Award No. 6262
Docket No. CL-6209

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 COLORADO AND SOUTHERN RAILWAY COMPANY

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

(1) That Carrier violated and continues to violate the prresent Clerks' Working Agreement in the Joint Telegraph Office at Denver, Colorado when it relieved Messenger Higdon on his designated rest days (Saturday and Sunday) with an outside person, namely Edward Hose, who held no seniority rights established on the seniority roster and failed and refused to permit claimant to work who was and is available, ready, willing and able to work and who has established seniority rights in this district.

(2) That Carrier now be required to compensate Mr. Higdon, his successors if there be any, for eight (8) hours at the rate of time and one-half for each and every rest day that the outside person is used to relieve a regular employe on his rest days, retroactive to April 22, 1950 and forward until agreement violation is corrected.

EMPLOYES' STATEMENT OF FACTS: On April 21, 1950, messenger force in the Joint Telegraph Office was as follows:

Title	Hours of Service	Rate of Pay	Rest Days
Messenger	7:30 A. M. — 4:30 P. M.	9.295 day	Sat. and Sun.
Messenger	7:00 A. M. — 4:00 P. M.	9.295 day	Sat. and Sun.
Messenger	7:45 A. M. — 5:45 P. M.	9.295 day	Sat. and Sun.

On Saturday, April 22, 1950, a Denver University student, Mr. Edward Hose, was assigned to work on **Saturday and Sunday only** relieving the Messenger with assignment 7:30 A. M. to 4:30 P. M., position occupied at that time by Victor Higdon.

The present messenger force is as listed above except an outsider is working relief on **Saturday** and **Sunday.**

With the inauguration of the 40-Hour Week on September 1, 1949 all three (3) Messenger positions were assigned Monday through Friday with rest days of Saturday and Sunday. Higdon, however, who was assigned 7:30 A. M. to 4:30 P. M., was called to work on Saturday and Sunday and paid time and one-half for this work. He worked in this manner until a change was made on April 22, 1950.

OPINION OF BOARD: The System Committee makes this claim on behalf of Messenger Victor Higdon and his successors. It is based on the contentions that Carrier, in violation of Rule 42 (f) of the parties' effective Agreement, used outsiders to fill the rest days of the messenger position held by Higdon and his successors. The claim is made for eight hours at time and one-half for each day, since April 22, 1950, that such violation occurred and up until the situation is corrected.

Rest days of the messenger position held by Higdon and his successors in the Joint Telegraph Office of Carrier at Denver, Colorado, were Saturday and Sunday. Carrier had no extra or unassigned employes available. It hired Edward Rose solely for the purpose of having him perform the necessary rest day work of this position and, commencing on Saturday, April 22, 1950, it assigned him thereto and had him perform it. Hose was then a student at Denver University and had had no previous service with this Carrier. He continued to work in this manner up until July 15, 1950 when he was regularly assigned to a messenger position and thereafter worked in that capacity. The work performed by Rose, up until July 15, 1950, was unassigned, that is, it was work not a part of any assignment and therefore subject to Rule 42 (f) of the parties' Agreement.

Rule 42 (f) provides:

> "Work on Unassigned Days.
>
> "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 employee who will otherwise not have forty (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 this 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 service 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 Carrier finds it necessary to have it assigned to relief, should, insofar as possible, be assigned to regular relief assignments with five days of work. See Rule 30½ (e). If it is not part of an assignment then it may be performed; first, by an available extra or unassigned employe who will not otherwise have forty hours of work that week, and finally, if neither of the foregoing is possible, by the regular employe. See Rule 42 (f).

Rule 42 (f) specifically relates to the working conditions here presented and is controlling thereof. We hold the language thereof, that is, "an available extra or unassigned employe who will otherwise not have forty (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 the provisions of 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 this

effective 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 Hose. 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 therefore 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 42 (f) he must have been an employe of the Carrier prior to the time need for such work arose and that he cannot be hired by Carrier, after need therefore arises, solely for the purpose of performing it. Since that was the situation here from April 22, 1950 up until July 15, 1950, we find Carrier, in having Hose perform this work during that period, violated Rule 42 (f) in doing so. The record is not sufficient for us to determine just what transpired after July 15, 1950. Since the burden of establishing a claim is on the one who makes it we dismiss the claim on and after that date. In view of the many holdings of this Division, under like situations, the claim will be allowed on a pro rata basis only. 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." See also Awards 4495, 5240 and 5620.

As stated in Case No. 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 42 (f)) could, if sustained, cause serious injury to the rights of employes holding seniority under a collective Agreement. No such result is intended by the 40-Hour Week Agreement."

Reference is made to the form of the claim. It is made for Higdon and his successors. We have often approved claims in this form. As stated in Award 3687:

> "The fact that the claim is general and fails to name the Claimants except as a class is not a bar to the disposition of the claim. See Awards 3251 and 3423."

The reason therefor is well set forth in Award 4821 as follows:

> "We think the correct procedure is to permit the filing of general claims where the question at issue operates uniformly upon a class of employes that is readily determinable. There is no reason why the work of this Board should not be so expedited. Technical procedures are not contemplated. The policing of an Agreement ought not to be unnecessarily difficult by requiring the filing of a multitude of claims, when the disposition of a single issue decides them all. The Organization is authorized to represent the employes and where no prejudice arises out of group handling, we think it is entirely proper."

We therefore allow the claim for the period from April 22, 1950 up to July 15, 1950 but only at a 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 Carrier violated the Agreement.

AWARD

Claim sustained for the period from April 22, 1950 up until July 15, 1950 at a pro rata rate, but otherwise dismissed.

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 6262, DOCKET NO. CL-6209

The majority admits that "it is true that the Seniority Rule of this effective 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 42 (f) he must have been an employe of the Carrier prior to the time need for such work arose and that he cannot be hired by Carrier, after need therefore arises, solely for the purpose of performing it."

Rule 42 (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 forty (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 42 (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 42 (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 42 (f) he must have been an employe of the Carrier prior to the time need for such work arose." Presumably if Hose had been hired on April 21 instead of April 22, 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 42 (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 con-

siders 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