Award No. 6018
Docket No. CL-5961

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement:

1. When on the dates of—

Sunday, July 1, 1951	Saturday, July 21, 1951
Saturday, July 7, 1951	Sunday, July 22, 1951
Sunday, July 8, 1951	Saturday, July 28, 1951
Sunday, July 29, 1951	

it utilized the services of H. C. Melton to work either as Warehouse Laborer (Group 3—Clerks' Agreement) or as Check Clerk (Group 1—Clerks' Agreement) on the warehouse platform which service was in excess of 40 hours in the work week starting on Monday and continuing through Sunday for an extra or unassigned employe, or utilized the employe to work on its St. Louis warehouse platform on Sunday, and failed and refused and continued to refuse to compensate the employe other than on the straight time or pro rata basis.

2. H. C. Melton shall be compensated in the amount of difference in the pro rata rate which he was paid by the Carrier and the punitive rate to which he was justly entitled for work performed on Sunday and/or on the sixth and seventh day of each work week for an unassigned employe, as shown in the Statement of Claim attached hereto and made a part hereof.

STATEMENT OF CLAIM—H. C. MELTON—REVISED AND CORRECTED

Claims:

1. Sunday, July 1, 1951—Seventh Street Station—Worked as Stowman, (Warehouse Laborer) 8 hours, paid straight time $1.545 per

hour—$12.36. Work performed on Sunday at the St. Louis warehouse platform requiring payment at punitive rate—

Claim—Difference in $12.36 and 8 hours @ $2.317 per hour punitive rate—$18.54 ..... $6.18

2. Saturday, July 7, 1951—Biddle Street Station—Worked as Clerk, 8 hours, paid straight time at $1.695 per hour—$13.56. Work in excess of 40 hours and on the sixth day in the work week, Monday, July 2 through Sunday, July 8, 1951 for an unassigned employe requiring payment at punitive rate—

Claim—Difference in $13.56 and 8 hours @ $2.5425 per hour punitive rate—$20.34 ..... $6.78

3. Sunday, July 8, 1951—Seventh Street Station—Worked as Picker (Warehouse Laborer) 8 hours, paid straight time $1.54 per hour—$12.32. Work on Sunday and/or work in excess of 40 hours and on the seventh day in the work week, Monday, July 2 through Sunday, July 8, 1951, for an unassigned employe requiring payment at punitive rate—

Claim—Difference in $12.32 and 8 hours @ $2.31 per hour punitive rate—$18.48 ..... $6.16

4. Saturday, July 21, 1951—Gratiot Street Station—Worked as Picker, (Warehouse Laborer) 8 hours, paid straight time $1.54 per hour—$12.32. Work in excess of 40 hours and on the sixth day of the work week, Monday, July 16, 1951 through Sunday, July 22, 1951 for an unassigned employe requiring payment at punitive rate—

Claim—Difference in $12.32 and 8 hours @ $2.31 per hour punitive rate—$18.48 ..... $6.16

5. Sunday, July 22, 1951—Seventh Street Station—Worked as Picker, (Warehouse Laborer) 8 hours, paid straight time $1.54 per hour—$12.32. Work on Sunday and/or work in excess of 40 hours and on the seventh day of the work week, Monday, July 16, 1951 through Sunday, July 22, 1951 for an unassigned employe requiring payment at punitive rate—

Claim—Difference in $12.32 and 8 hours @ $2.31 per hour punitive rate—$18.48 ..... $6.16

6. Saturday, July 28, 1951—Seventh Street Station—Worked as Picker (Warehouse Laborer) 8 hours, paid straight time $1.54 per hour—$12.32. Work in excess of 40 hours and on the sixth day of the work week, Monday, July 23, 1951 through Sunday, July 29, 1951 for an unassigned employe requiring payment at punitive rate—

Claim—Difference in $12.32 and 8 hours @ $2.31 per hour punitive rate—$18.48 ..... $6.16

7. Sunday, July 29, 1951—Seventh Street Station—Worked as Picker (Warehouse Laborer) 8 hours, paid straight time $1.54 per hour—$12.32. Work on Sunday and/or work in excess of 40 hours and on the seventh day of the work week, Monday, July 23, 1951 through Sunday, July 29, 1951 for an unassigned employe requiring payment at punitive rate—

Claim—Difference in $12.32 and 8 hours @ $2.31 per hour punitive rate—$18.48 ..... $6.16

Claims (1) to (7) inclusive $43.76

not it would be permissible under the Clerks' Agreement to work such employes more than 40 hours in a week. And the fact still remains that it dealt only with combinations of service in Groups 1 and 2 while the service involved in this dispute was in Groups 1 and 3.

(Exhibits not reproduced).

OPINION OF BOARD: There is an Agreement between the parties, effective July 1, 1943, which has been revised by a Memorandum Agreement, dated January 20, 1950, to conform with the National 40-Hour Week Agreement.

The Claimant, H. C. Melton, has seniority in two separate seniority groups at Carrier's Freight Station Warehouse, St. Louis, Missouri, under the current Agreement, namely Groups 1 and 3 and, except for the first three days of the week commencing June 26, 1951, while he held a regular Group 1 Check Clerk position, was a furloughed employe on all dates here in question, holding no regular assignment but retaining his seniority rights in each of such groups. As a furloughed employe his work week was a period of seven consecutive days starting with Monday as provided in Rule 21, Section 2 (i).

The claim is for four Sundays and three Saturdays, during the interim between June 25, 1951 and July 29, 1951, at the rate of time and one-half and is of such nature that the activities of Claimant during such period should be decribed at some length.

At the outset it should be stated in interest of clarity that it is conceded the work performed on the Saturdays and Sundays in question was no part of any assignment and that, except for July 4 when he was paid at time and one-half rate, Melton was paid at the pro rata rate for all days hereinafter mentioned.

During the work week beginning Tuesday, June 26, 1951, while holding a regular Group 1 Check Clerk position, Melton worked Tuesday through Thursday. During the remainder of that week he worked at extra work in Group 1 Friday and Saturday as a Check Clerk and in Group 3 on Sunday as Stowman.

Commencing Monday, July 2, his work week then being that of a furloughed employe, Melton worked Monday and Tuesday, Group 1; Wednesday, July 4, Group 3; Thursday, Friday, Saturday, Group 1; and Sunday, Group 3. July 9 through 15th he worked 5 days in Group 1 with no service on Saturday or Sunday. From July 16 to 22, inclusive, he worked Monday through Friday, Group 1, Saturday and Sunday, Group 3. July 23 through 29th he worked Monday through Friday, Group 1, Saturday and Sunday, Group 3.

In connection with what has been heretofore related it should be noted that during the period of time involved Claimant did not work more than 40 hours, nor on more than 5 days in either of the groups in which he held seniority. It should also be pointed out that the work week of July 9 to 15 is not in controversy because of the fact he worked but 5 days that week.

Summarily stated the claim for the time and one-half rate for all Saturdays and Sundays in question is based upon the premise the work performed on those days was in excess of 40 hours per week and therefore payable at the premium rate. In addition, Claimant contends that all work performed at the St. Louis warehouse on Sunday is payable at such rate.

In support of its position respecting the rate to be paid for work on Saturdays and Sundays in excess of 40 hours the Claimant relies primarily upon rules of the Memorandum Agreement hereafter mentioned.

Rule 21, Section 2 (a), reads in part:

> "Effective September 1, 1949, the Carrier will establish for all employes subject to this agreement a work week of forty hours,

consisting of five days of eight hours each, with two consecutive days off in each seven; * * *"

Rule 21, Section 2 (h) provides:

"To the extent extra or furloughed employes may be utilized under this agreement, their days off need not be consecutive; however, if they take the assignment of a regular employe they will have as their days off the regular days off of that assignment."

Rule 21, Section 2 (i) reads:

"The term 'work week' for regularly assigned employes shall mean a week beginning on the first day on which the assignment is bulletined to work, and for unassigned employes shall mean a period of seven consecutive days starting with Monday."

Rule 25 (c) reads:

"* * *

"Work in excess of forty straight time hours in any work week shall be paid for at one and one-half times the basic straight time rate except where such work is performed by an employe due to moving from one assignment to another or to or from an extra or furloughed list, or where days off are being accumulated under paragraph (g) of Section 2 of Rule 21.

"Employes worked more than five days in a work week shall be paid one and one-half times the basic straight time rate for work on the sixth and seventh days of their work weeks, except where such work is performed by an employe due to moving from one assignment to another or to or from an extra or furloughed list, or where days off are being accumulated under paragraph (g) of Section 2 of Rule 21.

"* * *"

Rule 25½ provides:

"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 forty hours of work that week; in all other cases by the regular employe."

With respect to his claim all Sunday work at the warehouse in St. Louis must be paid for at the punitive rate Claimant relies on Rule 26 (c), relating to and placing restrictions on the performance of Sunday work as such, as interpreted by this Division of the Board in Award 5247.

Primarily the Carrier bases its defense of the claim on Rule 14 (e). This rule, as it appeared in the Agreement both before and after its revision on January 20, 1950, reads:

"(e) As new positions are established or vacancies occur that are bulletined to employes in service only on the seniority district or roster where the position is created or where the vacancy occurs, and when not filled therefrom, furloughed employes that are off in reduction of force and who are retaining their seniority rights, will be required to return to service in the order of their seniority rights for temporary or permanent employment, except as provided in Sections f, g and h of this ule, and subject to provisions of Rules 4 and 7. Failure of employes to respond when called within seven days after being notified by mail or telegram sent to last address given, or

give satisfactory reason for not so doing, they will forfeit their seniority and their name will be dropped from the employes' seniority roster."

Carrier also relies heavily upon the second and third paragraphs of Rule 25 (c), heretofore quoted, and certain of our Awards, particularly Award 5798 which it claims is squarely in point and requires a denial of Claimant's contention that a furloughed or unassigned employe cannot be worked more than 40 hours in any one work week without being paid the punitive rate for all time worked in excess thereof.

What has been heretofore related makes it clear the paramount issue in this case is whether the quoted provisions of Rule 25 (c) require the Carrier to pay Claimant time and one-half for working on the Saturdays and Sundays in question. Indeed if, contrary to his contentions, the facts of record bring the work in question within the scope of the exceptions to such rule other rules of the Agreement relied on by Claimant become of little consequence and require no further attention.

Nothing would be gained by attempting to here repeat the lengthy arguments advanced by the parties in support of their respective positions. It suffices to say that after an extended examination of the record, careful consideration of all such arguments, and comparison of the rules relied upon we have become convinced that from the standpoint of facts and principles involved Award 5798 is a sound controlling precedent and requires a conclusion that under the existing facts and circumstance Claimant, an employe holding seniority rights in two separate seniority groups, i.e., Groups 1 and 3, when called to perform extra or overflow work in either Group was moved from the furloughed list to the Group in which he was called to work and therefore came within the exceptions to be found in the two paragraphs of Rule 25 (c), heretofore quoted, providing in substance that work in excess of Forty straight time hours in any work week shall be paid at the punitive rate, and that employes worked more than 5 days in a work week shall be paid at such rate on the Sixth and Seventh days of their work weeks, except "where such work is performed by an employe due to moving from one assignment to another or to or from an extra or furloughed list." That, it is to be noted, is the import given what to all intents and purposes are identical paragraphs of the rule involved in Award 5798 where, in disposing of a similar claim made by an employe who also held rights in two separate seniority groups, we said:

> "The joint statement of facts recites that Miss Sadler held a regular assignment as messenger. She held no regular assignment on the Clerks' roster. She was as has been stated an extra clerk. As such her rights are controlled by the two partially quoted paragraphs of Rule 12, Section 3 (a) including the exceptions.
>
> "It is to be observed that the exceptions apply (1) to an employe moving from one assignment to another, (2) from an extra or furloughed list, or (3) to an extra or furloughed list.
>
> "In this instance exceptions (1) and (3) have no application since it is clear that Miss Sadler was moved from the Clerks' extra list to a Clerks' roster position in the Office of the Chief Dispatcher.
>
> "The rights which Miss Sadler had to her rest days by virtue of her work under the Messenger roster may not be imposed as a burden on the obligation of the Carrier to give to her the work which she performed in the Office of the Chief Dispatcher."

In an effort to destroy the force and effect of Award 5798 as a precedent Claimant attempts to distinguish it by suggesting that the employe involved in that case moved from a Clerks' extra or furloughed list to an assignment whereas the Claimant here performed extra or overflow work not the part of any assignment and therefore did not move from a furloughed list to an

assignment. Conceding this to be true affords no ground for a sound distinction. The Opinion of such Award makes it clear that moving from one assignment to another is only one of the exceptions to be found in Rule 25 (c) respecting payment of the punitive rate. In fact it points out that moving from an extra or furloughed list is another exception and holds that when the Claimant in that case was assigned to perform one day's work on a roster position she was moved from the Clerks' extra list. Here, as we have indicated, when Claimant was assigned to perform the work in question he was moved from the furloughed list to perform that work in the separate and distinct seniority groups to which such work belonged. We find nothing in the Opinion, or for that matter in the rule itself, warranting a conclusion that the exceptions in such rule are controlled or even dependent upon the nature of the work performed. Nor is there merit in a further contention advanced by Claimant to the effect that regardless of what is said and held in Award 5798 the exception relating to moving ". . . to or from an extra or furloughed list . . ." cannot be separated from the exception ". . . due to moving from one assignment to another . . ." Use of the word "or" before each of the exceptions to the rule definitely establishes that neither of such exceptions is dependent upon the other. Under all well defined definitions "or" is a co-ordinating particle that marks an alternative.

The gist of Claimant's position that all Sunday work performed at the St. Louis Warehouse must be paid for at the punitive rate is based upon the premise that we so held in Award 5247. We believe Claimant misconstrues that decision. There all the Board held was that the Carrier had not maintained the burden of establishing its claim and hence had failed to show a necessity for regular Sunday assignments as contemplated by Rule 26 (c). Here, since he is the Claimant and it cannot be denied that under the provisions of such rule punitive rates for Sunday as such have been eliminated and necessary work may be performed on that day at the pro rata rate, the burden of establishing the extra work assigned to him by Carrier at its Warehouse in St. Louis on the Sundays in question was unnecessary and therefore work not contemplated by the terms of Rule 26 (c) is upon the Claimant who, under the facts of record, has wholly failed to sustain it.

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 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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of November, 1952.