Award No. 8897
Docket No. CL-8570

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis B. Murphy, Referee

PARTIES TO DISPUTE:

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

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

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

(a) Carrier violated rules of Agreement effective June 1, 1953, when it failed to properly compensate L. E. Newell, regularly assigned to position of Trucker at the Kansas City Warehouse, for services performed as a Clerk Saturday, February 5, 1955, his designated rest day.

(b) Mr. Newell be paid the difference between pro rata rate and overtime rate of pay attached to the Clerk's position for services performed on Saturday, February 5, 1955.

EMPLOYES' STATEMENT OF FACTS: Mr. Newell entered the service of the Carrier as a Trucker on February 17, 1953. He established seniority as a Group 3 employe pursuant to the provisions of Rule 5 (c) reading:

"An employe who holds seniority on Roster (a) only and who is assigned to a position covered by Roster (b) for sixty (60) days (not necessarily consecutive) shall establish seniority on Roster (b) as of the date on which he first performed service on Roster (b).

An employe who holds seniority on Roster (b) only and who is assigned to a position covered by Roster (a) will establish seniority on Roster (a) after he has completed sixty (60) days (not necessarily consecutive) as of the date of his first service on such roster subject to the provisions of Rules 7 and 9."

Mr. Newell completed his 60th day working on clerical vacancies on July 20, 1954, thus establishing his clerical seniority date retroactive to May 7, 1953.

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 particles that marks an alternative."

With these precedents before us there is only one alternative for the Board to follow and that is "Claim denied".

* * * * *

The Carrier respectfully submits that all data herein and herewith submitted has previously been submitted to the Employes.

(Exhibits not reproduced.)

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OPINION OF BOARD: Claimant L. E. Newell, entered the service of the Carrier on February 17, 1953, and established seniority as of that date on Roster "B" at Kansas City, Missouri. By operation of Rule 5 (c) he established a seniority date of May 7, 1953, as clerk on Roster "A" at Kansas City.

As of the date of this claim, Saturday, February 5, 1955, Mr. Newell was regularly assigned to position of Trucker at the Kansas City Warehouse; weekly assignment Monday through Friday, with Saturday and Sunday as rest days.

In his work week as a Trucker, Claimant worked Monday, January 31, through Friday, February 4, giving him as a regularly assigned Roster "B" employe forty (40) hours of work during week in question. On Saturday, February 5, a one-day vacancy occurred in Roster "A" position of statement clerk due to the illness of the extra employe who had been filling a vacation assignment.

It is the Organization's contention that in working Newell on his assigned rest day, Saturday, February 5, 1955, and paying him only the straight time rate therefor, the Carrier violated Rules 30 (i), 30 (j) and Rule 31 of the Agreement.

RULE 30

"(i) Beginning of Work Week—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."

"(j) Overtime Provisions—Provisions in existing rules which relate to the payment of daily overtime shall remain unchanged. Work in excess of 40 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 this rule.

"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 this rule.

"There shall be no overtime on overtime; neither shall overtime hours paid for, other than hours not in excess of eight paid for at overtime rates on holidays or for changing shifts, but utilized in computing the 40 hours per week, nor shall time paid for in the nature of arbitraries or special allowances such as attending court, deadheading, travel time, etc., be utilized for this purpose, except when such payments apply during assigned working hours in lieu of pay for such hours, or where such time is now included under existing rules in computations leading to overtime."

RULE 31

"Service on Rest Days—Service rendered by employes on their assigned rest days shall be paid for under the provisions of Rule 37 unless relieving an employe assigned to such day, in which case they will be paid the rate of the position occupied with a minimum of eight hours at rate of time and one-half."

It is conceded by the parties that Claimant on the day in question, Saturday, February 5, worked one of his assigned rest days.

In summarizing their position Carrier states that in this case Claimant does not show that he worked in excess of forty (40) hours as a Roster "B" employe, and that there is no showing that Claimant worked on a rest day of his assignment as a Roster "B" employe. Carrier also states that as an extra clerk, Claimant brought himself within the exception contained in Rule 30 (j) by moving to an extra or furloughed list. Carrier cites awards 5705, 5798, 6018, 6266, and 7295 in support of their denial of claim.

Award 6018 dealt with an extra and unassigned employe. Award 5798 deals with a messenger who held no regular assignment on the clerks roster. Award 6266 deals with employes working in Group 1 who had no seniority in Group 1, but hold seniority in Group 3. "Moving from one assignment to another" Award 7295 deals with an extra man who had worked seven consecutive days and assumed the work week and rest days of another position in a different seniority group.

We feel that the above-cited awards do not apply in this case, as Mr. Newell was a regularly assigned Trucker, his weekly assignment was Monday

through Friday. He had been permanently assigned to this position since October 27, 1954.

He was called to fill the Roster "A" clerk position due to illness of a vacation relief clerk, because of his previous seniority on Roster "A".

Mr. Newell had elected to exercise his seniority rights on this Trucker position and was regularly assigned. He did not perform any clerical work on Roster "A" for approximately four months. Rule 30 (j) contemplates the employe moving on his own volition from one assignment to another, or to or from an extra or furloughed list, according to his own desires. Rule 30 (j) is a General Rule applying to overtime and does not apply specifically to service on rest days, as does Rule 31, and we feel that the specific Rule must take precedence in this situation, and would exempt Claimant from the provisions of Rule 30 (j) as cited in Award 6266.

Here the Carrier called Mr. Newell on one of his regularly assigned rest days to fill a position on Roster "A" which required him to work six consecutive days in that week, and it was done for the Carrier's convenience. He held a regular assignment on Roster "B" and could refuse the call, but he worked the position and is entitled to be paid at the overtime rate for working on one of his regular rest days.

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 31, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Mr. L. E. Newell be paid the difference between pro rata rate and overtime rate, for services performed as clerk Saturday, February 5, 1955, his designated rest day.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 28th day of July, 1959.

DISSENT TO AWARD NO. 8897, DOCKET NO. CL-8570

In this Award the Majority not only misconstrues the rules, but further misconstrues the cited Awards which clearly supported denial of the claim. Thus, the errors are compounded.

The facts are not in dispute. Claimant was a regularly assigned Roster "B" employe, but at the same time held seniority and status as an extra or

unassigned Roster "A" employe. As a regularly assigned Roster "B" employe, his days off were Saturday and Sunday, and as an extra or unassigned Roster "A" employe, his work week was a period of seven consecutive days beginning with Monday. Claimant filled his weekly assignment as a Roster "B" employe and **did not** work in excess of forty hours or five days, or on his rest day as a Roster "B" employe. On the date in question, a Saturday, by reason of his seniority and status as a Roster "A" employe, he was called and used to fill a vacancy on a Roster "A" position. In his work week as an extra or unassigned Roster "A" employe, he **did not** work in excess of forty hours or five days. Despite this, the claim was sustained.

The Majority refers to the Awards cited by Carrier which supported denial of the claim and holds that the Awards were not applicable. This is erroneous.

The Majority makes no analysis of **Award 5705** (Wenke), but at the same time attempts to distinguish **Award 5798** (Yeager). These Awards are indistinguishable from the instant case. In **Award 5705** the claimants were regularly assigned Group 3 employes, but held status as extra or unassigned Group 1 employes. An attempt was made to combine work in the separate groups, which are covered by separate seniority rosters, for overtime purposes, but the claim was **denied.** The same is true concerning **Award 5798.**

The Majority further attempts to distinguish **Awards 6018, 6266 and 7295.** These Awards may be factually distinguishable, but they, like **Awards 5705 and 5798,** serve to point up the basic principle, consistently adhered to, that work in two separate classes covered by separate seniority rosters cannot be combined for overtime purposes. They are, therefore, at point and also supported denial of the instant claim.

Rule 31 is, as stated, a special rule in relation to Rule 30(j), but Rule 31 is inapplicable to the facts in this case. Claimant did not work in excess of forty hours or five days as a Roster "B" employe. Neither did he work on his rest day as a Roster "B" employe. He simply did not work six consecutive days in his work week as a Roster "B" employe or in his work week as an extra or unassigned Roster "A" employe. Under these facts, Rule 31 is clearly inapplicable.

It may have been within the Claimant's power to decline the Roster "A" extra work, a point which we need not decide as it is immaterial here, but the fact is he accepted the work and was so used by reason of his seniority and status as a Roster "A" employe. There is no evidence that his acceptance was other than voluntary and paragraphs (d) and (e) of Rule 12 specifically applied and commanded denial of the claim.

The Award is erroneous and for the reasons stated we dissent.

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ J. E. Kemp

/s/ J. F. Mullen