Award No. 6999
Docket No. CL-6731

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

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

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

1. That Carrier violated rules of the currently effective Agreement with the Brotherhood when on April 21, 1951, and on subsequently designated weekly rest days of H. W. Phillips, Casher-Ticket Clerk, Prairie du Chien, he was relieved by a non-employe.

2. That H. W. Phillips be compensated for wage loss sustained, namely a day's pay at the overtime rate attached to his position on April 21, 1951, and all subsequent dates that he was relived by non-employe on his designated rest days of each week. This to be determined by joint (Brotherhood and Carrier representatives) check of payroll and other Carrier records.

EMPLOYES' STATEMENT OF FACTS: The claimant, Mr. H. W. Phillips, is regularly employed as Cashier-Ticket Clerk at Prairie du Chien, Wisconsin.

Effective with application of the Forty Hour Week Rules of the Chicago, March 19, 1949 National Agreement, the Carrier designated the position of Cashier-Ticket Clerk at Prairie du Chien as a seven day position and in compliance with Article 2, Section 1 (b) of this National Agreement to which both the Carrier and Brotherhood were parties, named Saturday and Sunday of each week as the Cashier-Ticket Clerk's rest days.

The Carrier did not establish a regular relief assignment of Relief Clerk to provide relief for Mr. Phillips on his designated rest days, Saturdays and Sundays—of each week in accordance with Article 2, Section 1(e) (Regular Relief Assignments) of the Chicago National Agreement. The provisions of the Chicago National Agreement are reproduced verbatim in a Memorandum Agreement between the Carrier and Brotherhood dated Chicago, July 29, 1949.

During the first three weeks following the effective date of the Forty Hour Week Rules; namely, September 1 to 18, 1949, inclusive, the Carrier required Mr. Phillips to work his designated rest days of each week, September 3-4, 10-11 and 17-18, for which service he was allowed eight hours pay each date at overtime rate.

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.'

"Reading this rule these employes may be assigned to the rest days.

"The Employes have made no showing by the evidence presented that these employes did not hold themselves available to call at all times to protect clerical work, that because they were students that they could not be employed by the Carrier under the terms of the effective Agreement.

"This claim must be denied."

Rule 2 (d) of the agreement between the Virginian Railway and its clerical employes, although worded differently, cannot be distinguished from Rule 4 (c) applicable on this property. Virginian Rule 2 (f) corresponds to CB&Q Rule 25 (a), and their Rule 11 (j) is Section 3 (c) of the Forty Hour Week Ageeement. The facts and circumstances of that case are also identical to those in the instant claim. Third Division Award 6174 constitutes a well reasoned precedent, and the denial award there compels that the same findings be made here.

It is noted that in pursuing this matter to the Adjustment Board, the Organization has added a claim for compensation for April 21, 1951 **and all dates subsequent thereto.** As handled on the property the claim was only for four hours at time and one-half on April 21st and for eight hours on April 28th. Although in denying the entire claim the Third Division can well disregard this variance, it is mentioned to show the complete lack of theory behind the Organization's position. On the property the Brotherhood progressed this claim on the basis that Mr. Rasmussen did not establish seniority until some time after April 28, 1951, the latest date for which claim was made. Before the Third Division they must allege he **never** established seniority in order to substantiate the claim for all subsequent dates. Both these allegations are directly contrary to Rule 4 (c), which gives him a seniority date as of the first day of compensated service, April 21, 1951.

In conclusion the Carrier asserts that there is no foundation whatsoever in the agreement between the parties for this claim. Extra Clerk H. J. Rasmussen was employed, and accumulated seniority in exact accordance with Rule 4 (c). No justifiable complaint could possibly arise from using this man on the assigned rest days of claimant's position at Prairie du Chien.

In view of the above, this claim must be denied in its entirety.

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The Carrier affirmatively states that all data herein and herewith submitted has been previously submitted to the employes.

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(Exhibits not reproduced.)

OPINION OF BOARD: Claimant is regularly assigned as Cashier-Ticket Clerk at Prairie du Chien, Wisconsin, Monday through Friday, with Saturday and Sunday as rest days. On April 21, 1951, and subsequent rest days of claimant's position, one H. J. Rasmussen was used to perform rest day work. The record shows that Rasmussen is a science teacher in the Prairie du Chien High School and a full time employe of the School District. It is the contention of the Organization that Rasmussen was not a bona fide

employe of the Carrier and not entitled to perform the rest day work in question as against the right of the claimant to do so.

Section 3 (c) of the Forty-Hour Week Agreement provides:

> "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."

The rest day work of claimant's position was not made a part of a regular relief assignment. Unless Rasmussen was an available extra or unassigned employe, the work belonged to claimant.

The Organization contends that Carrier failed in its duty to establish a regular relief position which would include the rest days of claimant's position. The evidence does not sustain this contention.

It is next contended by the Organization that Rasmussen was not a bona fide employe and therefore not entitled to perform the rest day work of claimant's position. We sustain this contention. It is clearly shown by the written statements of Rasmussen himself that he had not been employed by the Carrier prior to April 21, 1951; that he was available for work only on Saturdays and Sundays; that it was understood by the Carrier that he would not be available for extra work on other days; and that he had no desire, intent or expectation of becoming a bona fide employe when he accepted the employment. Carrier says, however, that there is no instance in which any work was offered to Rasmussen which he ever refused to perform. We note, however, that Rasmussen had an understanding that he would not be called for other work. It is plain that he was employed to work the rest days of claimant's position only. He was not a bona fide employe.

The fact that an extra employe has outside employment to augment his income is not necessarily a controlling factor. But where, as here, the employe has a regular position in an outside industry or profession which makes him unavailable to protect the service for which he may be called, it is strong evidence that he is not a bona fide employe.

In a letter addressed "To Whom It May Concern," Rasmussen explains what he meant by some of the statements made to the Vice General Chairman, although he does not question the essential facts. He states that he might take a regular assignment with the Carrier but it remains clear that he has never become a bona fide employe. The evidence shows also that Rasmussen relieved claimant when the latter obtained a leave of absence during the summer months during school vacation.

Award 5558 holds that an employe used to work unassigned rest days must have existing seniority at the time he is used. Seniority was then used in its general sense and not on the basis that the employe must necessarily have a seniority date. Subsequent awards have properly used the terms "latent seniority" or "employe status" as more aptly stating the intended meaning. It would follow, in the pending case, that if Rasmussen met the requirements of a bona fide employe, he would have qualified to perform rest day work under Section 3 (c) when he was used to relieve claimant when the latter was absent for personal reasons. But we cannot accept the Carrier's contention that Rasmussen was even a bona fide employe of the Company. The claim is valid under the holdings of Awards 5558 and Interpretation No. 1 thereto, 6259, 6260, 6262, 6522, 6853, 6854, 6855 and 6974.

The Carrier argues that Rule 4 (c) requires a different result than in the foregoing cases. The applicable part of that rule provides:

"New employes who are employed to protect vacancies of thirty (30) calendar days or less, or perform extra work on positions covered by Rule 1, will establish seniority sixty (60) calendar days after the first day of compensated service, * * *"

We do not here question the right of Carrier to employ new employes to perform extra work and to provide for the fixing of a seniority date after sixty days' service retroactive to the first day of compensated service. But this does not have the effect of eliminating the requirement of antecedent employe status or the necessity that work on rest days be performed by bona fide employes. Carrier argues that there is no evidence that other extra work was ever refused by Rasmussen and that he has therefore met all requirements of the rule. We say, however, that Carrier may not agree to call an employe except for certain specified work and then assert that he was willing and available to protect all service for which called within the meaning of the rule. Such understandings and agreements conflict with the collective agreement and are not enforceable.

We think the claim is valid during the time claimant was available to perform the work. It is not valid during vacation periods or while claimant was on leave. Nor is claimant entitled to the overtime rate for time lost. For any holidays involved, the time and one-half rate applies.

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 in accordance with Opinion.

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 26th day of May, 1955.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 To Award No. 6999

Docket No. CL-6731

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

NAME OF CARRIER: Chicago, Burlington & Quincy Railroad Company.

Upon application of the Carrier involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3 First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The particular question which the Carrier seeks to have interpreted involves that part of the opinion which states: "It is not valid during vacation periods or while claimant was on leave." The meaning of this sentence is that claimant was not entitled to compensation for the days on which he was on leave or on vacation for the reason that he was not available to perform the work on those days. This is made very clear when the quoted sentence is read in context with the sentence which precedes it.

Carrier's request for an interpretation includes a reargument of the facts as shown by the record. This amounts to an application for a rehearing which is not, of course, a matter for consideration in a request for an interpretation. The findings of fact contained in an award must be considered final when this Board renders an interpretation with reference to its meaning.

We shall, nevertheless, interpret the meaning of the Award in order that it may not be misunderstood with reference to future application. Carrier states that it understands that the claim in this case was sustained on the theory that an individual who is hired to perform rest-day-relief work only does not have an employe status unless and until he performs some extra work other than tag-end relief work as stated in Awards 6854 and 6998. The Carrier misconceives the basis for the award in the present case. We affirm the view expressed in Awards 6854 and 6998. Under a similar factual situation they apply equally and identically on any Carrier having a rule similar to Section 3 (c) of the Forty Hour Week Agreement.

We call attention to the fact that the Award shows that the basis of the decision is that Rasmussen was not a bona fide employe. We specifically stated that the fact that new or extra employes had outside employment to augment their incomes is not necessarily a controlling factor. But where it is conclusively shown that a person is used who cannot or will not accept the responsibilities of the employer-employe relationship under the agreement, he cannot be said to be a bona fide employe. In the case before us, Rasmussen was under contract for full-time employment with the Prairie du Chien School District. It was thereby conclusively established that he could not accept the responsibilities of a bona fide employe. It was for this reason that the claim was sustained. This is made abundantly clear by the opinion where we said: "It

would follow, in the pending case, that if Rasmussen met the requirements of a bona fide employe, he would have qualified to perform rest day work under Section 3 (c) when he was used to relieve claimant when the latter was absent for personal reasons. But we cannot accept the Carrier's contention that Rasmussen was even a bona fide employe of the Company."

We conclude by stating that a person who could not qualify as a bona fide employe cannot acquire latent seniority or employe status. It is this finding, and not that urged by the Carrier, which was the determining factor in the decision. This being true, Rasmussen was improperly used at all times and claimant was entitled to compensation for all time he was available to work as shown by the Award. The language which the Carrier seeks to have interpreted is a limitation upon claimant's right of recovery and not a finding that Rasmussen was ever entitled to perform the work.

Referee Edward F. Carter who sat with the Division, as a member, when Award 6999 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 10th day of November, 1955.