Award No. 6260
Docket No. CL-6200

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

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

(1) That Carrier violated rules of the Clerks' Agreement effective with the application of the Forty Hour Week Rules September 1, 1949, by the employment of persons holding no seniority rights under the Rules of our Agreement—Rest Day Relief Service—for Station Clerk at Antioch, Illinois.

(2) That the involved employe, R. E. Burdick, be allowed an additional day's pay at overtime rate fixed for his position of Station Clerk at Antioch as wage loss sustained for the Saturdays and Sundays of each week commencing Saturday September 3, 1949, that his position was filled by a non employe, and continuing thereafter for each Saturday and Sunday of each week until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: The claimant, Mr. R. E. Burdick, is employed as Station Attendant at Antioch, Illinois. This is a position specifically named by classification as being subject to Rule 1—Scope—Group 3 of our General Rules Agreement with the Carrier effective June 1, 1945. Effective September 1, 1949, with application of the Forty Hour Week Rules to which both the Carrier and Brotherhood were parties the claimant was given an assignment from 6 P. M. to 10 P. M. Mondays to Fridays inclusive, rate of pay $1.16 per hour, with Saturdays and Sundays as his designated rest days of each week. Concurrently therewith Carrier engaged the services of an outsider named John Christensen who, to the best of our knowledge, regularly works five days (Monday through Friday inclusive) per week in some outside industry as a truck driver for the Great Lakes Pumping Company, Great Lakes, Illinois.

This irregular situation was called to Management's (Trainmaster McPherson's) attention on December 28, 1949. Employe's Exhibit No. 1.

Account no reply received from Mr. McPherson we traced him on February 6, and April 26, 1950. On May 1, 1950, Mr. McPherson stated that

visions of Rule 41½(a) the work necessary to be performed on Saturday and Sunday was given to a relief worker to comply with Rule 41½(e) and since no guarantee is applicable to station attendants or relief workers it was permissible for the Carrier to assign a relief attendant with less than five days of work.

Rule 50(f) on which the claimants rely does not support them. The two designated rest days on this seven day position was not a part of Burdick's assignment but on the contrary, was a part of the relief station attendant's assignment. Therefore, Rule 50(f) is not applicable.

The contention that we employed a non-employe without seniority cannot be supported. Rule 16 gives the Carrier a contractual right to make appointments when there are no bidders. Burdick originally obtained his position in this manner and acquired seniority rights in accordance with provisions of Rule 3(a).

In Award 5558 your Board stated that they would not sustain a case involving hiring of workers "off the street" unless the controlling agreement included such a provision. The agreement on the Soo Line specifically so provides.

It is the position of the Carrier that we have carried out the intent and spirit of our agreement of June 1, 1945 and as amended September 1, 1949, and that Claimant Burdick has no right under the agreement to claim work in his behalf on designated rest days.

It is the position of the Carrier that claim is not supported by the rules and we respectfully suggest to the Board that the claim be denied.

All data submitted in support of our position has been presented to the claimants. (Exhibits not reproduced.)

OPINION OF BOARD: This claim is made by the System Board of Adjustment in behalf of R. E. Burdick who is the regular occupant of the position of Station Attendant at Antioch, Illinois. This Station Attendant performs seven-day services and, as of September 1, 1949, the effective date of the Forty Hour Week, was assigned a work week of Monday to Friday with Saturday and Sunday as rest days. The basis of the claim is that Carrier used persons holding no seniority rights under the Clerks' Agreement to perform the duties of this position on its rest days and thereby violated the rules thereof. It asks that Burdick be paid an additional day's pay at the overtime rate of his position for each rest day of his position when it was thus filled by an outsider.

The facts are that from October 1, 1949 to January 28, 1951 and again from April 28 to May 28, 1951, Carrier used one Fred A. Techert to perform the duties of this position on the rest days thereof and thereafter, since September 15, 1951, it has used one John Christensen for that purpose and is presently continuing to use his services in that capacity. At all other times it has had Burdick perform the duties of his position on the rest days thereof and paid him therefor at time and one-half rate.

Carrier contends the claim as here made is not the identical claim handled on the property and therefore not properly before the Division. The claim made and handled on the property was in behalf of the Station Attendant at Antioch, which is the correct title of the Claimant's position, whereas here he is referred to as the Station Clerk. The record leaves no uncertainty as to what position is and was involved nor as to the basic nature of the contention on which the claim is made. We think the following from this Division's Award 3256 is applicable here: "In this respect, it was not intended by the Railway Labor Act that its administration should become super-technical and that the disposition of claims should become involved

in intricate procedures having the effect of delaying rather than expediting the settlement of disputes."

The subject matter of the claim, that is, the claimed violation of the Agreement, is the same here as it was on the property. We find no merit to this contention as no one could possibly be misled by this change in title in referring to the position involved.

Next reference is made to an alleged unconscionable delay in the handling of this claim. As stated in Award 5790: "The Railway Labor Act carries no limitation which bars claim by reason of lapse of time." If such limitation is desired, it must be by amendment thereto or by agreement of the parties if it relates to handling on the property. No such rule has been pointed out. We find this contention to be without merit.

"Station Attendants" are Group 3 employes. See Rule 1, Group 3, of the parties' effective Agreement. It is the Carrier's contention that Rule 41½(e) and 49(b) of the parties' effective Agreement permit it to establish relief assignments with less than five days of work and that the Saturday and Sunday rest days of the position of Station Attendant at Antioch could be made a regular relief assignment. Carrier bulletined these two days on February 27, 1951, and, having received no bids, proceeded to fill the vacancy pursuant to the following language of Rule 16: "In the event bulletin fails to develop an applicant, the position may be filled by appointment, * * *." This could only have application to Techert's being assigned thereto on April 28, 1951..

Rule 41½(e) is as follows:

> "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 this agreement. Where no guarantee rule now exists such relief assignments will not be required to have five days of work per week."

Rule 49 (b) provides:

> "Nothing in these rules shall be construed as permitting the reduction of days for regularly assigned employes in Group 1, and the office employes named in Group 2 of Rule 1 below five (5) per week, except that this number may be reduced in a week in which one of the seven holidays specified in Rule 63 occurs within the five days constituting the work week by the number of such holidays, or when reducing force as provided in Rule 26. This will not apply to employes used to relieve employes on six or seven day assignments when there is less than five days of such work."

Rule 50 (f) provides:

> "Where work is required by the carrier 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."

Ordinarily Rule 41½ (e) would only permit Carrier to establish regular relief assignments with five days of work and anything less would come under the provisions of Rule 50 (f). See Case No. 1 of Award 5558. Consequently if the position taken by Carrier is not correct then, as contended by the System Board of Adjustment, this tag end work would have to be per-

formed in accordance with the provisions of Rule 50 (f) and, since Carrier had no available extra or unassigned employes, go to the regular employe, who is the Claimant.

It will be observed that Rule 49 (b) does not guarantee five days of work per week for employes regularly assigned to relieve employes on six or seven day assignments when there is less than five days of such work. Rule 49 (b), in this respect, provides: "This will not apply to employes used to relieve employes on six or seven day assignments when there is less than five days of such work." And that such is possible under Rule 41½ (e) is made evident by the following language thereof: "Where no guarantee rule now exists such relief assignments will not be required to have five days of work per week." We find this special provision of Rule 49 (b) makes Carrier's position the correct one but the person used in this capacity must actually be a bonafide employe of the Carrier. Carrier cannot, for this purpose, use an available outside person who has no desire, intent or expectation of becoming a bona fide employe merely to avoid payment of overtime rates to the regular occupant of the position.

As stated in Award 5078: "The hirings which provoked this controversy involved persons * * * whose relationship with the employer falls short of being bona fide employer-employe relationship, because, * * * , the hiree does not approach the position with the desire, intention and expectation to become an employe subject to call and assignment at all times with readiness to serve, as provided in the labor agreement which governs the work. It cannot truthfully be said that they are the employes for whose benefit the contract was made, * * * ."

As stated in Award 4495: "The fact that they were in the army and not subject to use except for limited hours, and then only by permission of their commanding officer, substantiates this conclusion. The two soldiers never having become employes in the sense used in the Collective Agreement they could gain no rights under the Agreement." See also Award 2706 of this Division.

The record discloses Techert, during all of the time he was performing these services for Carrier, was a regular full time employe of Merrill-Cunningham Trucking Company with a work week of Monday to Friday. He apparently still is. Christensen has been, during all of the time he has performed these services for the Carrier, and still is, a regular full time employe of the Great Lakes Pumping Company. Neither, at any time, quit their regular jobs. Carrier says both have acquired seniority under Rule 3 (a) but significantly they were apparently never placed on a Seniority Roster. We do not think either of these men ever had, nor does Christensen now have, any desire, intention or expectation of becoming a bona fide employe of the Carrier nor do we think Carrier ever expected them to. They, Techert and Christensen, took this work to pick up extra money on the rest days of their regular jobs and Carrier did it to avoid paying the regular occupant of the position at the overtime rate for doing it on the rest days of his position. We do not think it can be truthfully said that they are employes for whose benefit the contract was made or in the sense that the term is intended by the collective bargaining Agreement.

The claim is made for additional pay on these days at the overtime rate. As stated in Case No. 1 of Award 5558: "The penalty for work lost is the pro rata rate of the position under the current awards of this Board." This claim should be allowed accordingly.

For the purposes of discussion we accepted the dates of the Carrier as to when Techert and Christensen worked. However, the parties are not agreed on this and there is nothing in the record before us from which we can determine that fact with certainty. The records of the Carrier will fully and accurately disclose this information and the matter is returned to the property solely for the purpose of determining the rest days of the

position on which these two men actually worked. The claim is allowed for those days on a pro rata basis.

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 on a pro rata basis with directions that it be returned to the property solely for the purpose of determining the days on which the violations occurred.

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.

DISSENT TO AWARD NO. 6260, DOCKET NO. CL-6200

Techert and Christensen were hired by the Carrier to perform regularly assigned relief work on the rest days of the regular occupant of the position of Station Attendant at Antioch, Illinois. Both had outside employment from Monday to Friday. The majority has decided that neither of these men ever became a bona fide employe of the Carrier and that, consequently, the Carrier had no right to use them to perform the work in question. In this connection the majority has found:

> "We do not think either of these men ever had, nor does Christensen now have, any desire, intention or expectation of becoming a bona fide employe of the Carrier nor do we think Carrier ever expected them to. They, Techert and Christensen, took this work to pick up extra money on the rest days of their regular jobs and Carrier did it to avoid paying the regular occupant of the position at the overtime rate for doing it on the rest days of his position. We do not think it can be truthfully said that they are employes for whose benefit the contract was made or in the sense that that term is intended by the collective bargaining Agreement."

There is absolutely no evidence contained in the record of this case to support any such conclusion. No contention was made by the Organization nor was any evidence submitted to show that either of these men had ever failed or refused to respond to any call for service made by the Carrier. Each of them performed all the service available to him for the Carrier. The sole evidence in this case having any bearing upon their intentions or

upon their availability as bona fide employes is the fact that they also had outside employment. This Board has held in Award No. 6261, in a case in which the facts were almost identical, as follows:

> "The Organization suggests that a person who has regular outside employment cannot qualify as a bona fide employe of a carrier. The term employe, as used in the Railway Labor Act, includes every person in the service of a carrier who performs any work defined by proper authority as that of an employe and who is subject to carrier's continuing authority to supervise and direct the manner of rendition of his services while performing it. They must accept the service with the intent, desire and expectation of becoming bona fide employes. It does not preclude them from having outside employment but they must, at all times, be subject to call and assignment with readiness to serve."

The quoted statement from Award 6261 exactly fits the situation involved in this present case. Neither Techert nor Christensen ever refused to perform any service required of them by the Carrier. If the Board intends to indulge in speculation concerning their motives, it is just as logical to assume that if they had been offered sufficient employment by the Carrier to enable them to make a living, they would have abandoned their outside jobs and accepted such employment with the Carrier. Since the Carrier had work for them only on Saturday and Sunday and they were never required to perform work on any other day since none was available to them, there is no basis whatsoever for the speculation indulged in by the majority that they would not have accepted such additional service.

Speculation of the kind indulged in by the majority in this case without any foundation in the record for such assumptions can only tend to produce decisions by this Board based upon an emotional approach to the solution of the dispute.

For the reasons stated above we dissent.

/s/ C. P. Dugan

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ R. M. Butler

/s/ J. E. Kemp