Award No. 14299
Docket No. CL-12690

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

G. Dan Rambo, Referee

PARTIES TO DISPUTE:

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

THE DENVER UNION TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4950) that:

(1) Terms of the current Agreement were violated when on May 7, 8, 14, 15, 16, 21, 22, 28 and 29, 1960, an employe holding no seniority, i.e., Miss Judy Modglin, performed extra work in Ticket Office.

(2) That on the dates above mentioned Miss Modglin was not a bona fide employe.

(3) That Miss Hattie Anfang be paid a day's pay for May 7, 8, 14, 15, 28 and 29, 1960.

(4) That Elizabeth Cella be paid a day's pay for May 16, 1960.

(5) That Mrs. Jessie Frank be paid a day's pay for May 21 and 22, 1960.

EMPLOYES' STATEMENT OF FACTS: Under date of May 6, 1960, Mr. T. A. Mitchell, Ticket Agent at Denver Union Terminal Railway Company posted the following notice:

"All Employees:

'We all know that the phones are busier on Saturday and Sundays than any other days because of the City offices closed. I also know that we can only do our best these days. Tomorrow Sat. the 7th we have a new clerk coming in to work Sat. and Sundays only. She is Judy Modglin. All of you be as helpful as possible like you

(Exhibits not reproduced.)

OPINION OF BOARD: On May 6, 1960, Carrier, Denver Union Terminal Railway Company, announced the impending employe of a Miss Judy Modglin, a new employe who would work in the Ticket Office of Carrier on unassigned days, i.e. Saturdays and Sundays. The subject work was normally performed by Claimants herein on 5-day positions established according to the subject Agreement under which these grievances are brought.

Miss Modglin, a student, reported to work on May 7, 1960, and worked May 7, 8, 14, 15, 16, 21, 22, 28 and 29, 1960, all of which days were Saturdays and Sundays with the exception of May 16, 1960, a Monday and a normally assigned day.

On May 7, 1960, her first day of employment, she also filled out a form representing herself as a furloughed employe available for extra work.

Both parties point to Rule 40(f) of the Agreement:

> "(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."

Carrier stands on the position that she was "extra" within the framework of the Rule, being previously unassigned; that she was qualified as to training and ability since there is no evidence that she did not properly perform the duties assigned; that she was available since she performed all extra work for which she was called (one day — May 16, 1960); that she accumulated seniority from the day her pay started under Rule 3(a) of the Agreement; that in sum she was a bona fide employe.

Carrier further points out that no restriction exists in the Agreement on the hiring of extra employes and the point is well taken that prerogatives of management not bargained away are retained; that it is an attribute of management to determine what overtime shall be necessary or extra employes temporarily needed.

There is no question here that the Carrier thought "overtime", i.e. Saturday and Sunday continuation of a normal 5-day assignment, was necessary since Miss Modglin was hired to perform that work. But what about Carrier's general right to hiring of extra employes, temporary or otherwise, to do such work? Such right must be exercised in light of those points which have become the subject of special agreement, in this instance Rule 40(f).

Rule 40(f) has been the subject of and defined by many awards of this Division. See Awards 5240, 5558, 5620, 6259, 6853, 6854, 6974, 6997, 6999, 13142, 13824, 14029.

Award 5240 has said that "available" intended the concept of proper seniority standing. Award 5558 is the landmark award on the subject. It has been followed by all other listed awards and is controlling here. In part, it says:

"We think the Carrier is in error when it states that 'an available extra or unassigned employe' as used in Rule 17 (f) includes a person who had no seniority standing under the controlling agreement prior to September 1, 1949. Clearly this provision means that an employe holding seniority who is not working, or one who has worked less than 40 hours of work that week, shall be used before the regular employe can claim the work as his at the rest day rate. This identical question was determined by this Board in Award 5240. The hiring of persons without any seniority rights for less than five days per week to perform relief work belonging under an agreement because the work was not a part of an assignment under Rule 17 (f) could, if sustained, cause serious injury to the rights of employes holding seniority under a collective agreement. No such result was intended by the 40 Hour Week Agreement. To permit persons 'off the street' to do such work poses such a grave question involving the value of collective agreements that this Board will sustain it only when the controlling agreement so provides or, in the case before us, if the Emergency Board responsible for the drafting of the 40 Hour Week Agreement interprets it to mean otherwise by a formal interpretation of the intended meaning of the language used. If it was the intention of the parties in drafting the agreement to permit the use of persons holding no seniority rights to perform relief work covered by Rule 17 (f), the English language contains adequate words to have plainly expressed such an intent. The language used clearly expresses an intent contrary to Carrier's interpretation of the rule. * * *."

Serial No. 133, Interpretation No. 1 to Award No. 5558

"* * * We therefore interpret the award as it affects Cases 1, 2, 6 and 7, as meaning that a continuing violation existed until an extra or unassigned employe was assigned who, at any time **prior to such assignment,** had acquired seniority under the controlling agreement. Unless and until such an assignment is made, the regular employe whose rest day is involved is entitled to perform the work." (Emphasis supplied).

Carrier's agrument that seniority accrued from May 7, 1960 under Rule 3(a) of the Agreement has been dealt with in Award 5620, which states:

"* * *. The fact that the Agreement provides that seniority of an employe begins at the time his pay starts does not confer seniority rights upon these transients. * * *. They were not bona fide new employes (See Awards 4495, 5501, 5558, 5078). * * *."

Thus, she could not have been a bona fide "extra" employe.

The fact that Miss Modglin was a student is not controlling, since it has been held in many similar cases that the fact of outside or other employment, even fulltime employment, does not of itself rule out bona fide employe status, but there as here other duties which would make her available to protect the service for which she may be called is persuasive that she is not a bona fide employe.

In final disposal of the question of bona fide employment herein, the following is taken from Carrier's rebuttal statement submitted herein;

". . . The Employes', in the last sentence in the above referred to paragraph, state:

> 'The fact that Miss Modglin quit the employment of the Carrier and returned to school at the end of the summer vacation gives further emphasis and proof that she was not available for work until school year was over, except on Saturday and Sunday.'

"With respect thereto Carrier asserts that this further proves and substantiates the fact that Miss Modglin was a bona fide employe inasmuch as **when she again returned to school she knew she could not be available for all extra work and, therefore, tendered her resignation** with this carrier." (Emphasis supplied.)

That is to say she returned to the status which she occupied during the period at issue. Thus, she could not have been a bona fide furloughed employe.

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 Carrier violated the Agreement.

AWARD

The Claims are sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1966.

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