to adjust the rules of the agreement so as to produce a result which the majority apparently considers desirable. It is not the function of this Board to rewrite the agreements which the parties have made.

For the reasons stated, we dissent.

/s/ C. P. Dugan

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ R. M. Butler

/s/ J. E. Kemp