



Award No. 17152

Docket No. CL-16271

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nicholas H. Zumas, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAIL-
ROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5995) that:

1. Carrier violated the rules of the Clerks' Agreement at Bensenville, Illinois when it failed to use employe John Padour to fill Utility Clerk Position No. 456 on Wednesday, April 28th, and Thursday, April 29, 1965.
2. Carrier shall be required to compensate employe John Padour for eight (8) hours at the overtime rate of Utility Clerk Position 456 for Wednesday, April 28th and Thursday, April 29th, 1965.

EMPLOYEES' STATEMENT OF FACTS: Employe John Padour is the regular occupant of Utility Clerk Position No. 456 at Bensenville, Illinois with hours and days of assignment of 3 P.M. to 11 P.M. Friday through Tuesday, with Wednesday and Thursday rest days.

Utility Clerk Position 456 is a 7-day position; however, the rest days of the position were unassigned days and since his assignment to Position 456 by Bulletin No. 122 dated March 22, employe Padour has been used to fill Position 456 on his assigned rest days on an overtime basis.

Mr. J. Mullens is an employe of the Milwaukee Motor Transport Company. He holds no seniority under the Clerks' Agreement and is not covered thereby.

For a period of several days beginning on or about April 24, 1965, he was prevented from working on his regular job with the Milwaukee Motor Transport Company as result of Mississippi River flooding conditions which restricted movement of Flexi vans of that company.

During this period he performed service for the Carrier on five days as follows: April 26, 27, performing extra work in the Yard Office; April 28 and 29 rest day relief work on Position 456; and May 1, 1965 filling Position No. 459.

Only two days, Wednesday and Thursday, April 28th and 29th, 1965 are involved in this dispute.

temporary new position nor were there any qualified furloughed employees available to fill same, therefore, the Carrier exercised its inherent right to employ someone for the temporary new position under such circumstances and John C. Mullen, after making formal application for employment, was employed therefor.

Rule 3(a) reads in pertinent part as follows:

"Seniority begins at the time an employee's pay starts in the seniority district and on the roster to which assigned."

In accordance with aforementioned Rule 3(a), when the Carrier hired John C. Mullen for the temporary new position on April 26, 1965, for which there were no requests under the provisions of Rule 9(g) and for which there were no qualified furloughed employees available, and when he performed service thereon on April 26 and 27, 1965 he immediately established a seniority date on April 26, 1965.

Claimant John Padour is the regularly assigned occupant of Utility Clerk Position No. 456 in Seniority District No. 30 which is assigned from 3:00 P.M. to 11:00 P.M. from Friday through Tuesday with Wednesday and Thursday as rest days.

The Wednesday and Thursday rest days of claimant Padour's regularly assigned Position No. 456 are not included in a regular rest day relief assignment, but instead are days which are not a part of any assignment and are filled in accordance with the provisions of Rule 28 which reads as follows:

"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 employee who will otherwise not have 40 hours of work that week; in all other cases by the regular employee."

The Wednesday, April 28 and Thursday, April 29, 1965 rest days of claimant Padour's regularly assigned Position No. 456 were filled by available extra or unassigned employee Mullen, who did not otherwise have 40 hours of work that week, in accordance with the specific provisions of aforementioned Rule 28.

Extra or unassigned employee Mullen filled Position No. 459 on May 1, 1965, after which he submitted a written resignation giving as the reason for leaving Carrier's service "Recalled to Milwaukee Motor Transportation Company" where he had been previously laid off.

There is attached hereto as Carrier's Exhibit "A" copy of letter written by Mr. S. W. Amour, Assistant to Vice President, to Mr. H. C. Hopper, Acting General Chairman, under date of September 16, 1965.

OPINION OF BOARD: The Organization contends that Carrier violated the Agreement between the parties when it failed to use the regularly assigned employee and instead utilized the services of a non-employee, Mr. J. Mullens.

Preliminary to a proper determination of this dispute is the necessity for the Organization to prove that Mr. J. Mullens was not an employee on the dates in question. The record does not support the Organization's allega-

tion that Mr. Mullens was not an employe, and for that reason its claim must fail.

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 was not violated.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of May 1969.