

Award No. 18696
Docket No. CL-19099

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

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

**UNION PACIFIC RAILROAD COMPANY
(South-Central District)**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6877) that:

1. The Carrier violated or caused to be violated the currently controlling agreement between the parties to this dispute when on September 20 and 27, 1969, October 4, 11 and 18, 1969, Carrier failed to utilize the services of the incumbent of the position of General Clerk No. 9, with hours of 8:00 A.M. to 4:30 P.M., at the Rail Trailer Ramp, Los Angeles, California, and in lieu thereof, utilized the services of Mr. D. G. Trader, General Clerk No. 3 at the over-time rate of pay.

2. Carrier shall now be required to compensate Claimant Dale L. Moore for wage loss suffered by him due to this violation of the Agreement as follows:

9'30" September 20, 1969	8 A. M.-6 P. M. at rate of \$575.29 per WDM
5'30" September 27, 1969	8 A. M.-2 P. M. at rate of \$575.29 per WDM
6'30" October 4, 1969	8 A. M.-3 P. M. at rate of \$575.29 per WDM
8'30" October 11, 1969	8 A. M.-5 P. M. at rate of \$575.29 per WDM
7'30" October 18, 1969	8 A. M.-4 P. M. at rate of \$575.29 per WDM

NOTE—WDM Stands for Work Day Month.

EMPLOYEES' STATEMENT OF FACTS: Claimant, D. L. Moore, is in the employ of the Carrier in the capacity of General Clerk, a position encompassed by the Agreement between the Brotherhood of Railway, Airline and Steamship Clerks and the Union Pacific Railroad Company which he holds by virtue of his employment status on seniority District No. 91, such assignment being temporary in nature.

On September 20 and 27, 1969 and October 4, 11 and 18, 1969 Carrier, due to the press of business, found it necessary to work the position of

In submitting the claim on behalf of extra Clerk Moore, the Organization has relied upon Rules 38 and 41(1) in support thereof. Those rules read as follows.

"RULE 38. OVERTIME. (a) Except as otherwise provided in these rules, time on duty in excess of eight (8) hours, exclusive of the meal period, on any day will be considered overtime and paid on the actual minute basis at the rate of time and one-half.

(b) Employees will not be required or permitted to suspend work during assigned hours to absorb overtime.

(c) No overtime hours shall be worked except by direction of proper authority, except in cases of emergency where advance authority is not obtainable. In working overtime before and after assigned hours, employees filling the particular positions on which overtime is required will be used."

RULE 41. 40-HOUR WEEK. * * * (1) 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 employee who will otherwise not have 40 hours of work that week; in all other cases by the regular employee."

On November 2, 1969, the Organization's Local Chairman appealed the claim to the Carrier's Supervisor of Wage Schedules (Carrier's Exhibit "A") and on November 18, 1969, the Supervisor of Wage Schedules denied such appeal (Carrier's Exhibit "B").

On December 3, 1969, the Organization's General Chairman appealed the claim to the Carrier's Assistant to Vice President (Carrier's Exhibit "C") and on January 6, 1970, the Carrier reiterated its denial decision (Carrier's Exhibit "D").

The claim was subsequently reviewed in conference by the parties at Salt Lake City, March 27, 1970. No agreement was reached and the Organization again propounded its allegation in letter to the Carrier dated April 17, 1970 (Carrier's Exhibit "E").

(Exhibits not reproduced.)

OPINION OF BOARD: Effective Monday, September 8, 1969, Claimant was temporarily assigned by Carrier to the position of General Clerk No. 9. Prior to this assignment and between the dates of September 6, 1969, and September 15, 1969, Claimant established "Employment Status" with Carrier and was used to fill temporary vacancies. The need arose for the services of a General Clerk on Saturday, September 13 - a rest day of Claimant. Claimant was used on that date, but another employee was called and used on subsequent Saturday Claim dates. The other employee so used was the regular incumbent of the position of General Clerk No. 3. Claimant herein did not establish a seniority date until October 29, 1969. The Organization contends that under Rule 18, Carrier was contractually bound to utilize the services of Claimant on the dates in question. Carrier contends Claimant was not qualified to perform the overtime work; that Claimant was not a regular employee and was not the senior available and qualified employee at the location where the work was performed; that Claimant was an extra or

unassigned employe who had already worked 40 hours during the 5 days preceding each of the involved claim dates; and that Claimant did not become a regular employe until October 9, 1969, when assigned by bulletin to Yard Clerk Position No. 6.

It is axiomatic that Carrier has the discretion and prerogative to determine the fitness and ability of an employe, unless contractually restrained. It is also generally accepted that Carrier's discretion of matters of determination of fitness and ability will not be disturbed unless Carrier has acted arbitrarily and capriciously. In the instant dispute, Claimant did not obtain seniority until October 29, 1969. Prior to that date, which includes the claim dates, Claimant had established "Employment Status" and was on temporary assignment to the position of General Clerk No. 9. As a temporary employe on employment status only, Claimant was not a regular employe. Therefore, Carrier had the discretionary right, unencumbered by contractual mandate, to determine the fitness and ability of Claimant for the solitary duty involved on the claim dates. The Organization had the burden in this dispute of showing that Carrier acted arbitrarily and capriciously in its discretion of whether or not to use Claimant on the involved claim dates. The Organization has failed to sustain this burden. The record reflects that Carrier, by using the services of this Claimant, as General Clerk on Saturday, September 13, a rest day of Claimant, gave Claimant every opportunity to prove his fitness and ability to work alone on the position in dispute. This Claimant did not measure up to the standards required, and was, therefore, not used on the disputed dates. Not being a regular employe on the claim dates, Carrier did not abuse its discretion nor did it act arbitrarily or capriciously in determining Claimant's lack of fitness and ability. Claimant did not become a regular employe until October 9, 1969, when assigned by bulletin to Yard Clerk Position No. 6. This claim will be denied.

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.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 10th day of September 1971.

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