# Award No. 5421

# Docket No. MW-5446

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Jay S. Parker, Referee.

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## PARTIES TO DISPUTE:

## BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

## BOSTON AND MAINE RAILROAD COMPANY

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

(1) That the Carrier violated the effective agreement when it compensated Assistant Foreman John Grimes at the pro rata rate for eight (8) hours service rendered on Sunday, August 14, 1949.

(2) That Assistant Foreman John Grimes be paid the difference between what he did receive at his straight time rate of pay and what he should have received at his time and one-half rate of pay for service referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Prior to August 8, 1949, Assistant Foreman John Grimes was regularly assigned to Extra Crew No. 4.

Effective August 8, 1949, the position of Assistant Foreman at emergency headquarters, became temporarily vacant because the regular Assistant Foreman was on vacation.

The position of Assistant Foreman in Extra Crew No. 4 was regularly assigned to work Monday through Saturday. The position of Assistant Foreman at emergency headquarters was regularly assigned to work Monday through Sunday.

The position held by the Assistant Foreman in Crew No. 4 paid the time and one-half rate for Sunday work.

The position held by the Assistant Foreman at emergency headquarters paid the straight time rate for Sunday work.

During the period of time that the Assistant Foreman at emergency headquarters was absent on vacation, Assistant Foreman John Grimes was required to cover the position. On Sunday, August 14, 1949, Assistant Foreman John Grimes worked a total of 12 hours. For this service he was compensated at his overtime rate of pay for a period of 4 hours and at his straight time rate of pay for a total of 8 hours.

while filling the position in precisely the same manner (seven (7) days at pro rata rate) as the regular incumbent, on the accepted double barreled theory that Carrier should not be required to assume extra expense due to granting vacation to the regular incumbent and that an employe assumes the conditions of the position to which he is temporarily assigned, including rest days, if any. In this case, the position had no rest days. The practice, concurred in by the employes should not now be disturbed. Petitioner has offered no rule which will support this claim and it should be denied.

**OPINION OF BOARD:** Prior to August 8, 1949, Assistant Foreman John Grimes was regularly assigned to Carrier's Extra Crew No. 4, six days per week, Monday through Saturday, with Sunday as a rest day. S. Loriano, Assistant Foreman, regularly assigned at Emergency Headquarters, seven days a week at the pro rata rate, including Sundays, was granted a vacation under the Vacation Agreement from August 8, 1949 to August 14, 1949. Grimes, who was the senior qualified Assistant Foreman, was notified to and filled the temporary vacancy at Emergency Headquarters on the above dates, inclusive. Sunday, August 14, 1949, he worked a total of 12 hours and was compensated at the overtime rate for four hours at the straight time rate for 8 hours. The next day he returned to his regularly assigned position on Extra Crew 4 and Loriano, who was back from vacation, worked on the duties of his own position. Shortly thereafter the instant claim, for the difference between what Grimes was paid and what he would have received if he had been paid at the overtime rate for the 8 hours of the day in question, was filed with the Carrier and denied. Hence this dispute.

The fact it is conceded Claimant was required to work on Sunday, the rest day of his regularly assigned position and that Rule 28(A) of the current Agreement provides "Except as otherwise provided herein, employes who are required to work on Sundays . . . shall be compensated therefor at the rate of time and one-half," establishes a prima-facie case.

The Carrier's first defense is based on custom and practice which, without proof, it asserts has existed for several years. In its rebuttal the Organization denies this by stating that to the best of its knowledge no regularly assigned employe, holding a regular Monday through Saturday assignment, has ever been required to work on Sunday at the straight time rate of pay. So far as the record shows Grimes was assigned without application, agreement or consent. Custom and practice is a defense which must be proved by evidence when traversed. Mere assertions of its existence when denied to not suffice to meet the burden of proof placed on the party asserting it. Therefore Carrier's contention on this point fails for want of evidence to sustain it.

Next it is argued the quoted provision of Rule 28(A), supra, has no application because of 28 (B) (III). There is little merit to this contention. The provisions of 28 (B) including subsections 1, 2 and 3 have application only to positions established on a seven-day calendar basis. What we are concerned with here is whether claimant, who held a regularly assigned 6 day position, was entitled to pay at the punitive rate when required to temporarily perform work on another position on the established rate of his own position.

Finally it is contended the Vacation Agreement of December 17, 1941, provides, and interpretations thereof reveal, that in a situation such as is disclosed by the record Sunday vacation work performed by any employe will be paid for at the straight time rate. Unless otherwise indicated succeeding paragraphs of this Opinion will have reference to that contention.

The principle, that in an instance where there is a conflict between the Vacation Agreement and the Rules Agreement the terms and conditions of the Rules Agreement control until such time as it is modified or changed by the parties thereto, is so well established that it hardly requires citation of the decision supporting it. See, e.g., Awards 5108, 4690 and 3785. In the instant case it is clear the current Agreement contains nothing to modify the

requirement of the heretofore quoted rules that the holder of a six-day position required to work on Sunday shall be paid the punitive rate. Therefore, assuming without deciding that Section 10 (a) of the Vacation Agreement is to be construed as the Carrier construes it, i.e., that any employe claimant's situation, regardless of the existing status of his own position, can be temporarily assigned to fill the position of an employe on vacation and required to accept the straight time rate for Sunday work, there appears to be a conflict in the rules of the two Agreements that cannot be reconciled. Applying the foregoing principle this would mean the quoted provisions of Rule 28 (A) prevail. Even so we are not disposed to base this Opinion entirely upon that premise.

Claimant, who had bid in and was the holder of a regularly assigned position, was entitled to all its benefits and privileges. One of its advantages was Sunday as a day of rest. Another was the right to be compensated at the punitive rate if he was required to work that day. In the absence of agreement he could not be arbitrarily shifted about from one position to another in such a manner as to deprive him of the rights of his position and we do not believe the Vacation Agreement contemplates any such result. We have said many times that regular assignments should not be disturbed except as a last recourse. There was a recourse here. The Carrier could have provided relief workers. Indeed Rule 6 of the Vacation Agreement expressly requires it. So far as the record shows it made no effort to do so. For that matter it does not appear it made any effort to assign occupants of seven-day positions who, under the Agreement, would not have been entitled to the overtime rate to the position. Instead it chose a course which resulted in depriving claimant of the privileges of his own regularly assigned position.

The Carrier argues Section 12 (a) of the Vacation Agreement provides the Carrier shall not be required to assume greater expense because of granting a vacation than would be incurred if one had not been granted. Quite true but that does not mean it cannot choose to follow a course which has the result of putting it to greater expense. It then argues that if it had not assigned claimant he would have made a claim and it would have been subjected to a penalty because of the provisions of 12 (b) of the same Agreement providing that when a regular employe is not utilized effort will be made to observe a principle of seniority. We do not agree. In Award 5108 we denied the claim of a senior employe who claimed the right to work a vacation position on Sunday and held the effort to observe the princple of seniority required by the terms of such section has application to employes who are so situated they would be able to work the position of a vacationing employe without subjecting the Carrier to payment of overtime under other rules of the Rules Agreement.

Lastly, the Carrier insists the interpretation of Referee Morse, appearing in the last paragraph of Page 10 of the Vacation Agreement and Interpretations, is contrary to our conclusion. Again we must disagree. That interpretation did not deal with Sunday work and is clearly distinguishable.

We are convinced that under the existing conditions and circumstances as heretofore related the Carrier violated the Rules Agreement and that under its terms claimant should have been paid the overtime 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 Employe involved in this dispute are respectively Carrier and Employe 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

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 8th day of August, 1951.