

Award No. 6974

Docket No. CLX-6768

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**

RAILWAY EXPRESS AGENCY, INC.

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

(a) The Agreement governing hours of service and working conditions between Railway Express Agency and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, effective September 1, 1949, was violated at the Bismarck, Missouri Agency, when H. O. Horton was given a run-around on call to perform work on the rest days of the position to which he was regularly assigned; and

(b) He shall now be compensated for 8 hours' pay at one and one-half times the basic straight time rate for each calendar Saturday and Sunday retroactive to and including October 20, 1951.

EMPLOYEES' STATEMENT OF FACTS: H. O. Horton, with a seniority date of October 12, 1946, is the regular occupant of Position 1, Group 1, titled "Transfer Clerk-Express Handler", hours of assignment 9:00 P. M. to 6:00 A. M., meal period 1:00 to 2:00 A. M., work week assignment Monday to Friday inclusive, days of rest Saturday and Sunday, salary \$254.97 basic per month.

Effective October 20, 1951, Carrier brought into service and used for the first time, one Kenneth L. Brown, 14 years of age, to perform work on the rest days (Saturday and Sunday) of Position 1, Group 1, occupied by Employee Horton. Brown worked each succeeding Saturday and Sunday subsequent thereto up to and including February 10, 1952, when he was removed from service because of his failure to meet the age requirements. (Exhibit "B").

Effective Saturday, February 16, 1952, Carrier brought into service and used for the first time, one W. F. Rube, a Locomotive Fireman employed by the Missouri Pacific Railroad, to perform work on the rest days (Saturday and Sunday) of position occupied by Employee Horton. Rube worked the Saturdays and Sundays on February 16, 17, 23 and 24, 1952 on Position 1, Group 1.

the rules of the Agreement particularly Rules 3, 20, 19 and 45-A (j) providing for the employment of extra status employees; the posting of the seniority date of such employees on the extra status roster; their rights to perform extra or unassigned work subject to the prior rights of furloughed employees, and to perform work on a day which is not a part of any assignment in instances where the available unassigned employee otherwise has not had forty hours of work in the week.

The essence of the claim in the instant case is that extra status employees Brown and Nall were not bona fide employees since Brown was a student and Nall had previous to his employment by the Carrier on occasion worked in a Coffee Shop for his meals. In this connection, it is interesting to note the Opinion of the Board in Award 6261, in which objection was raised to the employment of a bartender who had regular employment as such to perform service on the rest days of positions in seven-day operation. The Board said:

"Francis presents a more difficult problem. It appears he was and still is a bartender in a tavern in Stevens Point. It would appear that he has faithfully filled all the duties of a relief position and there is nothing to show he has ever failed to respond when called upon. The only thing is his regular outside employment, but we do not think this necessarily precludes him from becoming a bona fide employee. We find, when Carrier hired Francis and assigned him to the relief position, he actually had the intent, desire and expectation of becoming a bona fide employee of the Carrier and that, in fact, he became such."

In the instance cited in Award 6261, the employee after employment by the Carrier continued his employment as a bartender. In the case before us there is no evidence that Nall was regularly employed in the Coffee Shop before entering Carrier's service nor that since his employment with the Carrier he even worked in the Coffee Shop for an occasional meal.

In the case of Brown, he was a student when employed in February 1952, but as held in Award 6089 that did not act as an impediment to perform service as an extra or unassigned employee who otherwise did not have forty hours of work in the week.

There is no showing in the instant case that going back to 1946 in the case of Olin H. Horton, and subsequently in the cases of Brown and Nall, that they did not approach their employment with the intent, desire and expectation of becoming bona fide employees, or that they failed to respond when called for such extra work as was available. The claim is wholly unsupported under the facts and applicable rules of the Agreement and should be denied.

All evidence and data have been considered by the parties in correspondence and in conference.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant is the regular occupant of the position of Transfer Clerk-Express Handler at Bismarck, Missouri, assigned Monday through Friday with Saturday and Sunday as rest days. The position is required to be worked seven days each week. Commencing October 20, 1951, the Carrier used consecutively three persons (Brown, Rube, Nall) on the rest days of Claimant's position. The record is clear that none of the three persons used held rights under the Clerks' Agreement during the time about which complaint is here made.

The Organization relies on Rule 45 (a) (j), current Agreement, which provides:

"Where work is required by the management 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."

This rule has been construed to mean that a person used on rest day work must have antecedent employe status. Awards 5558 and Interpretation No. 1 thereto, 6522, 6853, 6854, 6855. The Carrier violated the Agreement in using Brown, Rube and Nall. The regular occupant of the position (Claimant) was therefore deprived of this rest day work. His claim is valid at the pro rata rate, it being the penalty rate for time lost. The claim is also subject to the limitations contained in Rule 32 and the note added thereto.

Carrier relies primarily on Award 6559 and others similar in their effect. This award is clearly distinguishable. It was said in that award: "Had Baltutat been hired for the Saturday work only, as was erroneously alleged, there might be some question as to whether she had status as an employe on the first Saturday, April 5." If the persons here used had acquired the status of an extra employe by being used as such to relieve the regularly assigned employe prior to their use on rest day work, we would concur with Carrier's views. But the three persons here used had no employe status antecedent to their use in rest day work.

The Carrier does state that Nall had been previously used as Transfer Clerk at Bismarck from February, 1947 to July, 1948. It does not show that he retained any employment rights as a result of such service at the time he was used in the rest day work here complained of. We must assume that his employment rights growing out of his service in 1947 and 1948 had been severed.

Carrier argues, also, that the three persons used were in the same status as the previous occupant of the position before he entered the military service. We point out that this employe, Olin H. Horton, secured an employment status entitling him to perform the work under an agreement known as Addendum A. Addendum A was eliminated from the current Agreement on September 1, 1949, and consequently it has had no effect since that date. Carrier attempts to gain comfort from a statement made by the employes to the effect that "His (Olin H. Horton's) employe relations and right to perform extra, relief and substitute service at Bismarck, Missouri, will again be recognized, if and when he returns to service with Railway Express Agency at the conclusion of his military service." The right to use Olin H. Horton in rest day service at Bismarck, Missouri, is in no way put in issue by this claim. For aught we know, he may have been properly used in extra service and thereby attained an antecedent employe status qualifying him for the work here involved. We shall not undertake a discussion of the rights of Olin H. Horton as they are foreign to the issue here presented. The quoted statement of the Organization cannot affect the result of the present case.

For the reasons stated, an affirmative award is required.

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 (a) sustained. Claim (b) sustained at the pro rata rate, except as to Holidays which shall be at the time and one-half rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of April, 1955.

DISSENT TO AWARD NO. 6974, DOCKET CLX-6768

"Antecedent employe status" is pure referee fiction of extra-contractual genesis. We must make a serious record objection against turning the case upon this nonexistent provision.

Let us look at the rule governing this case: It provides that an available extra or unassigned employe not having 40 hours of work that week may be used to perform work on a day which is not a part of any assignment. The Referee says that this rule has been construed to mean that such an available extra or unassigned employe must have the aforesaid antecedent employe status. Of course this means, according to the Opinion, that the Carrier must have hired the employe before it hired him and because that is impossible, all such claims must be sustained or the work performed by the regular employe. This construction is absurdly absurd.

Let us look at the facts: Here we have a one-man office with seniority limited to that office. The one regular man was Herbert Horton. The one extra or unassigned employe was his brother, Olin Horton. Both were hired in 1946. Herbert established seniority. Olin has not yet established seniority, having only an employe status. His name appears on an extra list as does also the man named Nall. During the past nearly nine years the only work available for an extra or unassigned employe has been on the rest days of the regular position. This work was performed by Olin Horton as an extra or unassigned employe. Olin Horton went into the Army October 14, 1951, and the Employes' position erroneously sustained by this award is that nobody could perform the involved work but Herbert Horton, the regular man, until his brother, Olin Horton, returns from military service. In other words, the Carrier could not hire anyone to do the subject work because such an employe must have an "antecedent employe status."

Let us look at the Referee's "antecedent employe status": The Opinion falls into a trap of its own creation for it points out that Nall "had been previously used as transfer clerk at Bismarck from February, 1947 to July, 1948". Surely then, this man had an "antecedent employe status", assuming there is such a thing. But we find that there really is not such a thing for the Opinion goes on to eliminate Nall by stating that he had not "retained any employment rights as a result of such service at the time he was used in the rest day work here complained of". This definite statement of the Referee is supported by his own assumption, viz.: "We must assume that his employment rights growing out of his service in 1947 and 1948 had been severed". Here is the trap: Nall had an antecedent employe status because he was in this Carrier's service at this same station in 1947 and 1948, but fiction is easily changed so we find the Opinion revises and amends the "antecedent employe status" theory by the collateral holding, necessarily implied solely to outlaw Nall in this case, that an employe must have an "antecedent and CONTINUOUS employe status". Nall's service in those previous years was inescapably an "antecedent" employment at the time he was again hired in 1952 to take the place of Olin Horton. But that would deny the claim even on the original fiction, so while the Opinion says that the rule has been

construed to mean that an employe must have an antecedent employe status, it does not mean it because Nall met that imaginary condition completely by his having been in service in 1947 and 1948.

There is further trouble with the so-called antecedent employe status: If, after Olin Horton had gone into the Army, any person hired to take his place worked more than one day, did he not have an antecedent employe status on the second day that he worked? Certainly; as a matter of plain rhetoric.

This award attempts to require this Carrier to pay the regular man for each calendar Saturday and Sunday for the last nearly four years when there were available extra or unassigned employes by merely saying that there were not, in complete disregard of the Agreement Rules (8 and 19) which provide that an individual acquires an employe status at the time his pay starts and in such status has the right to perform all extra and substitute work, subject only to the prior rights of furloughed employes.

The basic trouble with this award and its prototypes is that the terms "antecedent employe status" and "antecedent, continuous employe status" are not only entirely different from each other, but each is of such outstanding importance that it would have to be stated in the rule in order to be intended by the rule. Neither one appears in the rule. Neither one was intended by the rule. Therefore, there is no such thing as an antecedent employe status either existing for a time or continuously. That is why such a construction cannot be accepted and that is why we dissent.

/s/ E. T. Horsley
/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp