Award No. 12688
Docket No. MW-12069

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Lee R. West, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

WESTERN MARYLAND RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement, when, in lieu of calling and using furloughed Chauffeur R. E. Keplinger to fill a temporary position in the chauffeur's class on Forman R. Paugh's B&B Gang during the period from March 16 through April 3, 1959, it assigned and used an employe who holds no seniority rights in the chauffeur's class to fill said position.

(2) Furloughed Chauffeur R. E. Keplinger now be allowed the exact amount of monetary loss suffered account of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Messrs. M. S. Phares and E. H. Carr were each regularly assigned to the position of chauffeur on the Bridge and Building gang under the supervision and jurisdiction of B&B Foreman P. Paugh, with headquarters at Elkins, West Virginia. The gang is divided into two units; one unit, to which one of the aforementioned chauffeurs is assigned, remains at Elkins and performs B&B work in the vicinity thereof, while the other unit, to which the other chauffeur is assigned, is used to perform B&B work elsewhere, departing from Elkins on Monday, the beginning of the work week and returning thereto on Friday, the close of the work week.

On Monday, March 16, 1959, Chauffeur Phares laid off because of illness.

The Carrier, in lieu of calling and using claimant Keplinger, who has established and holds seniority in the chauffeur's class but who was in furloughed status, to fill the aforementioned temporary vacancy, assigned and used B&B Laborer, M. D. Lawrence, who holds no seniority in the chauffeur's class, to fill said temporary vacancy.

The temporary chauffeur's vacancy, occasioned by Mr. Phares' illness, was bulletined on March 25, 1959 and assigned on April 6, 1959 in accordance with the bulletin procedure.

larly assigned laborers and foreman for pay at their respective straight time rates for an equal proportionate share of the total man hours consumed by the extra gang employes. In denying that claim, Referee A. Langley Coffey held:

> "Claim (3) will be denied. The violation, under facts and circumstances of record, appearing to be one of working employes under the same contract out of classification, rather than a clear invasion of another's work domain, we see no need to look beyond the composite service rule in the Agreement for a remedy. Actual overtime not being involved, and there being nothing of record on which to base a finding that the extra gang was worked in place of regular section gang to avoid overtime, Rule 26(g) is not applicable to the facts in dispute."

Mr. Lawrence was properly assigned and compensated in accordance with schedule rules. Therefore, it follows that the claim of Mr. Keplinger lacks validity under the agreement.

The Railway Company's Submission in this case is made to the best of its ability without knowledge of the contents of the Employes' Submission to the Board, and the Carrier reserves the right to file additional data with the Board in rebuttal or reply to the Employes' Submission.

(Exhibits not reproduced.)

OPINION OF BOARD: M. S. Phares and E. H. Carr filled Chauffeur's positions on a Bridge and Building Sub-department gang whose headquarters was at Elkins, West Virginia. M. S. Phares ordinarily remains around the headquarters to work in that vicinity. On March 16, 1959, Mr. Phares went off duty because of illness. His position was not bulletined and awarded until April 6, 1959. From March 16, 1959 until April 1, 1959, Phares' chauffeur's position in the vicinity of Elkins was filled by E. H. Carr, the other chauffeur who ordinarily worked away from Elkins. Carr's ordinary duties included driving the work gang from Elkins to Knobley Tunnel, a distance of about 100 miles, on Monday morning and returning them on Friday afternoon. Each trip requires about 3 hours' driving time. The record does not reflect what duties Carr ordinarily performed in the period between completion of his trip on Monday morning until he begins the return trip on Friday afternoon. Further, the record does not reflect where Carr performed any such interim duties. During the period of March 16, 1959 and April 6, 1959, the job of chauffeuring the work truck to Knobley Tunnel on Monday morning and from Knobley Tunnel on Friday afternoon was assigned to one M. D. Lawrence, a bridgeman. In the interim, a period of about 34 hours of the week, Lawrence fulfilled his regular duties on the work gang as a bridgeman.

The Organization contends that the assignment of the chauffeuring work to Lawrence constitutes the filling of a chauffeur's position by an employe who holds no seniority in the Chauffeur's Class and violates the Agreement. It is the Organization's contention that Claimant, a furloughed chauffeur, should have been used to fill such position and that Carrier should be required to compensate him for the monetary loss he suffered on account of their failure to assign him.

The Carrier argues that Lawrence was not used to "fill the position" of a chauffeur. They point out that he worked approximately 34 hours of each week at his regular duties as a bridgeman and only performed chauffeuring duties for a period of approximately 6 hours per week.

It appears that the position vacated by Phares' illness was almost completely blanked by the Carrier. The Organization does not argue that this violates the Agreement, but instead only argues that such a position was "filled" by Lawrence when it should have been filled by Claimant. We are unable to agree that a bridgeman, who performs his regular duties for approximately 34 hours of each week, "fills" a chauffeur's position by driving the work truck for approximately 6 hours a week for a brief period of time. It therefore follows that the Claimant does not have a valid claim for the entire period that the vacancy existed.

The more perplexing problem involves Claimant's right, as a furloughed chauffeur, to the chauffeuring work actually performed by Lawrence, a bridgeman. The Carrier contends that Lawrence, the bridgeman, only performed chauffeuring work which was incidental and secondary to his work as a bridgeman. Carrier contends that under such circumstances, Rule 35 authorizes them to cross class lines in assigning chauffeuring work to a bridgeman. Rule 35 provides:

> "**Rule 35. COMPOSITE SERVICE**—An employe working on more than one class of work on any day, will be allowed the rate applicable to the character of work preponderating for the day, except that when temporarily assigned by the proper officer to lower rated positions, when such assignment is not brought about by a reduction of force or request or fault of such employe, the rate of pay will not be reduced.
>
> "This rule not to permit using regularly assigned employes of a lower rate of pay for less than half of a work-day period, to avoid payment of higher rates.
>
> "Work coming under this Rule is classified and defined in Rule 43, Paragraphs (a) and (b)."

The Organization argues that such an interpretation of Rule 35 would undermine seniority and its proper application by destroying the significance of seniority classifications except with regard to pay. To support their position with regard to the significance of seniority, it quotes from Award 604 as follows:

> "This Board, and others, have held, in many decisions, that work of a class covered by the agreement belongs to the employes upon whose behalf it was made and cannot be delegated to others without violating the agreement."

The Organization contends that the chauffeuring work here assigned to a bridgeman clearly crosses class lines in violation of the seniority classifications which established classes as chauffeurs and bridgemen. It argues that Rule 35 may not be applied so as to violate these seniority provisions and classifications established by the Agreement. The Organization quotes from Award 6562 as follows:

> "This Division has repeatedly ruled that Rule 7 and similar rules on other railroads is a 'rating rule' to preserve wage rates, and does not authorize a Carrier to ignore its obligations under another specific rule of an agreement. (See Award 6015)."

We agree with the Organization. We do not feel that the 6 hours of

chauffeuring in this case was incidental and secondary to the bridgeman's work. In a certain sense, all chauffeuring work can be said to be secondary or incidental to some primary or ultimate task. However, this does not prevent work from being classified as primarily chauffeuring work. We believe that the driving of a work gang to a work site approximately 100 miles away, requiring about three hours' time is clearly chauffeuring work.

We further agree that Rule 35 should not be used to undermine the significance of seniority classes where they are clearly discernible as here, between chauffeuring work and bridgework. We approve of the language in Award 6562 with regard to the purpose and effect of Rule 35. Admittedly, there are some situations where the Carrier is authorized to use an employe to do work of another class. In such situations, Rule 35 provides the measure of compensation. However, we do not believe that such rule authorizes the Carrier to disregard the seniority rights of Claimant, in work which clearly belonged to a chauffeur, as it did in this case.

Since Carrier wrongfully assigned an employe not classified as a chauffeur to do six (6) hours of chauffeuring work per week in violation of the Agreement, Claimant should be compensated for such time at the pro rata rate.

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 has been violated.

AWARD

The claim is sustained to the extent of allowing Claimant pay for six hours each week from March 16, 1959 to April 6, 1959.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1964.