Award No. 6853

Docket No. CL-6664

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter—Referee

PARTIES TO DISPUTE:

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

BOSTON & ALBANY RAILROAD (N.Y.C.R.R. Co., Lessee)

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

(1) Carrier violated the rules of the current Clerks' Agreement when on April 4, 1952, it used a furloughed Yard Brakeman, Mr. J. D. Keefe, to cover the unassigned relief work of the third trick Yard Clerk's position at Worcester Yard Office, Worcester, Mass. on the assigned days of rest, Friday and Saturday, of the regular employe, this furloughed Yard Brakeman, Mr. J. D. Keefe, not having previously established seniority rights on the involved roster, and further violated the rules of the current Clerks' Agreement when it continued to use Mr. Keefe to cover this unassigned relief work and other vacancies of the regularly assigned employes, and that

(2) Effective April 4, 1952, and continuing in effect until such time as this grievance is properly adjudicated, all regular employes affected be compensated for all losses sustained due to the above mentioned violation of the Clerks' Agreement.

Note: Claims were filed by employes J. Oriani and E. J. Morse on various dates and it will be necessary to have a joint check to determine to whom claims should be paid and number of days involved.

EMPLOYES' STATEMENT OF FACTS: On or around the first of March, 1952, Yard Clerk E. J. Morse worked Wednesday and Thursday of each week as a Yard Clerk, and on Friday, Saturday and Sunday of each week as a Relief Yardmaster. During the early part of March, 1952, the Relief Yardmaster's work was combined with other Relief Yardmaster's work at another point due to establishing a full-time Relief Yardmaster's position and it was necessary to re-arrange the Yard Clerk force at Worcester, Mass. The re-arranged force was as follows:

service may be performed by extra or furloughed employes who will otherwise not have work on 5 days of that work week, and in all other cases by the regular employes in the following order of preference:

1. The regular employe, if the work is part of the service or operation associated with his regular position.

2. The senior available and qualified regular employe, if the work is not so associated.

The Employes' position in this dispute would seem to infer that it is not permissible for the Carrier to use anyone but a regular assigned employe to fill such assignments and thus force the Carrier to award premium pay to such regular employes. If it is not permissible for the Carrier to use extra or furloughed employes for these assignments, it would seem that the application of Rule 15, (c) would be of little benefit to employes who have been placed on the extra or furloughed list as the result of the application of this rule, which reads

RULE 15—PROMOTION TO SUPERVISORY, OFFICIAL POSITIONS, ETC.

"(c) Employes assigned in accordance with Paragraph (a) of this rule who are disqualified (other than physical disqualification) therefor, or who voluntarily relinquish such positions, returning to service covered by scope of this agreement, will take their place on the extra or furloughed list on the seniority district from which assigned."

The Carrier maintains that Mr. Keefe having established seniority date of April 4, 1952 under the application of Rule 3 and having the status of a qualified extra man, was eligible to perform the spare yard clerk's duties and that it was perfectly proper for the Carrier to use him as it did. Nowhere can any rule be found which specifies that only regular employes must be used for these assignments and therefore the Carrier has violated no rules of the Clerks' Agreement. Obviously, the position of the employes has no merit and should be declined.

CONCLUSION

It is the Carrier's opinion and belief that:

1. None of the specific rules cited have been violated as alleged;

2. The procedure followed in the present instance in the hiring of Mr. J. D. Keefe to perform extra work at Worcester was in accordance with past practice accepted in such cases over a period of many years;

3. The organization has not taken exception to this practice and procedure hitherto.

Therefore, the Carrier believes that the claims should be denied.

The position of the Carrier has been made fully known to the organization. If there should be found in the Brotherhood's ex parte submission any new evidence or arguments, Carrier reserves the right to supplement its presentation.

(Exhibits not reproduced.)

OPINION OF BOARD: In March 1952, the clerical work at Worcester Yard Office, Worcester, Mass., was rearranged in such a way that there were seven relief days to be worked. One five day relief position was assigned, leaving two unassigned relief days remaining. There were no extra or fur-

loughed employes available and regular employes were doubled over for a time. On April 4, 1952, one J. D. Keefe, a furloughed Yard Brakeman, who held no seniority as a Clerk, was used to cover the unassigned relief work. He continued to perform this unassigned relief work, and other unassigned work as well, until June 7, 1952, when he was displaced by one Giannini, a furloughed Clerk, who had been on leave of absence. The Organization contends that the use of Keefe was a violation of applicable rules and that the work belonged to regular employes in the absence of extra or furloughed employes who will otherwise not have work on 5 days of that work week, as provided by Rule 17 (f), current schedule agreement.

The controlling rule is

"(f) Unassigned Relief Work:

Relief work not a part of any regular relief assignment and other unassigned work required by the carrier may be performed by extra or furloughed employes who will otherwise not have work on 5 days of that work week; in all other cases by the regular employes in the following order of preference:

(1) The regular employe, if the work is part of the service or operation associated with his regular position.

(2) The senior available and qualified regular employe, if the work is not so associated."

(Rule 17 (f) current agreement.)

The record shows that Keefe was hired on April 4, 1952. On April 4 and 5, he performed unassigned relief work on the two tag end relief days. He worked on April 6, 7 and 9 which were not unassigned relief days. It appears that Keefe worked 45 days from April 4, 1952 to June 7, 1952, which work consisted of extra work, filling temporary vacancies, and two unassigned relief days each week. He averaged about 5 days per week. It is evident that there was extra clerks' work to be performed at this station in addition to the tag end unassigned relief work. The Organization contends that Keefe was improperly used to do the above described work under Rule 17 (f), current schedule agreement. The Carrier asserts that Keefe was properly used, he having attained seniority by virtue of Rule 3 (a), current schedule agreement, which provides:

"(a) Seniority begins at the time the employe enters service with pay in the department employed."

The Carrier also asserts a past practice on this property which authorizes the employment of Keefe as a spare or extra employe in the manner in which he was employed in the present case.

Rule 17 (f) came into existence as a part of the 40 hour work week agreement which became effective as of September 1, 1949. By that agreement the employes gained a substantial pay increase and a reduced hourly work week. Among other things, the Carrier obtained the right to stagger the work of six and seven day positions and thereby to marshall its forces by having a greater force when there was much work to be done and a smaller force when there was less work to do. The agreement provided for the assignment of regular work weeks of five 8-hour days and all possible regular relief assignments with five days of work and two consecutive rest days (subject to stated exceptions) in six and seven day service. After the assignment of all regular relief assignments possible, any relief days remaining were to be filled in accordance with the rule covering unassigned relief work, Rule 17 (f) of the controlling agreement in the present case.

Rule 17 (f) specifically provides that regular relief work, which is no part of an assignment, may be performed by extra or furloughed employes

who will otherwise not have work on five days of that work week; and in all other cases by regularly assigned employes. It was clearly the intention of the parties to preserve tag end relief work resulting from the change to the 40 hour work week to those covered by the agreement who formerly performed the work, to-wit, those holding seniority in the craft and class at the time the necessity for performing the tag end relief work arose. If this were not so, employes could be hired off the street or elsewhere to do the work to the detriment of employes having existing rights to do the work. The purpose of the rule was to eliminate persons from performing this work who were not extra or furloughed employes at the time unassigned relief work became available. If this were not the case, the Carrier could employ any person to perform the work whether or not he ever intended to attain seniority in the craft to which the work belongs.

The Carrier contends that it has the same right under the current agreement to hire new employes that it had before the 40 Hour Work Week Agreement was made. Decision No. 2 of the Forty-Hour Week Committee, bearing date of September 23, 1949, appears to support this statement. It is therein said:

> "Section 3 (i) did not create the right to utilize extra or unassigned employes unless a carrier has that right under existing agreements or practices."

While the foregoing statement indicates that the 40-Hour Work Week Agreement was not intended to interfere with the right to hire extra or unassigned employes as that right existed before the 40-Hour Work Week, it sheds little or no light upon the meaning of the language used in Rule 17 (f) and whether the latter section was intended to restrict the use of extra employes who had not attained an employe status before undertaking to perform unassigned relief work.

In a letter signed by the Members of the Emergency Board appointed to investigate disputes concerning requests for a 40-Hour Work Week, bearing date of February 27, 1949, it was said:

> "* * * 'Consistent with their operational requirements' qualifies the entire 40 hour program recommended. That program has a combination of elements: five 8-hour days, 40 hours per week, two consecutive days off each week, Saturdays and Sundays as the rest days, staggered work weeks and relief assignments.
>
> "When an operational problem is met it does not automatically follow that the solution is to make the days off non-consecutive. Other possible solutions may be found **by hiring additional relief or extra men who may be used to relieve on combinations of 6 day and 7 day positions.** * * * Other suitable or practical plans may suggest themselves to one of the parties and meet with the approval of the other. The least desirable solution, to be used only as a last resort, in keeping with the main purpose of the Board (Emergency Board), would be to work some regular employes on the 6th or 7th days at overtime rates **and thus withhold work from additional relief men.** * * *" (Emphasis supplied.)

While the foregoing quotation goes only to the over-all purposes the Emergency Board had in mind and not to the meaning of the particular language presently before this Board, it furnishes some evidence that the hiring of new employes to perform tag end relief work was in harmony with one of the announced purposes of the 40 Hour Work Week plan, to spread and maintain employment.

The meaning of Art. II, 3 (i) of the Agreement of March 19, 1949, the comparable section in the present agreement before us being Rule 17 (f),

has been before the Board many times with varying results. We have held that one performing tag end relief work must be an available extra or unassigned employe prior to the time the need for the assignment arose. Award 5558, Case 1, and Interpretation No. 1 thereto; 6262.

In the present case, however, it is not disputed that regular assignments were properly made. It is conceded also that all regular relief assignments were made that could reasonably be made. If we view the situation in retrospect, a combination assignment of two relief days and three days doing extra work could have been established. But a carrier is not required to foretell possible contingencies in creating regular relief assignments. There were two unassigned relief days remaining. The Carrier used a furloughed brakeman who held no seniority as a clerk to do the work. Did the Carrier violate the Agreement?

It must be borne in mind that April 4 and 5 were rest days of a regular 7 day position. There was more than one 7 day position at Worcester so that the work weeks could be staggered in accordance with the Carrier's operational requirements. In other words, the rest days here involved were not required to be worked unless such a course was dictated by operational needs. But if such relief days were required to be worked, members of the Clerks' Organization were required to be used. They must be of the same craft and class as the regular occupants of the positions. The Carrier asserts that under the present agreement, "seniority begins at the time the employe enters service with pay in the department employed" and that a new employe may be employed and assigned to tag end relief work because he attains seniority as a clerk when his pay starts. We concur in the view that the 40-Hour Work Week Agreement of March 19, 1949, did not undertake to change or in anywise interfere with existing rules and practices for the augmentation of Carrier's forces. Rule 17 (f) does not purport to do so. It came into existence as a part of the Forty-Hour Week Agreement and designates the employes who shall perform work on unassigned rest days. It was provided by the Agreement of March 19, 1949, that where work is required to be performed on a day which is not a part of any assignment, it may be performed (1) by an available extra or unassigned employe who will otherwise not have 40 hours of work that week, and (2) in all other cases by the regular employe. This clearly provides for a distribution of work to then existing employes. If the contentions of the Carrier be correct that a person off the street could be used because he attained a seniority date when his pay started, there would have been no reason for Rule 17 (f), a conclusion we cannot assume. We must presume that 17 (f) was put in the agreement for a reason and not as declaratory of rules already accomplishing the same purpose. We necessarily conclude that compliance with Rule 3 (a), stating the time when seniority begins, was a condition precedent to the use of a new man for the performance of unassigned relief work. The Carrier construes Article II, Section 3 (i) of the March 19, 1949, 40-Hour Week Agreement to mean that any person attaining seniority as an extra or unassigned employe may perform work on tag end relief days before the regular occupant may do so. We do not so construe it. As we view it, it means that unassigned relief days of 6 or 7 day positions may be performed (1) by an extra or unassigned employe then having seniority and (2) by the regular employe. We use the term seniority as including an employe status with potential seniority. The very purpose of the rule was to restrict, in this particular instance, the use of a person without antecedent seniority or employe status and to eliminate such employe from the performance of the work to the detriment of the regular occupant of the 6 or 7 day position whose rest days were being filled. Unless this be a proper construction, Section 3 (i) is a useless appendage to the 40-Hour Week Agreement. It will be noted that Rule 17 (f) under consideration in Award 5558 is identical with Section 3 (i) in the March 19, 1949 Agreement. They have the same meaning in both Agreements and consequently the conclusion reached in Award 5558, Case 1, is in conformity with what we have heretofore said. See also Award 5240, wherein it is stated: "The rules of the Agreement must be construed

together, and when the parties said in Rule 37 (f) 'available extra or unassigned,' they intended 'available' to include the concept of proper seniority standing. Otherwise, there would have been no necessity for the provisions in 28.5 (e) reading: '* * * to perform relief work on certain days and such types of other work on other days as may be assigned under individual agreements.' " We conclude, therefore, that under Section 3 (i) of the March 19, 1949 Agreement, the Carrier violated the Agreement in using a person (Keefe) having no established seniority or employe status to the detriment of the regular occupant of the position. On April 6, however, Keefe performed work other than rest day work and it is asserted he then established seniority under the provisions of the March 19, 1949 Agreement that would permit his use on subsequent tag end rest days where no senior employe was available.

But in the present case, the parties did not adopt Rule 3 (i) of the March 19, 1949 Agreement and integrate it into the existing schedule Agreement. They rewrote the rule and provided that "relief work not a part of any relief assignment and **other unassigned work** required by the carrier" may be performed by extra or furloughed employes who will otherwise not have work on five days of that work week, otherwise such work is to be performed by regular employes in a designated order of preference. We do not question the right of a furloughed employe with seniority in the same craft and class to perform any of the work referred to in Rule 17 (f). Nor do we question the right of an extra or spare clerk with antecedent seniority or employe status to do the work. And if the parties had not included "other unassigned work" in Rule 17 (f), we would agree that other unassigned work could be performed by a new employe whose seniority began when his pay commenced. The contention of the Carrier Member that Keefe became qualified on April 6, 1952, the first day he performed other unassigned work other than tag end relief work, is not meritorious. Such contention would have been a valid one under Article II, Sec. 3 (i) of the March 19, 1949 40-Hour Work Week Agreement. But the parties saw fit to enlarge its terms when the corresponding provision was written into the current agreement with this Carrier. It points up the dangers involved in departing from the carefully prepared 40-Hour Work Week Agreement of March 19, 1949, and the interpretations thereto by the Forty-Hour Week Committee. But the language having been included, we must give it meaning. We conclude, therefore, that Keefe was not eligible throughout the period of the claim to perform the tag end relief work or the other unassigned work here in question.

The claim for time and one-half for the work lost cannot be sustained. The penalty for work lost under many recent awards of this Division is the pro rata rate of the positions; except holidays lost will be paid at time and one-half 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 Agreement was violated.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 28th day of January, 1955.