

PUBLIC LAW BOARD NO. 3055

Parties: Railroad Yardmasters of America
and
Chesapeake & Ohio Railway Company

Statement of Claim: "Claim of behalf of Yardmaster R. D. Judy, Walbridge, Ohio for one yardmaster pro-rata day for August 27 and 28, 1979 account not being allowed to take 10:30 PM - 6:30 AM Hump Yardmaster position after requesting same."

Background: The Rule here in issue is Rule 5, captioned
"Seniority, Reduction, etc." and it states in:

"(e) After a new position has been on for two consecutive calendar days, the senior regular employee declaring there-fore at least ten hours prior to the starting time on the third day will be assigned."

The operative facts giving rise to the claim are the 10:30 PM Walbridge Hump Position had been cut off on August 18, 1979 due to lack of business. The job operated on August 25 and 26, 1979 which the Carrier maintained was on a temporary basis. On August 27 and 28 no yardmaster was called to fill the position. On August 29 and 30, 1979 the Carrier states the job again worked extra. On September 1, 1979 the job was reestablished on a regular basis. The Claimant made application for this Hump job on August 27, 1979, at 6:30 AM, but his application was rejected.

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Organization's Position

The Organization asserts that, while it recognizes the Carrier possesses the managerial authority to determine when a position may be established, however, under the contract when a position has worked for two days, the senior yardmaster may declare for the position at least 10 hours prior to the starting time of the third day. The Organization maintains the starting time is established when the position works on the first of two consecutive calendar days, and the fact that it does not work on the third day does not change the rule or its intent. It is undisputed the position in question worked on August 25 and 26. The Claimant stated the fact the job did not work on the third day is immaterial. The signal fact is that the job worked on August 25 and 26 and the Claimant filed for the job on the third day.

The Organization states that the Claimant does not have to engage in a guessing game to determine which is the third day on which the Carrier will make up its mind to continue the position. The Organization adds that the Carrier's theory would allow the Carrier to make any number of false starts, even for ten or twenty days, and none of them will count because that is what Rule 5(e) means according to the Carrier. The Organization maintains this Rule does not imply that the Carrier has to have the intent to work the job on the third day.

The Organization concedes that it is possible that the administration of this Rule may inconvenience or cause difficulty to the Carrier, but the way to correct such a situation is by negotiations rather than by violating the Rule.

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The Organization states the Rule means what it states, and since the Claimant complied with "its terms," the claim should be sustained.

Carrier's Position

The Carrier denies that it violated Rule 5(e) because this Rule does not apply to jobs that are worked temporarily or intermittently. The Rule does not compel the Carrier to establish a job that it does not want or need. The Carrier stresses that "new position" in this Rule refers only to regularly established positions. Moreover, the Rule does not compel the Carrier to put on any regular yardmaster assignment, but only describes the procedure to be followed in the event it should decide to create the new position. The Carrier adds that if it was the intent of the Agreement to encompass temporary positions and force the Carrier to establish a permanent position after working an extra assignment only two days, then the Agreement would have so stated. It is a managerial prerogative to determine when a new position will be established.

The Carrier notes that the Organization has not contended the term "new position" includes temporary or intermittent assignments. The Carrier, on the other hand, insists that it has always asserted the term applies to regularly established positions, and since there was no such position there is no valid basis to the claim. The Carrier emphasizes that allegations are not proof and the Organization has not proved the Carrier established any permanent position.

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The Carrier notes that the position did not exist on August 27 and 28, and therefore it cannot be maintained there was a regular position for which the Claimant could exercise his seniority. The Carrier asserts that the job was not established until September 1, 1979 and therefore there is no contractual basis for the claim and it should be denied.

Findings: The Board, upon the whole record and all the evidence, finds that the employee and Carrier are Employee and Carrier within the Railway Labor Act; that the Board has jurisdiction over the dispute and that the parties to the dispute were given due notice of the hearing thereon.

The Board finds the Organization's position more persuasive in this case than that of the Carrier. The Carrier's position would require the affected employee to engage in an analysis of the Carrier's mental state when it "re-established" a previously abolished job or created a new job. We find that Rule 5(e) does not impose such a burden on the affected employee. While we find that a Carrier may institute a temporary or intermittent position on an ad hoc basis, the Carrier then has the responsibility to make it signal clear that it is establishing an extra job and not a new permanent position. However, if the Carrier establishes a "new" position and operates it without more, a senior yardmaster would be justified in exercising his seniority for this apparently new job on the third day, giving, of course, the prior requisite notice.

The Board finds that, absent a clear and overt indication by the Carrier that it is not establishing a regular permanent

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position, an employee who was aware that the Carrier was operating the said job for two consecutive calendar days, could not know when he could avail himself of his Rule 5(e) contractual rights.

The Board finds merit in the Organization's observation that if the literal language of Rule 5(e) creates operational problems for the Carrier, the latter should seek to negotiate a rule that is responsive to its operational problems.

Award: Claim sustained.

Order: The Carrier is directed to comply with the Award,
on or before April 4, 1982.

Jacob Seidenberg
Jacob Seidenberg, Chairman and Neutral Member

W. C. Comiskey
W. C. Comiskey, Carrier Member

R. C. Arthur
R. C. Arthur, Employee Member

March 3, 1982