Award No. 10990
Docket No. CL-10665

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

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

MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILROAD COMPANY

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

(1) That Carrier violated rules of the currently effective Agreement dated August 1, 1955, by employment of outsiders, commonly referred to as floaters or transient laborers, to perform work of handling freight at its Schiller Park Freight House commencing December 17, 1956.

(2) That Carrier's warehouse employes, H. P. Sadowski, K. C. Ayer, K. Aarteig, E. Kapus, L. Rivera, R. Krol, J. Dubrava, L. Terrozas, S. S. Clay, H. Schmidt, A. F. Bocek, G. Geldon, A. Saucedo, A. J. Halvorsen, B. Geldon, J. Cunningham, F. P. Rueker and A. Rivera be paid for wage loss sustained, i.e., eight hours' pay at overtime rate for Monday, April 22, 1957, and similar payment be extended to claims of employes for all subsequent dates that Carrier violated rules of the parties' Agreement as set forth in Section (1) hereof.

NOTE: Restitution to employes for dates subsequent to April 22, 1957, be determined by joint check of Carrier's records.

EMPLOYES' STATEMENT OF FACTS: Schiller Park is a station on the main line of the Carrier and located some 17 miles out of Chicago. The force at the time this dispute arose in December, 1956, consisted of approximately two (2) Foremen, eight (8) Clerks and forty-three (43) Laborers which latter term embraces Group 3 employes designated as Truckers, Callers, Stowers or Stevedores, Coopers and Sealers in Rule 1 of our General Rules Agreement.

Prior to effective date of the Forty Hour Week Rules on September 1, 1949, (Rule 42 of the Parties' current Agreement dated August 1, 1955), the warehouse force at Schiller Park regularly worked six days per week, Monday through Saturday. The warehouse was closed on Sundays and that was the recognized weekly rest day of the employes.

Carrier also maintains that the only claims that can be entertained are those that were timely filed and progressed in the usual manner and by or on behalf of specific employes. Many of the claims for specific employes on rest day status for Mondays when Carrier hired men supplied by the employment agency have been barred account failure to progress appeals in accordance with the time limit rule.

Since notice was served by the employes of intent to submit this dispute to the Board, Carrier has agreed that similar claims filed on behalf of named individuals for subsequent Mondays will be settled in accordance with the Board's ruling without the necessity of progressing through the several levels of appeal.

All data submitted in support of the Carrier's position has been presented to the employes' committee and made a part of the particular question in dispute.

Carrier contends that the claim is without merit and respectfully requests that it be denied.

OPINION OF BOARD: After the Forty Hour Week Agreement, September 1, 1949, the operation of the warehouse facilities at the Schiller Park, Illinois, Freight House was changed from six to five days per week with Saturday and Sunday as rest days. In December, 1956, the Carrier proposed a six-day staggering of the work force with Saturdays and Sundays as rest days for part of the work force and Sunday and Monday as rest days for the others which would result in a short force on both Saturdays and Mondays of each week. The Superintendent suggested to the employes that this situation could be taken care of by the employment of transient labor supplied by a Chicago labor agency. The employes objected to this method of hiring labor but indicated they had no objection to the six-day week provided that such extra employes be hired in the customary manner and with the understanding that such extra employes have preference for future work.

Petitioners charge that the Carrier inaugurated the six-day staggered work week program for its warehouse employes on December 17, 1956, and unilaterally augmented its warehouse force with men supplied by a labor agency who were not bona fide employes and contend they were simply hired by the day.

Petitioners further assert that they frequently notified Carrier this arrangement was unacceptable to the employes, that it was not contemplated by the Carrier that the men thus hired would be bona fide employes, that they were merely hired by the day and that such procedure deprived regular employes of work opportunities and wages.

Claim was made by the Petitioners covering loss of work for December 17, 1956, and subsequent days and a number of conferences were held between officers of the Carriers and representatives of the Petitioners with the result that a proposal was made by the Carrier under Rule 42(g) of the Agreement for non-consecutive rest days—which was accepted by the Petitioners. Petitioners contend that for some reason, unknown to them, no effort was made to put into effect the terms of this Agreement proposed but Carrier, unilaterally, continued the practice that it had commenced on December 17 of augmenting their force of warehouse

labor by the employment of transients. The employes continued filing claims for the days these men were hired but are not including here claims processed prior to Monday, April 22, 1957.

The Carrier claims that it experienced inability in maintaining sufficient, fully manned freighthouse crews which made it necessary to work employes overtime and on their rest days, which was economically unsound, and was confronted with a continuing labor shortage. The volume of freight to be handled on Mondays was quite heavy and under the staggered work arrangements made with the employes there were fewer employes on Monday than on Tuesday through Friday. It became necessary to augment the force on Mondays by employing men referred to Carrier by an employment agency. The Carrier contends that these employes so hired completed applications in the same manner as any other employe; that they were advised of continued need for regular employes and assured them future employment and preference thereto. It is the Carrier's further contention that very few of these men chose to continue employment, preferring to resign at the end of the day worked in order to collect their wages. The Carrier maintains that the plan for nonconsecutive rest days wouldn't have helped the situation as it would still have had to resort to use of men from the employment agency under that plan and so it was abandoned. It is the contention of Carrier that these men employed obtained employment status under Rule 3 of the Agreement, that the Carrier had a right to augment the work forces as it did as it became necessary.

The Carrier had a right to augment its forces at any time is without question. That it experienced difficulty in securing help doesn't justify a violation of the Agreement. Nor can it be seriously controverted that an individual may attain employment status at the time he is hired if he comes within the definition of an employe as contained in Section 1, Fifth, of the Railway Labor Act, as follows:

> "The term 'employe' as used herein includes every person in the service of a Carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) . . ."

It is the firm position of the Petitioners that the individuals here used to perform work on a day not part of any assignment had no intention of placing themselves under the continuing authority of the Carrier nor did the Carrier expect them to do so which was necessary before they could be considered bona fide employes and that Rule 51(f) is applicable and controlling here—

> "(f) Work on Unassigned Days. 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."

It is quite apparent from a perusal of the record that the individuals hired by the Carrier through the employment agency had never intended to become bona fide employes of the Carrier within the contemplation of the Railway Labor Act as is demonstrated by the fact that they resigned after each day's work. From their conduct Carrier either knew or should have known that they had no such intention and were hiring out merely on a daily basis.

The issues presented in this controversy are not new to this Board. In Award 5078 — (Coffey) we note the following:

> "This Board has been long committed to the view that the delegation of work to a class covered by Agreement belongs to those for whose benefit the contract was made. A delegation of such work to others not covered by the Agreement is violative of the Agreement. Awards 3868, 3860, 3955."
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> ". . . Because the work is outside an employe's regular hours of assignment does not grant the Carrier the right to assign the work to persons not covered by the Agreement. Award 4933."
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> "It is with understandable vigor that the Organization opposes hiring persons for one day a week, who, by the very nature of the hiring, owe a divided allegiance to the employer and none to the Organization."

In a sustaining award we find a thorough discussion of issues presented in 6853 (Carter).

The language used in Award 5620 (Robertson) quite succinctly expresses our conclusion in sustaining these claims: "The fact that the Agreement provides the seniority of an employe begins at the time his pay starts does not confer seniority rights upon these transients. . . . All of them terminated their status on the day it began and were again rehired on the same basis. They were not bona fide new employes."

The claim for time and one-half for the work lost cannot be sustained. The penalty for work lost under many awards of this Division is the pro rata rate of the positions.

Since there is implied in the claim a continuing violation of the Agreement and the Board is unable to determine who of Carrier's employes are affected, the case is remanded for adjustment of all claims in accordance with these views.

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 the Agreement has been violated.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December 1962.