Award No. 7128
Docket No. CLX-6959

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

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, Inc. and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective September 1, 1949, was violated at the Fresno, California Agency through the use of individuals, having no rights under the Agreement to perform work incident to the handling of the normal flow of express traffic during the period December 8 to 24, inclusive;

(b) Employe Opal Clark, et al shall be compensated for 8 hours each, at the salary rate of their respective positions for work performed by these individuals on their respective days of rest at the rate of time and one-half covering the period in question; and

(c) They shall be compensated for 8 hours overtime each on a daily basis, at the rate of time and one-half at the salary rate of their respective positions, during the period in question.

EMPLOYES' STATEMENT OF FACTS: Opal Clark, with a seniority date of March 26, 1945 is the regular occupant of position titled Revision Clerk, Group 7, Position 1, hours of assignment 12:01 A. M. to 9:01 A. M., days of rest Saturday and Sunday, salary $305.90, basic per month.

W. J. Morgan, with an employe status date of November 10, 1949, is not the occupant of a position and is compensated for his work at the salary rate of the position on which he works.

J. A. Hicks, with a seniority date of January 25, 1946 is a furloughed employe substituting on position titled Driver, Group 15, Position 8, hours of assignment 7:30 A. M. to 4:30 P. M., days of rest Saturday and Sunday, salary $305.90, basic per month, pending bulletin.

Jane Keyes, with a seniority date of September 11, 1917 is the regular occupant of position titled Stenographer-Clerk, Group 32, Position 8, hours

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

(Exhibits not reproduced).

OPINION OF BOARD: Claimant Opal Clark was regularly assigned during the period of the claim as Revision Clerk, Group 7, Position 1, 12:01 A. M. to 9:01 A. M., Monday through Friday, with rest days Saturday and Sunday, salary $305.90, basic per month. Many other clerical employes held similar assignments at the same point (Fresno, California, Agency). Their claims are identical in principle and we shall not extend this award by setting forth their assignments as shown in the record. On or about December 8, 1951, and continuing to December 24, 1951, Carrier hired outside persons, including drivers and transportation equipment of an outside trucking company, to perform seasonal Christmas holiday rush work that was over and above the capacity of the regular assigned employes to perform. Claimant Clark and other regularly assigned employes similarly situated, contend that they should have been used on an overtime basis. They claim pay for the work lost.

This claim involves the performance of work during the Christmas rush at Carrier's Fresno, California, Agency. The work can be properly described as work in excess of that which regularly assigned employes had the capacity to perform within their regular assignments. The excess work was seasonal in character and was such that the Carrier could anticipate it although the amount thereof might vary from year to year. It is clear from the record that the Carrier used all of its regularly assigned employes during the period in question, December 8 to December 23, 1951, and used only regular employes on their rest days at the punitive rates, except as will be hereinafter pointed out. There were no extra or furloughed employes available who had not been recalled to service when the new employes were employed whose use gave rise to the present claims. The claim involves the use of 8 employe status employes and a number of trucks and truck drivers of a trucking company, all of whom were used to augment the regularly assigned force in performing the excess work resulting from this Christmas rush. The Organization contends that such employes were improperly used in violation of the Agreement. The Carrier asserts that their use was proper under the Agreement and that the Agreement was in all respects complied with.

We shall first deal with the use of the "employe status" employes. There appears to have been 8 of such employes used. The dispute can be determined by a consideration of the employment of 4 of them, Harper, Latham, Howell and Mohlkee. The first 3 were women and the fourth a man who is alleged to be an Indiana farmer on a winter vacation in California. They were given regular assignments Monday through Friday, and were not used on their rest days. The regular assigned employes were assigned the same days, Monday through Friday, and they were used at the penalty rate on their rest days. The new employes were given regular employment applications and their names were posted as "employe status" employes under Rules 3 and 20. Their positions were not bulletined as their positions were known to be for less than 30 days which under Rule 12 eliminated the necessity for bulletining. The question is whether they were bona fide employes.

In this latter respect, it must be conceded that they had no previous employment rights with the Carrier which gave them any right to the work. The rule has often been announced by this Board that a carrier is not required to work regularly assigned employes on rest days or on overtime if it can get the work done at the pro rata rate without violating the agreement. Awards 4948, 4969. When the carrier cannot get the work done at pro rata rates without violating the agreement, the rights of regular employes to perform it on rest days or overtime accrues and they will be entitled to it on a seniority basis. Consequently, if the 8 employe status employes were rightfully used, this portion of the claim is without basis.

We think the Carrier could properly employ new employes to perform the excess work as it did. The Organization does not appear to question

Carrier's right to employ new employes, but it insists that these 8 persons never intended to become regular employes of the Carrier entitled even to an "employe status" within the rules. This is based on the fact that women are disqualified by a California law from occupying positions requiring the lifting of objects weighing 25 pounds or more. The work which they performed was not in violation of law and certainly they could attain seniority towards any position they were qualified to fill. The fact that they might be disqualified from holding many positions to which their seniority would otherwise entitle them is not material. Their seniority rights would attach to any position to which the prohibitions of the state law did not apply. As to Mohlkee, the man referred to as the farmer, on vacation, we find nothing in the record that would bar him from becoming a bona fide employe. It was not shown that he was in any manner obligated to another employer or was the occupant of any other occupational status such as being the occupant of another position which he could not abandon, or a student committed to attend school. There is no evidence in this record that would of itself disqualify him as a proper person to be hired as an employe status employe. A person seeking a position might hold some other job or be engaged in some other means of livelihood. It is only when it is conclusively established that he could or would not assume the responsibilities of the employer-employe relationship that it can be said that his hiring operates as a constructive fraud on regular employes that would otherwise be entitled to the work. Since these claimants were not deprived of any work of their regular assignments, nor did they lose any rest day or overtime work necessary to be worked because of their seniority rights thereto under the Agreement, we are required to say that the use of these 8 "employe status" employes on regularly assigned 8 hour positions of less than 30 days' duration was not in violation of the Agreement.

The record shows, also, that Carrier made use of the services of trucks and drivers of a private trucking firm in handling the distribution of express during the same period. The record shows that the Carrier was making full use of its own equipment. Additional trucks were necessary to the handling of its business during this rush period. There is no contention here made that adequate equipment was not maintained at this Agency to handle the normal business at that point. It would be unreasonable to require the Carrier to have expensive equipment on hand to handle all the business of the Agency during this abnormal Christmas period. Other agencies were faced with the same rush period so that a marshaling of equipment from other agencies was not possible. Under such circumstances it was clearly proper for the Carrier to use trucks and drivers from an outside source so long as the rights of regular drivers were not invaded. The record shows that these outside trucks and drivers were used on Mondays through Fridays when all assigned drivers of the Carrier were working. The Organization asserts, however, that the latter could have been used during meal periods and overtime hours. The Carrier contends that the delivery of express in residential areas after 5:00 P. M. was not practical and that adequate service to the public demanded prompt deliveries. This is clearly a matter of managerial prerogative with which we will not intervene. It is clear that the decision of management was reasonable under the circumstances and consequently outside the province of this Board. Carrier further asserts that outside trucks and drivers were not used on the rest days of regular drivers except on December 21 and 23. They state also that all regularly assigned drivers of the Carrier were being used on such days at the penalty rate. If such be the fact, we can see no violation of the rights of the regular drivers. The Organization questions the latter statement, particularly with reference to Claimant Woods. It is asserted trucks and drivers of the trucking company were used on December 23, one of Woods' rest days, and that Woods was available and not called. The Carrier appears to admit that at least in one instance a driver of the trucking company worked when a regular driver did not, when it states:

> "On only one day during the period in question did a driver of the Hefley Trucking Company perform work on a day on which

Driver Woods did not work by reason of being off on his rest day, i. e., December 23, 1951."

We are of the Opinion under the circumstances of this case that it was a violation of the Agreement to use Hefley Trucking Company drivers on any day, including rest days, when Carrier's regular drivers were not used. The rule permitting the augmentation of forces to meet operational needs is not applicable to a situation when the work is contracted out. In the latter case the Carrier is not permitted to contract out work to the detriment of its own employes. The record shows outside truck drivers were used when regular drivers (Rogers) were absent from duty. This is not a violation when regular drivers laid off of their own volition.

Summarizing, we hold (a) that the employ status employes were properly hired as such under the facts disclosed by the record. They not having been used in overtime or rest day work to which regular employes were entitled because of their seniority there was no violation of the Agreement in their use. (b) The hiring of outside trucks and drivers was proper under the circumstances shown. (c) The use of outside trucks and drivers when regular drivers were available to perform work constitutes a violation of the Agreement. (d) The claim will be sustained at the pro rata rate as to any and all available regular drivers who were not worked on any day that outside trucks and drivers were used.

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 except as to the limited extent shown by the Opinion.

AWARD

Claim sustained to the limited extent shown by the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 23rd day of September, 1955.