Award No. 8280
Docket No. CL-7817

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

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

(a) That the Carrier violated the terms of Clerks' Agreement No. 7 when on April 30, 1952 and subsequent dates it used Mrs. June Carr, not a bona fide Employe covered by the Clerks' Agreement, to perform clerical work in its Coal Traffic Department at Russell, Kentucky;

(b) That Claimants Mr. E. R. Hilton or Mr. C. E. McClellan be paid at time and one-half times the straight time rate of their positions for each day Mrs. Carr was permitted to work, beginning April 30, 1952, in the order of their seniority and availability;

(c) That the employment date of Mrs. June Carr be changed from April 30, 1952 to January 6, 1954, the date she first became a bona fide employe.

EMPLOYES' STATEMENT OF FACTS: On April 24, 1952, the Carrier employed in its Coal Traffic Department, Russell, Kentucky, one Mrs. June Carr to perform "extra" work. Mrs. Carr was at that time an employe of a local business establishment in no way connected with the Carrier. She continued to work for the same employer, making herself available for "extra" work with the Carrier only for first "trick" vacancies as steno-clerk and secretary. This situation continued until January 6, 1954, when Mrs. Carr ceased working for the business concern and began to be qualified for and accept calls to fill all positions in the Coal Traffic Department.

Effective January 5, 1953, the Carrier employed another "extra" clerk, Mr. Carlos R. Pratt. Therefore, in 1953, there were two (2) so-called extra clerks to protect the vacancies occurring on ten (10) positions. During the year 1953 Mrs. Carr worked a total of fifty-six (56) days, all on two of the ten positions. (Employes' Exhibit "L")

Claim was filed by Claimants Hilton and McClellan on March 8, 1953, and appealed in the usual manner up to and including the highest officer of the Carrier to whom such appeals may be made. Conference was held on March 29, 1954, the Carrier refusing to allow the claim.

". . . extra Group 1 and 2 employes . . . in the order of their employment dates for such work in Group 1 as they **are qualified to perform.**" (Emphasis ours.)

From this it will be seen that the parties in framing Rule 12 (a) 5 recognized that all employes coming in the **Fifth Step** could be used only **according to qualification.** Thus, a Group 2 employe under this section (with seniority) might be qualified to work a yard clerk position, but would not be qualified to work as ticket seller, and so on. That employe would be so used.

The Carrier submits that there has been no violation of Rule 12 in any respect in connection with qualification of Mrs. Carr to work the various positions in the Coal Traffic Department at Russell, Ky., and the contention in this respect falls.

Basis of Hilton-McClellan Claim

Hilton and McClellan are assigned to do the rate and route work on the second and third tricks, and their claim appears to move on the theory that if Mrs. Carr had not been used to work first trick positions, they would have been called out to work such positions on an overtime basis.

Their claim is, therefore, repugnant to the whole scheme of Rule 12 with regard to employing personss to fill short-term vacancies. The parties recognized the need for re-arrangment to take care of vacancies in the higher grades of work, and they recognized that employes could not (and should not) be called out for positions for which they are not qualified. Overtime basis is resorted to only when other steps under Rule 12 have failed.

If these two men could claim all vacancies on the first trick on an overtime basis in this manner, what would be the sense of Rule 12 provisions for employing persons from the outside to do such work as they can qualify for and eventually fill the ranks when permanent vacancies occur? It is patent that Hilton and McClellan have not been deprived of any employment to which they are entitled under the rules.

They worked their regular positions, in the manner of the rules, during all of the period covered by this claim, and their claim amounts to compounding additional expense already laid upon the Carrier by virtue of the fact that Mrs. Carr was not qualified during the period of the claim to work the second and third trick positions. The Carrier paid overtime to get vacancies on those tricks covered until an employment date clerk could fill them satisfactorily. What this claim seeks, then, would completely eliminate the use of employment date clerks, something clearly embedded into the whole pattern of filling short-term vacancies.

The basis of the Hilton-McClellan claim is without proper foundation, because, as previously shown, Mrs. Carr was employed, and has continued in such employment status, fully in accordance with Rule 12.

* * * * *

All data contained in this submission have been discussed in conference or by correspondence with the employe representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: Mrs. June Carr was employed by Carrier as an "employment date extra clerk" on April 24, 1952. She had been regularly employed prior thereto at McConnell's Dress Shoppe in Russell, Kentucky.

There is present in this record a letter from D. L. McConnell stating that "on or about April of 1952" Mrs. Carr resigned as a Clerk "in the store to work for Carrier." He stated he hired "another girl in her place. I have since used her as an extra when she was not working for the Railway Company."

Rule 12 (e) of the applicable Agreement reads:

"Extra employes without seniority shall be required to protect all work for which they stand except as provided herein. Such extra employes may for good and sufficient reason be given permission by the proper officer to be off not to exceed fifteen (15) days in any calendar year. If the employe desires to be off in excess of fifteen (15) days in any calendar year he must secure permission in writing from the proper officer approved by the Division Chairman. Such employe will not be permitted to mark off to engage in other employment. Persons holding regular positions elsewhere will not be employed on work covered by this agreement, except that extra employes without seniority who do not stand to work for a period of fifteen (15) days may be permitted to engage in regular employment elsewhere by agreement in writing between the proper officer and Division Chairman, but when they again stand for work under this agreement they must return and protect such work unless they are permitted to continue in such outside employment temporarily by agreement in writing between the Division Chairman and the proper officer of the Railway Company. Where extra employes without seniority are relieved for fifteen (15) days or less, the proper officer will promptly advise the Division Chairman in writing giving the reasons for the employe's absence. Extra employes failing to comply with the provisions of this section unless prevented by sickness or other unavoidable cause, will be considered out of service."

Two points are made by, and in behalf of petitioning Organization:

1. Mrs. Carr was not qualified at the time she was employed by the Carrier nor during the period covered by this claim to work as an extra Employe because she was "at that time an employe of a local business establishment in no way connected with the Carrier."

2. Mrs. Carr "was not required to protect all work for which she stood, as specifically provided in the first sentence of Rule 12 (e)."

With respect to the first point, the record is clear that when she accepted the position of employment date extra clerk, Mrs. Carr resigned her regular job at the dress shop, and the proprietor thereof "hired another girl in her place." The work she performed as an extra clerk at this shop cannot, from the record here established, be classed as a "regular position" or "regular employment." We must agree with argument offered in behalf of Carrier that "Rule 12 (e) does not proscribe an extra employe from doing so except that such employe will not be permitted to 'mark off' to engage in other employment."

There is no charge, much less evidence, that Mrs. Carr "marked off" to engage in other employment; neither is there any showing that she was ever unavailable, because of this extra work in the dress shop, when called to work by Carrier.

With respect to Organization's second point, it is argued in behalf of Organization that "for a period of twenty months Mrs. Carr was allowed by the Carrier to fill only vacancies on the Steno-Clerk and Secretary positions on the first trick. It is thus evident that Mrs. Carr was not required to protect all work for which she stood, as specifically provided in the first sentence of Rule 12 (e)," previously quoted

Rule 12 covers "Temporary Vacancies," and the applicable portion thereof is Rule 12(a) 5, paraphrased as follows:

"5—Filling Group 1 Vacancies: Where the Group 1 vacancies or new positions cannot be filled as provided above, by:

regularly assigned and 'cut-off' group 2 employes and extra Group 1 and 2 employes; * * * who have filed a letter

with the proper officer, copy to Division Chairman, stating that they desire to protect extra work in Group 1,

who make themselves available to protect extra work will be called in the order of their employment dates for such work in Group 1 that they are qualified to perform."

Argument offered in behalf of Carrier, noting the above portions of the Agreement, observes that "such extra employes stand to be called in order of their employments, and must protect all extra work in Group 1 that they are qualified to perform. Much more, there is no evidence in the record that Mrs. Carr ever refused to accept work for which she was called."

Also this:

"We have consistently recognized and held that the matter of judging an employe's fitness and ability to perform work required is the function of Carrier alone. (Awards 7909, 7810, 7170, 7070, 7015 and 6829 among many others.)"

Among Awards cited by or in behalf of the Organization is Award 6999 (Carter). In that case the extra employe Carrier sought to use was a man who held a regular position as a school teacher and, for that reason, was available only to Carrier on Saturdays and Sundays of the school term. Such a situation does not exist here.

Yet in that Award this Division held:

"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."

A denial award is in order.

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.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By ORDER of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 20th day of March, 1958.