Award No. 6522
Docket No. CL-6570

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

William M. Leiserson, Referee

PARTIES TO DISPUTE:

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

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY—Eastern Lines

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

(a) Carrier violates the rules of the Clerks' Argeement at Kansas City, Missouri, on Saturdays when it assigns or permits work to be performed by persons other than bona fide employes under the Agreement; and,

(b) Hermis Martin, W. Harrity, W. H. Criss, W. Wagner, J. Hawthorne, B. Spurlock, B. Mambrillo, S. Ojeda, J. L. Fairfax, Roy Bootman, Earl Smalley, E. Holmes, C. Jacobs, C. Valadez, E. Zuniga, F. Gutierrez, A. F. Jones, M. T. Lenihan, W. Glover, D. Garcia, M. G. Pecina, T. B. Killing, C. T. Jones, W. Brown, M. Perez and/or all other employes adversely affected shall now each be paid for eight (8) hours at the rate of time and one-half for each Saturday, beginning September 2, 1950, and until violation is corrected.

EMPLOYES' STATEMENT OF FACTS: Prior to September 1, 1949, regularly assigned clerical and related employes covered by the Clerks' Agreement on the A. T. & S. F. Railway were guaranteed and assigned six days of eight hours, or 48 hours per week. The unloading, loading, checking, trucking and handling of all less-than-carload freight at the Kansas City Warehouse was, prior to that date, handled by this regularly assigned force and such bona fide off-in-force-reduction employes as were available and needed to accomplish the work. Effective September 1, 1949, all non-operating employes, including the clerical and related employes at the Kansas City Warehouse, on the A. T. & S. F. Railway and a majority, if not all, of the other Class 1 railroads in the United States were placed on a five (5) day, 40-hour, week by virtue of a National Agreement reached between the representatives of the Carriers and the representatives of the involved employes on March 19, 1949.

In the initial changeover from a six (6) day, 48 hour week, to a five (5) day, 40 hour week, it was necessary to work a considerable number of regularly assigned employes in the Kansas City Warehouse on their sixth day, which was one of their rest days, at overtime rate of pay. Gradually Carrier began to engage the services of certain individuals who were employed full time in other industries and who had already worked 40 hours for their bona

such work could be postponed over Sunday. But significant increases in volume might make the handling of this on Sunday imperative, and the provision of the Rule, reading: 'Changes in amount or nature of traffic or business and seasonal fluctuations must be taken into account,' would be applicable."

While Award No. 5247 covers 7-day operation and the instant dispute covers 6-day operation, the necessity for which is obvious, and which cannot be protected under the provisions of Article VI, Section 10-c, the Carrier is of the opinion that the pronouncements of the Board in Award No. 5247, which are quoted in the preceding paragraph, as applying to Sunday work, are all the more applicable to Saturday work and that the least implication to be had from these pronouncements are that an obligation rests upon the Employes to meet with the Carrier in an honest and sincere effort to resolve their differences.

Third Division Award No. 5843 definitely establishes the principle that a furloughed employe does not forfeit seniority rights by reason of securing regular outside employment while on furlough even though he is unavailable for certain calls by the Carrier because of such outside employment. This sustains the practice followed by this Carrier at Kansas City.

The Employes allege that Article I, Section 1, Article II, Sections 1 and 2, Article III, Section 1-a, 2, 3 and 4, Article VII, Sections 1, 1-a (since here is no Section 1, the Carrier assumes that the reference was intended to read Section 1-a) and 2, and Article XIII, Section 15, of the Clerks' Agreement are in violation. These allegations are apparently premised upon (1) an attempt to have the Board ignore the provisions of Article VI, Section 5, of the Agreement and (2) an improper assumption that the Carrier is making use of individuals at Kansas City on Saturdays who are not bona fide employes. The Carrier has detailed at length in this submission the falsity of the employes' position and having done so categorically denies that any one or all of these rules are in violation.

In conclusion, the Carrier respectfully asserts that the claim of the Employes in the instant dispute is entirely without support under Agreement rules and should, for the reasons expressed herein, be either dismissed or denied in its entirety.

All that is contained herein is either known or available to the Employes or their representatives.

(Exhibits not reproduced).

OPINION OF BOARD: At the Carrier's Kansas City Warehouse, all regular employes are assigned to work Monday through Friday, with Saturday and Sunday as rest days. There is a fluctuating amount of work necessary to be done on Saturdays and the parties agree that this Saturday work is "performed on a day which is not a part of any assignment." Article VII, Section 1-e of the Agreement between the parties provides that such work "may be performed by the senior qualified available off-in-force-reduction employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

The term, "off-in-force-reduction-employe," is an unusual one. It appears to refer to employes who were laid off or furloughed retaining their seniority. But Article III, Section 2, provides that "Seniority begins at the time an employe's pay starts in the class to which assigned," and there are unassigned or extra employes who have seniority, though they may not have been furloughed or laid off in force reductions. Article III also provides for seniority rosters to be maintained by classes of employes, and the Class 3 roster contains the names not only of employes laid off in force reduction but also other unassigned or extra employes who were hired as such. This is evident from Employes' Exhibits A, B and C which are titled "Unassigned Class 3 Men", and lists names by seniority dates without dis-

tinguishing between off-in-force-reduction employes and other unassigned or extra employes.

Section 5 of Article VI stipulates that a regular force of full time Class 3 employes shall be established "where and to the extent that their services can be utilized for substantially a full-time-period." And further, that the part of the work "which can not be handled by this regular force without periods of idleness, . . . shall be handled by unassigned Class 3 employes if available when needed, and in seniority order excepting that, on the sixth and seventh day of the work week, preference shall be given those employes, if any, who have not worked on as many as five days in that work week." (Note that in this rule "unassigned" employes are referred to, not "off-in-force-reduction" employes.)

The claim here is in behalf of 25 named employes "and/or all other employes adversely affected." Claimants are not otherwise identified but the Carrier submitted a tabulation showing that all the named claimants were regularly assigned employes at the time the claim was filed—10 of them to Class 1 positions, the other 15 to Class 3 positions. The reason for the claim is stated to be that the "Carrier violates the rules of the Clerks' Agreement . . . . on Saturdays when it assigns or permits work to be performed by persons other than bona fide employes under the Agreement." For each of the named and unnamed employes, pay is claimed "for eight (8) hours at the rate of time and one-half for each Saturday, beginning September 2, 1950, and until violation is corrected."

In behalf of the Claimants, it is alleged that they are entitled to punitive overtime pay for Saturday, September 2, 1950, and subsequent Saturdays because "non-employes" were used on those Saturdays. But just why the named 25 regularly assigned Claimants were entitled to the undersigned work on Saturdays, rather than other employes either unassigned or assigned, is not explained in the record. Assuming, as the Employes charge, that many of the names on the list of "Unassigned Class 3 Men" were not bona fide employes, this would not prove that the particular Claimants here were deprived of work on the days when the alleged non-employes were working. There were many other unassigned employes whose status as such was not challenged (as well as assigned employes) whose seniority might have entitled them to work on the days in question rather than those named as Claimants.

We think positive evidence is necessary to support the claim of each individual that he was deprived of the work for which penalty pay is claimed. Instead of supplying such evidence, the Employes argue negatively that "school boys" were hired who were not bona fide employes; and further

> "that unless and until the above provisions of the 40-hour Week Agreement are complied with in so far as the regular assignment the full six day operation . . . is concerned, the Carrier is directly breeching the provisions of the Clerks' Agreement by their use of the unassigned Class 3 employes on Saturdays to the exclusion of all regular assigned employes. . . ."

Thus, we have an additional charge of continued breach of the Agreement, but this allegation no more than the contention about school boys being used on Saturdays constitutes proof that the 25 regular assigned Claimants, and not other employes, are entitled to the work and pay as claimed. Moreover upon examination of the two grounds on which violation of the Agreement is alleged, we find no merit in either of them, except in one respect, namely the first hiring of the so-called "school boys".

There is nothing in the rules of the Agreement here that prohibits the Carrier from hiring new employes for extra work on days not part of an assignment whether they go to school or have jobs in other industries between meeting calls when the extra work is available. But they must have seniority under the Agreement when they are put to work. In Award 6259

this Division held that the language, "an available extra or unassigned employe . . . . has reference to those persons who were employes of the Carrier when need for having the work performed arose." The Award then goes on to explain:

> "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. (Emphasis added). In this respect it is true that the Seniority rule . . . provides: 'Seniority begins at the time employe's pay starts. . . .' But this provision does not help the 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. (Emphasis added). 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) (the Work on Unassigned Days Rule), he must have been an employe of the Carrier prior to the need for such work arose. . . ."

In other words, an employe must have seniority at the time he is assigned; he cannot qualify as having seniority when he does not begin to get it until after he starts working on the job. But once such an employe has thus established seniority, the Division has ruled in many cases that he can be used as an extra or unassigned employe regardless of whether he is a school boy or has a job in another industry (e.g. Awards 6261, 6174, 6089). The only condition is that he must show by responding to calls that he intends to continue as an employe.

In the instant case, the Employes contend that the "School Boys" work only on Saturdays and school holidays. This, however, does not show that they are "non-employed". On the contrary, the fact that they work on school holidays indicates that they want to do extra work on other days as well as Saturdays. Since regularly assigned employes handle most of the work on other days, they will naturally be used mostly on the Saturday extra work, and on holidays. True, they may not want full time work. But the Carrier does not have full time work for them. It needs them only for the extra, unassigned work, and there is relatively little of this on the regularly assigned days, Monday through Friday.

The Employes protested "the granting of such (school boy) persons seniority and insist that the names of those who have been available on Saturday only be removed from the . . . roster." They identified 133 "outsiders designated as 'school boys'," and claim that all these are non-employes. This claim must be rejected because most of them have earned seniority rights under the Agreement by working successive Saturdays. If in the future, the Carrier assigns any employe to the extra work before he has established seniority, any other unassigned or assigned employe holding seniority who has a right to that work would have a valid claim for compensation. But in the instant case the claim is that 133 employes are outsiders or non-employes whether they have seniority or not, and it is allowed that Claimants are entitled punitive overtime pay for this reason. No differentiation is made between those "school boys" who had a right to the work on unassigned days by reason of their seniority, and those who may have been newly hired on a particular Saturday.

For this reason and the other reasons stated above, the claim is invalid, and must be denied.

As for the Employes' contention that the Carrier will continue to breach the contract until "regular assignments for full six-day operations" are established, this merely shows that the claim submitted here was the wrong way of dealing an operational problem. The Carrier tried to meet the problem of the fluctuating work on Saturdays by assigning regular em-

ployes to work Monday through Friday, and handling the Saturday work by unassigned employes. It experimented with staggering assignments over six days and found this not practical. The Employes objected to staggering over seven days. Their objection to leaving Saturday work unassigned is in effect a charge that the Carrier does not have "all possible regular relief assignments" as provided in Section 10-e of Article VI. But they do not explain how such relief assignments could be established or how staggering assignments over six days would meet the problem with the warehouse closed on Sunday.

Under these circumstances, the Carrier was free to use its judgment as to the manner of meeting the problem. But it went farther than this. When the instant claim was filed, its Chief Personnel Officer wrote to the General Chairman that he was sorry "we were not able to get together on a settlement . . . (he) would have conceded that these particular employes (school boys) **had no seniority as of their first day of service.**" (Emphasis added). If no agreement were reached on this basis, then the Employes could have filed a proper claim on the real issue involved, namely: whether all possible regular and relief assignments had been made in view of the operational problem the Carrier faced.

Under ordinary circumstances in a case like this, it might be appropriate to remand the dispute to the parties for negotiations to work out the operational problem. Here, however, the claim as submitted is so inappropriate and invalid that it must be denied. But the Carrier's suggestion that the parties work out the operational problem on the basis that employes have no seniority on their first day of service was sound in view of the rulings of this Division, and should be accepted by the Employes.

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 Agreement was not violated as charged.

AWARD

Claim denied as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 24th day of March, 1954.

SPECIAL CONCURRENCE
AWARD NO. 6522, DOCKET NO. CL-6570

We concur in the denial of the claim in this case because it should be denied for a number of reasons, but we do not agree with many of the statements made by the Referee nor with the theories expressed thereby.

First of all, we object to the large amount of dictum that appears in the Opinion, including advice to the parties as to what would constitute a violation of the agreement in a hypothetical case not before the Board. It is the function of this Board to decide disputes presented to it and not to indicate how a successful claim could be framed.

We also regard it as improper and completely outside the powers of this Board to indicate that since the Employes have failed to produce any evidence to support their contentions, it would be proper to remand the case for "negotiations." The Opinion states:

> "Under ordinary circumstances in a case like this, it might be appropriate to remand the dispute to the parties for negotiations to work out the operational problem. Here, however, the claim as submitted is so inappropriate and invalid that it must be denied."

In othed words, since the Claimants failed to support their claim, it should be remanded for "negotiations," except that here the claim reached such a **high degree** of invalidity that there is no course available except to deny it! In effect, the Referee is apologizing for having to make a **denial** Award.

If a claim is not supported by the facts or the agreement, it should be denied; this Board has no authority to require negotiations between the parties and has no concern with any course taken by the parties after the claim is disposed of by the Board. The Referee has apparently confused the functions of the National Mediation Board with those of the National Railroad Adjustment Board. Such paternalism on the part of a Referee only serves to create disputes between the parties and not to dispose of them.

The Opinion states that extra employes may be used to perform work on a day "which is not a part of any assignment" and then states that they may only do so if they have seniority. It is then stated that they must work one day before they can be used properly on work which is not a part of any assignment. The net effect is to hold that such extra employes do not earn seniority until they have worked one day; according to the Referee, they have seniority at the beginning of the second day. **But Article III, Section 2 of the agreement provides that an employe's seniority begins at the time his pay starts.** By what authority does the Referee amend this rule so as to provide that an employe's seniority (for the purpose of performing work on a day which is not a part of any assignment) **does not** begin when his pay starts but only begins on the **second day** after his pay starts?

Furthermore, there is no provision of this agreement which requires that an extra employe possess any different kind of seniority in order to perform work "on a day which is not a part of any assignment" than is necessary in order to perform work at any other time. However, by stating that an extra employe must have one day of service before doing work on a day which is not a part of any assignment while apparently admitting that he can perform extra work on other types of days without the one day of service, the Referee apparently sets up a special requirement for work by extra men on days which are not a part of an assignment—a requirement not provided for by the agreement. While the discussion of such matters was not necessary to the decision in this case, the fact that it is included in the Opinion makes it necessary for the undersigned to point out the fallacy thereof.

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ J. E. Kemp