Award No. 10799
Docket No. TE-10144

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Harold Kramer, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Order of Railroad Telegraphers on the Chicago, Burlington, and Quincy Railroad that:

1. Carrier violated the agreement between the parties when it failed and refused to pay Extra Operator M. Buechler for time consumed in posting on position in interlocking plants on the LaCrosse Division.

2. Carrier shall now compensate Operator M. Buechler at the posting rate for 8 hours on December 7, 8, 9, 10, 11, 12, 14 and 16, 1956, at the deadheading rate for 3 hours, 30 minutes on December 7, 1956, 1 hour, 37 minutes on December 10, 1956, and 1 hour, 3 minutes on December 11, 1956.

EMPLOYES' STATEMENT OF FACTS: The agreements between the parties are available to your Board and by this reference are made a part hereof.

M. Buechler made application to this Carrier for employment as a telegrapher on or about October 30, 1956, he passed the required physical examination on December 5, 1956 and was ready and OK for work commencing with that date.

He was instructed by the Carrier to post on several interlockers on the division, i.e., to qualify himself to fill the positions of Operator-Leverman at these locations. On December 7 he deadheaded from North LaCrosse to St. Paul and posted on the 3rd trick Operator-Leverman position at Oakland Tower on December 7, 8 and 9; on December 10 he deadheaded from St. Paul to Pepin, Wisconsin and posted on the 3rd trick Operator-Leverman at Pepin on December 10; on December 11 he deadheaded from Pepin to East Winona, Wisconsin and posted on the 3rd trick Operator-Leverman position at East Winona on December 11 and 12; on December 13 he worked as Operator-Leverman on the 3rd trick at Oakland Tower; on December 14 he posted on the 3rd trick Operator-Leverman at East Winona; on December 16 he posted on the 3rd trick Operator-Leverman position at Pepin. He sent in daily time slips for both the posting and deadheading which were not paid. Claim was

The claimant in this case is no different than any other telegrapher on this property who goes through a student period before he becomes an employe. There has never been a time during the last fifteeen years that the Carrier has not had anywhere from five to fifteen prospective telegraphers in training as students, and not one of them became an employe until he completed his student training period. Such students are placed in stations or towers for periods of a few days to as long as two weeks, and during such periods they perform no service whatever for the Carrier; they do not become employes during such periods; they do not establish seniority dates during such student training periods; they do not fill vacancies or displace employes during such periods; and they are not subject to the terms of the collective agreement or the union shop agreement during such periods. After they complete their student training period, they are then placed on the extra list and they then become employes subject to the terms of the collective agreement.

Claimant in this case was not an extra employe as that term is used in Rule 15 on December 7, 8, 9, 10 or 12, but on the contrary he was a student during that period, and did not become an employe until December 13, 1956. On that date, he was placed on the extra list and his name was placed on the seniority roster with a date of December 13, 1956, in conformity with the provisions of Rule 21(a). That is the date he entered service and became an employe, and, as stated previously, he was compensated for the service performed on that date the same as any other extra employe. Since he was a student and not an employe on December 7, 8, 9, 10, 11 and 12, the provisions of Rule 15 do not apply to him, and the claim for those dates cannot be sustained.

With respect to the claim for December 14 and 16, the record shows that on December 14 claimant moved from Oakland to East Winona and was compensated for the deadhead move in the amount of 2 hours and 40 minutes, and in addition was paid 8 hours at pro rata rate for working at East Winona on the 14th. On December 16, claimant worked at Pepin and was allowed 8 hours pay at the pro rata rate of the position worked, plus 57 minutes for deadheading East Winona to Pepin. It is obvious, therefore, that the claims for December 14 and 16 are clearly requests for duplication of payments allowed on the December 1956 time roll, for which there is no support under the agreement or even in common sense.

As a matter of information, claimant worked intermittently from December 13, 1956 to March 9, 1957, after which he voluntarily left Carrier's service.

There is no merit to the claim, and it must be denied.

The Carrier affirmatively states that all data herewith submitted have previously been submitted to the Employes.

OPINION OF BOARD: Claim is made by the Organization on behalf of Operator Mr. Buechler at the posting rate for the period specified in the submission.

Applicable rule in this matter.

"RULE 15

"POSTING ON POSITIONS

"(a) Extra employes required to qualify themselves for service

as towermen, levermen, and car retarder operators will be allowed eight (8) hours at the pro rata rate, less twenty-five cents (25¢) an hour for the time so consumed, the management to be judge as to the time necessary for qualification.

"(b) The employe directed to instruct such an employe shall be paid, in addition to his regular rate, twenty-five cents (25¢) an hour for each hour of instruction."

The problem before us basically, is to determine whether the Claimant in this instant was in fact an extra Employe and subject to the bargaining agreement and covered by Rule 15, above quoted, or as the Carrier contends that the Claimant was a student until December 13, 1956 and not subject to the agreement until he was employed on December 13, 1956.

There is no dispute regarding the eligibility of the Claimant to payment for work performed on December 14, 16, 1956.

1. The Organization contended in its submission and it has not been denied that under the dates in dispute and in accordance with Rule 15(b) the Carrier did compensate the person directed to instruct the Claimant at the specified rate under Rule 15(b).

2. Other evidence which we have in this instant and not disputed is that Claimant filed an application with the Carrier on October 30, 1956 and that he passed the required physical examination on December 5, 1956. Obviously neither the filing of an application nor the passing of a physical can of necessity and by itself compel us to conclude that he was therefore employed.

The agreement is silent on the question of students or trainees.

Rule 28 of this agreement under Employment

"An employe filing an application for employment will be notified within sixty (60) days of the acceptance or rejection of his application. If not notified within sixty (60) days, he will be considered as accepted. This rule shall not apply in event of applicant giving false information."

Rule 28 does not spell out the manner of notification. The Carrier contends that the application of October 30, 1956 was disapproved on the same date filed and Claimant was so advised. The Carrier also contends that on December 5 when Claimant again appeared he was not permitted to file an application for employment.

Record page 19 taken from the Carriers submission dated February 21, 1958, in part reads as follows:

"Claimant again contacted the Chief Dispatcher on December 5, 1956, seeking employment. However, on that date he was not permitted to file an application for employment because,

1. There were no prospective vacancies in sight, and

2. because the application filed on October 30, which was rejected, indicated that Claimant's entire working experience was confined to "farming" and "janitor work."

3. We have however on record that on December 5, 1956 the Claimant passed a physical examination as stated by E. R. Shrader, General Superintendent and marked O.R.T. EXHIBIT No. 6.

4. The Organization further contends that the Claimant was reported by the Carrier in their monthly list of new Employes covered by the Telegraphers Agreement, as entered service on October 30, 1956, pending the correction of a minor ailment. Evidence was not introduced nor was this "monthly list" submitted nor for that matter is there any evidence that the Carrier disclaims such a monthly list of new Employes on which the Claimant's name appears."

The weight of evidence as indicated in items marked 1, 2, 3, 4 in above Opinion calls for a sustained award despite the very considerable conflicts in the submissions.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 there is a violation of the Agreement.

AWARD

Claim sustained except where payment may have been made by the Carrier for some of the dates in dispute.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September, 1962.

CARRIER MEMBERS' DISSENT TO AWARD 10799, DOCKET TE-10144

After quoting Rule 15, the Majority then state:

"The problem before us basically, is to determine whether the Claimant in this instant was in fact an extra employe * * * ."

Basically, that is true, but there was also involved, and the Majority ignored, the word "required," which is as much a part of the rule as any other word appearing therein. The record shows Claimant was not required to qualify for service. This, in itself, required a denial award.

With respect to the "basic" issue, the matter of whether or not Claimant was an employe prior to December 13, 1956, the Majority has ignored the only real evidence, and in lieu thereof have listed four items which they refer

to as evidence, but which constitute absolutely no evidence at all.

As to the Majority's Item No. 1, it must be conceded that if the Carrier payed someone 25¢ per hour to explain the operation of the towers to the Claimant, this is not evidence that Claimant was an employe at the time. Positive evidence in the record, and again shown below, proves he was not at that time an employe.

If the Majority's Item 2 proves anything, it proves that Claimant was not an employe prior to December 13. They state: "Obviously neither the filing of an application or the passing of a physical can of necessity and by itself compel us to conclude that he was therefore employed." Yet, the Majority proceed to find that he did become an employe by reason of such happenings. They fly off in reverse when they pin their thinking to Rule 28, which clearly refutes their theory. Even though the Majority elected not to believe Carrier's Statement that the October 30, 1956, application was disapproved, we believe that anyone capable of counting beyond 60 should agree that Rule 28 had no automatic effect on Claimant's status—certainly it couldn't until after the sixty-day period expired. These claim dates were well within the sixty-day period, even if we start with October 30, 1956.

Item 3, which the Majority list as "weight of evidence," is completely nullified by the admission in their Item No. 2.

The Majority's Item No. 4 is an absurdity. No such document as mentioned therein is even known to exist. Furthermore, if such did exist, it would not constitute evidence on the basic issues involved.

In addition to being denied on the ground of long and consistent application of the rules involved, this claim was clearly precluded by the only real evidence in the record. Aside from Claimant's not being **required** to qualify for the service, the claim was absolutely without merit on the ground that Claimant was not an employe prior to December 13, 1956, and therefore certainly could not have qualified under Rule 15(a), which obviously applies only to "extra employes."

If the record shows anything, it shows that Claimant's uncontested seniority date was **December 13, 1956.** Since Claimant was paid for work performed on December 14 and 16, those dates were not in issue. Thus, the dates at issue, (December 7, 8, 9, 10, 11 and 12) were dates prior to Claimant's establishment of seniority. Rule 21(a) and (b) reads as follows:

"SENIORITY—ROAD DISTRICT

"(a) Seniority rights will date from the last time of **entering the service** and will extend over each division superintendent's district as existing in the effective date of this agreement, except as otherwise provided in this rule.

" * * *

"(b) The date and hour the employe begins work after formal application has been made shall be considered as the date of entering service, subject to the provisions of Rule 28." (Emphasis ours.)

That rule, coupled with Claimant's admitted seniority date, is positive evidence demanding denial of the claim. Certainly, Claimant was not an employe until he entered service, and seniority begins upon entering service.

Claimant's seniority date of December 13, 1956, is conclusive proof that he was not an employe prior to December 13. For that reason a rule such as Rule 15(a) applicable to "extra employes" did not apply to Claimant prior to December 13. Prior to that time, he was simply a man "off the farm" being allowed to use Carrier's facilities for the purpose of gaining sufficient knowledge of railroading so that he could logically be considered for initial employment—a student, or trainee, so to speak.

With the above in mind, we quote the Majority's own words in connection with students or trainees:

"The Agreement is silent on the question of students or trainees."

The Agreement being silent on the question of students or trainees, the claim should have been denied. By attempting to write into the Agreement something which is not there, the Majority has attempted to exceed the authority of this Board. See, among many other similar ones, **Awards 871, 1230, 2029, 3289, 3407, 4763, 6767, 6856 and 10581.**

Since the Majority decision exceeds the bounds of our authority the award is a nullity.

/s/ **O. B. Sayers**
O. B. Sayers

/s/ **R. E. Black**
R. E. Black

/s/ **R. A. DeRossett**
R. A. DeRossett

/s/ **W. F. Euker**
W. F. Euker

/s/ **G. L. Naylor**
G. L. Naylor