

**Award No. 10800**

**Docket No. MW-10306**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**(Supplemental)**

**Harold Kramer, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES  
BOSTON AND MAINE RAILROAD**

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

(1) The Carrier violated the effective Agreement when it assigned other than a crossing tender to perform crossing tender's work at Mechanicville, New York on December 6, 1956.

(2) Crossing Tender J. Piroli be allowed eight (8) hours' pay at his time and one half rate because of the violation referred to in Part (1) of this claim.

**EMPLOYES' STATEMENT OF FACTS:** The Claimant, Mr. J. Piroli, was regularly assigned to the position of Crossing Tender at Mechanicville, New York, with Friday, December 6, 1956 being one of his designated rest days.

On the aforementioned date, the Carrier required the services of a spare crossing tender, but no regular spare crossing tender having less than forty hours of work in that week was available.

The Carrier, instead of using the Claimant, who was available, ready and willing to perform overtime service, assigned Freight Handler, John Volpe, who holds no seniority rights under the provisions of this Agreement, to perform the Crossing tender's work at the above referred to location.

The Agreement violation was protested and a suitable claim was filed in behalf of the Claimant.

The Claim was handled in the usual manner on the property and declined at all stages of the appeals procedure.

The Agreement in effect between the two parties to this dispute dated November 29, 1943, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

actually hired, as any other employe, whether it be a furloughed railroad employe or an off-the-street employe. He was given the necessary physical and placed on the position of crossing tender.

Carrier is confident that your Board will agree there has been no violation of the agreement.

Claim should be denied.

All data and arguments contained herein have been presented to the Petitioner in conference and/or correspondence.

(Exhibits not reproduced.)

**OPINION OF BOARD:** On Friday, December 6, 1956 the Carrier required the services of a spare crossing tender at Mechanicville, New York. No regular spare crossing tender having less than 40 hours of work in that week was available.

#### **POSITION OF ORGANIZATION**

That the Carrier instead of using Claimant who was the available regular assigned crossing watchman in overtime service, assigned Freight Handler, John Volpe, who holds no seniority rights under the provisions of this Agreement, to perform the Crossing tender's work at the above referred to location.

That under Rule 10 sub-section (d) of the Agreement, seniority is restricted to each classified department in each seniority district. Section (d) of Rule 10 reads as follows:

"Seniority will be restricted to each classified department in each seniority district."

That John Volpe, could not acquire seniority under provisions of this Agreement and at the same time hold seniority under the provisions of another Collective Bargaining Agreement.

That freight handlers are not included within the Scope of Rule 1 of this Agreement.

That John Volpe not only retained seniority rights under the Clerks Agreement, but in fact, that he, after December 6, 1956, returned to service under the Clerks Agreement and later requested a leave of absence under the Clerk's Agreement and not under the Maintenance of Way Agreement.

#### **POSITION OF CARRIER**

That a vacancy occurred for a crossing tender at Mechanicville, New York, on December 6, 1956.

That it was necessary to hire a new man for spare work, since no spare Employes were available.

That John Volpe was a furloughed freight handler who was assigned to work on December 6, 1956 after taking physical examinations and completing other necessary requirements.

That John Volpe was laid off as Freight Handler and that the last date he worked as Freight Handler was November 27, 1956 and that under Rule 10 (g):

“Seniority as an employee will be computed as of the date of entering the service, provided, that their application for employment has been accepted.”

### OPINION

There is no contention that the Carrier may not hire new employees, obviously, hiring new employees is strictly the prerogative of the Carrier. Nor is there anything in the Agreement to prohibit the Carrier from hiring a furloughed employee from another craft to fill a vacancy as a crossing tender.

The question before us basically is whether Volpe who retained his seniority rights with the Clerks was a bona fide applicant for the position of crossing tender or whether Volpe was simply used on the one day in question to relieve the need of the Carrier to compensate the Claimant, who was the regular assigned crossing watchman, at the penalty rate for overtime.

It cannot be argued that Volpe gave up his seniority with the Clerks because the record indicates that he returned to work as a freight handler covered by the Clerk's Agreement after his one day as crossing tender.

It is the opinion of this Board that John Volpe was a spare freight handler at the time that he was assigned to work as a crossing tender and was not a bona fide applicant for a position as crossing tender under this Agreement.

**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 Employees involved in this dispute are respectively Carrier and Employees 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 to the extent of pro rata pay.

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.