Award No. 8527
Docket No. CL-8258

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Harold M. Weston, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

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

(1) The Carrier violated the rules of the Clerks' Agreement at Marion, Ohio when on October 24, 1954 the Carrier utilized the services of Employe J. D. Brokaw, a junior employe, an unassigned Clerk, on the position of first trick Interchange Clerk after he had completed forty (40) straight-time hours as an assigned Clerk, beginning Monday, October 18, 1954, and

(2) That Carrier shall now compensate Employe J. E. Sheehe, a senior regularly-assigned employe, at the rate of time and one-half for October 24, 1954 account utilizing the services of unassigned Clerk Brokaw after he had completed his forty (40) straight-time hours for that workweek.

(3) That Carrier shall now compensate Employe Brokaw one-half day in addition to the compensation already allowed account working six (6) days in his workweek for service on October 24, 1954. (Claim 1087)

EMPLOYES' STATEMENT OF FACTS: Prior to and on October 24, 1954 Employe Brokaw, a junior employe was an unassigned Clerk. During the workweek of October 18, 1954 he worked on a day-to-day basis as follows: Monday, October 18, Interchange Clerk, hours 7:00 A.M. to 3:00 P.M.; Tuesday, October 19, Interchange Clerk, hours 3:00 P.M. to 11:00 P.M.; Wednesday, October 24, Chief Caller, hours 7:00 A.M. to 3:00 P.M.; Thursday, October 21, Chief Caller, hours 7:00 A.M. to 3:00 P.M.; Friday, October 22, Chief Caller, hours 7:00 A.M. to 3:00 P.M.; Saturday, one of his earned rest days he did not work; Sunday, October 24, his second earned rest day, he marked up on the short vacancy of Relief Clerk Little and worked Sunday, October 24, first trick Interchange Clerk, hours 7:00 A.M. to 3:00 P.M. He worked the vacancy on and after that date.

week were Sunday and Monday. We can see that an extra employe doing extra work which is not a part of a regularly assigned position, and consequently has no assignment of work or rest days, could fall within the provision of paragraph (i) making his work week seven consecutive days commencing with Monday, but when he occupies a regularly assigned position he assumes all the conditions of that position."

In handling the claim on the property, Petitioner relied on Rules 3, 20 and 25 to support its position. Rule 3 is the seniority rule and Rule 25 is the call rule. The facts show that neither of these rules has any application here. Insofar as Rule 20 is concerned, the Carrier has shown that under the language of 20-3(b), the claim should be denied for the reason earlier set forth herein. In any event, the facts show there has been no violation of Rule 20 or any other rule.

The Carrier has shown that under the applicable agreement, Extra Clerk Brokaw is not entitled to the additional compensation which he claims. He took the relief clerk assignment on October 24, 1954 and was, therefore, required to perform the duties thereof at the straight time rate. In this situation, Employe Sheehe has no claim. But even assuming a violation of the applicable agreement, which the Carrier denies, Employe Sheehe would only be entitled to compensation of a day's pay at the pro rata rate.

This Board has repeatedly held that an employe who is denied the right to work on his rest days is only entitled to be compensated at the straight time or pro rata rate. Awards 4244, 4728, 5271, 5950, 6262, 6730, and many other similar awards.

The Carrier has shown that the claim is not supported by the applicable Agreement and should be denied in its entirety.

All data contained herein have been furnished to or are known to the Petitioner.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant Brokaw, a junior clerk at Marion, Ohio, worked five consecutive eight hour days beginning Monday, October 18, 1954. It is undisputed that he performed this work on a day-to-day basis, serving as an Interchange Clerk on October 18 and 19, and as a Chief Caller on October 20, 21 and 22. Brokaw did not work on Saturday, October 23, but on Sunday, October 24, marked up on the temporary vacancy of a relief clerk. Sunday was the first day of the workweek for the relief clerk position. Brokaw worked Sunday, October 24, through Thursday, October 28, in that relief position and observed the rest days on October 29 and 30. He remained on the relief position until November 7, again observing the rest days November 5 and 6.

For his services on October 24, 1954, the Sunday in question, Brokaw received one day's pay at the straight time rate of the first trick interchange clerk position. The Employes charge that this is a violation of their Agreement with the Carrier and claim that Brokaw is entitled to time and one-half for his work that Sunday. In addition, they maintain that Sheehe, a senior employe, should have been offered the Sunday work in question in place of Brokaw and therefore is entitled to receive time and one-half for the work performed that day.

It is the Carrier's position that Brokaw was correctly paid straight time under the terms of the Agreement and that Sheehe's claim also is without merit.

Rule 20-3 of the Agreement relates to overtime, which plainly is the basic issue in the Brokaw claim. Subparagraphs (b) and (c) of that Rule provide for payment at time and one-half for work in excess of respectively forty hours or five days in a work week. If subparagraphs (b) and (c) stopped there, Brokaw's claim would be sustained without further discussion, assuming his work week started Monday, since it is well settled that unassigned or extra employes are not excluded from the Agreement's overtime benefits if they are otherwise qualified.

However, after providing for premium pay for work performed in excess of forty hours or five days within a single work week, subparagraphs (b) and (c) continue on to set forth an exception to the overtime pay requirement, which reads:

> "* * * except where such work is performed by an employe due to moving from one assignment to another * * *."

Accordingly, it is important to determine whether the phrase "moving from one assignment to another" is applicable to Brokaw under the facts of this case.

The precise meaning of "assignment" as used in the exception contained in Rule 20-3 (b) and (c) is not set forth anywhere in the Agreement. There is no doubt that this exception is controlling where an employe moves from one bulletined position to another and in such a case, the employe assumes all the conditions, including the work week and rest days, of the assignment to which he moves. A more difficult problem of interpretation arises when extra employes are transferred between short vacancies or position pending assignment. On this latter point, the prior awards are certainly not in accord, some holding that only bulletined work assignments fall within the exception (e.g., 6382, 6383, 5494, 5495, 5794 and 5796) while others support the broader position that transfers between temporary vacancies or work in relief of regularly assigned position are "assignments" within the meaning of the exception. (6973, cf. 5811, 6503 and 6561.)

It is not important in the present case to resolve this variance between prior awards for the factual situations are quite different. Here is a situation where, as both parties agree, the employe was working on a day-to-day basis for five successive days beginning Monday, October 18, before he began his Sunday work. Rule 20-2 (i) recognizes two classes of employes—those regularly assigned and those unassigned. It is quite apparent that a day-to-day employe is not "regularly assigned" and it would be entirely unrealistic to hold that he is anything more than an "unassigned" employe. In the light of the record before us, there is nothing in Rule 20-2 (b) that alters this result, which it is emphasized, applies only to a day-to-day worker.

We cannot here be properly concerned with the emotional appeal in favor of overtime on one hand or the equities in support of the Carrier's position on the other. We are limited to a consideration of the Agreement before us and the record prepared on the property. As that record now stands, it appears and we find that Brokaw was on October 18 through 22 an "unassigned" employe within the meaning of Rule 20-2 (i). Accordingly, his

workweek began on Monday, October 18, and he completed forty hours or five days of work at the close of the fifth day of his workweek. By that time, his right to Saturday and Sunday rest days had accrued and he was entitled to time and one-half for work performed on either or both of his rest days. (6970, 6971 and 6972.)

Whether or not the position Brokaw moved to on October 24 was an "assignment", it is clear that he did not move from an "assignment" within the exception of Rule 20-3 (b) and (c). The exception does therefore not apply and Brokaw's claim must be sustained, his right to overtime having accrued prior to October 24.

The Employes' further contention that Sheehe is entitled to time and one-half for October 24, 1954 is without merit. Rule 7(f) provides for extra preference for senior qualified employes making application for temporary vacancies in excess of three and less than thirty days. The record is barren of evidence that Sheehe made application for the position as required by Rule 7 (f). Nor does any justification or excuse appear for Sheehe's failure to apply. It is further noted that he did not claim the extra vacancy but only those days which coincided with the rest days of his assignment and which were a part of the regular relief assignment. Under these circumstances, and upon considering the Agreement as a whole, there is manifestly no substance to Sheehe's claim, except as a penalty for violation of the Agreement. No penalty clause for the violation is contained in the Agreement.

We have carefully examined the citations of the parties on this point and while we are not foreclosing ourselves from taking whatever action we consider necessary in appropriate cases, we are convinced that the facts and nature of this case do not justify the allowance of Sheehe's claim as a penalty or otherwise.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived hearing on this dispute; and

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 Brokaw's claim for overtime pay for October 24, 1954 is sustained and Sheehe's claim is denied.

AWARD

Claim sustained as to Brokaw and denied as to Sheehe.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 18th day of November, 1958.