

Award No. 6854

Docket No. CL-6646

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

UNION PACIFIC RAILROAD COMPANY

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

(a) The Carrier violated the Clerks' Agreement on March 19, 1951, and continued to violate it until April 13, 1952, by using a person who holds no seniority rights under the Clerks' Agreement to perform work on assigned rest days of a regular trucker at Arlington, Oregon.

(ab) Claim that Charles Norris be compensated at punitive rate of pay for March 19, 1951 and all his assigned rest days subsequent to March 19, 1951 on which Arthur Bailey, a person without clerk's seniority rights was used to relieve Charles Norris.

EMPLOYEES' STATEMENT OF FACTS: Charles Norris, with seniority date of May 3, 1936 on Roster 85-2 was regular assigned trucker at Arlington, Oregon with hours of assignment 11:00 P. M. to 7:30 A. M. with 30 minutes meal period, and his assigned day of rest Mondays and Tuesdays.

It was necessary for truckers work to be performed at Arlington, Oregon seven days per week, and there being no regular relief employee assigned to relieve Norris on his days of rest, and no extra or unassigned employee available to relieve him, he was, prior to March 19, 1951 worked on his assigned rest days and compensated at punitive rate of pay.

On Monday, March 19, 1951 the Agent at Arlington, Oregon used Arthur Bailey to relieve Charles Norris, regular assigned Trucker, and continued to use him on each of Norris' assigned rest days to April 13, 1952, when a regular relief employee was assigned. Bailey did not hold seniority rights nor could he possibly establish seniority under the present Rule of the Agreement, and under the conditions of his present employment. He is now and has been for past twenty years or more, regularly employed by the Oregon State Highway Dept. as a laborer and equipment operator.

Under date of April 26, 1951 claim was filed with Division Supt. by Division Chairman, copy of Division Chairman's letter attached as Exhibit

have established another seniority date as a trucker at Arlington had there been a vacancy on a regular assignment to which he was assigned by reason of no employe with a seniority date or earlier employe status taking it.

The Carrier could not give Bailey steady employment and could not insist that he confine his employment to the two days per week that he regularly worked relieving Norris. Bailey did indicate clearly, when he relieved Norris for his vacation in July, 1951, as well as on many other occasions, that he was available to perform other work in addition to the two days each week that he regularly worked relieving Norris on his assigned rest days.

Bailey was an unassigned employe and properly used to relieve Norris on his two assigned rest days each week.

This claim should be denied.

All data used in this Submission Responding to Notice of Ex Parte Submission is of record in correspondence and/or has been discussed in conference with the Organization's representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was a regularly assigned trucker at Arlington, Oregon, with assigned hours of 11:00 P. M. to 7:30 A. M. with a 30 minute meal period, with Monday and Tuesday as rest days. The position was a 7 day one and until March 19, 1951, there being no extra or unassigned employe available to relieve him on his rest days, the claimant worked his rest days at the time and one-half rate. On March 19, 1951, Carrier used one Arthur Bailey to relieve Norris on his assigned rest days and continued to use him until April 13, 1952, when a regular relief employe was assigned. Bailey held no seniority prior to his use to relieve Norris. He was, during the times herein mentioned, regularly employed as a laborer and machine operator for the Oregon State Highway Department. It is the contention of the Organization that the relief work belonged to Norris under Rule 41 (1), current agreement. The Carrier asserts that Bailey had an employe status which made him eligible to perform the work. The record discloses that Bailey was a former employe of this Carrier whose seniority as such was forfeited under agreement rules on February 14, 1951. He had no seniority or antecedent employe status when he was used to fill the two unassigned relief days beginning March 19, 1951.

The controlling rule is:

"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." Rule 41 (1), current agreement.

The foregoing rule applies to days which are not a part of any assignment. Normally, it would apply only to unassigned relief days on 6 or 7 day positions. The right of a carrier to hire new employes is not questioned. But unless there is an available extra or unassigned employe with an antecedent seniority or bona fide employe status, the work belongs to the regular occupant of the position. Awards 5558, Interpretation 1 thereto, 6259, 6260, 6262 and 6853. We think the same rule applies to one having an employe status and a consequent potential seniority right where such status is bona fide and not created for the sole purpose of circumventing the agreement rights of other employes.

We do not agree with the Organization that an employe may not acquire seniority if he has outside employment. Certainly an extra or spare employe who has only intermittent work with the Carrier does not lose his seniority

rights because he must seek outside work to augment his income until he can bid in a regular assignment. The contention that Bailey was improperly hired because he was regularly employed by the Oregon State Highway Department is without merit.

The question before us is: Was Bailey entitled to perform the work on the unassigned tag end relief days on March 19, 1951, the day he was first assigned. We think not. He had no existing seniority or employment status at the time the work was assigned to him. There being no extra or unassigned employe available to perform the work, it belonged to the occupant of the regular position.

The record shows, however, that Bailey worked as an Extra Clerk and an Extra Trucker in June, 1951. As soon as he performed extra work other than the unassigned tag end relief day work, Bailey attained an employe status which would permit him to subsequently perform tag end relief day work in conformity with Rule 41 (1). We hold therefore that the claim is valid from March 19, 1951 until such time as Bailey acquired an employe status by doing extra or unassigned work other than the unassigned relief days of the position held by the Claimant, Norris.

Claimant cannot be allowed the punitive rate as a penalty. Many recent awards of this Division hold that the penalty for work lost is the pro rata rate; except as to holidays lost which shall be at the 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 Employees involved in this dispute are respectively Carrier and Employees 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 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 28th day of January, 1955.