

Award No. 9942
Docket No. CL-8403

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

PARTIES TO DISPUTE:

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

THE TEXAS AND PACIFIC RAILWAY COMPANY

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

(1) Carrier violated rules of the Agreement revised as of March 1, 1954, when it failed to properly compensate our employe for services performed on his assigned rest day; and

(2) R. C. Elder now be paid the difference between time and one-half and the straight time rate that he was allowed for services performed as General Clerk, Shreveport Freight Office on Saturday, December 18, 1954, his regular assigned rest day.

EMPLOYES' STATEMENT OF FACT:

(1) R. C. Elder is regularly assigned to position X-78, Messenger Group 2 position, Shreveport Freight Office, working assigned hours 8:00 A. M. to 5:00 P. M. Monday through Friday, with Saturday and Sunday as rest days.

(2) A. J. Tuminello is regularly assigned to General Clerk's position X-1351, Group 1, Shreveport Freight Office 8:00 A. M. to 5:00 P. M., Tuesday through Saturday with Sunday and Monday as rest days.

(3) On Saturday, December 18, 1954, Mr. Tuminello regular occupant of position X-1351, Group 1, General Clerk, was absent from duty account illness. Carrier elected to fill this vacancy. There being no furloughed, Group 1 employes available, called and required Mr. R. C. Elder, regularly assigned to group 2 position X-78, and who was off duty on his regularly assigned rest day, to protect this temporary vacancy and compensated him at pro-rata rate for the service performed on his rest day, December 18, 1954, instead of compensating him at time and one-half as required by the rules.

Formal claim was filed for and in behalf of Mr. R. C. Elder with Superintendent Tucker on February 28, 1955 by Division Chairman Crawford (Employes' Exhibit No. 1) which claim was declined on March 16, 1955. (Employes' Exhibit No. 2).

The Carrier could still use extra or furloughed Group 1 men, who had no rights in a lower Group, but were working in a filling station or somewhere else until they could gain, or regain, a regular assignment in Group 1. This is demonstrated by Award 7191 on this property.

Such an arrangement would impair the ability of Group 2 men to learn Group 1 work and advance into Group 1. It would discriminate against them in favor of all men who hold either status or roster seniority rights in Group 1, but who hold no rights in Group 2. Under those conditions, if there were no available extra, unassigned or furloughed Group 1 men, then the extra and relief work would become overtime work, and, as such, would accrue to the men in Group 1 who held the highest seniority and already held the best jobs.

It may be that, by referring this case to your Board, the Brotherhood hopes to get a rule which would make it difficult to provide extra and relief work in Group 1 at pro rata rates, in order to provide more overtime work for the insiders in Group 1, who already hold the best jobs the craft has to offer. But, if that were done, it would be at the expense of the junior men and Group 2 men, and of course it would materially impair the efficiency of the operation of the railroad. Such favoritism and such unfair and shortsighted objectives would be entirely unworthy of the Brotherhood of Railway Clerks. It seems more likely that the Brotherhood's officials merely need to have the Board relieve them of their responsibility to tell their own constituents that the correct answer is "no."

The fact remains that, if the Board were to sustain this claim, it would be in effect making a rule which would cause us all to discriminate against men in Group 1, if they also hold rights in Group 2. It is difficult to see how such a rule could be beneficial either to the employees as a whole or to the Carrier.

And, of course, that is why we do not have any such rule.

Therefore, the Carrier respectfully requests that the Board dismiss this case, or deny the claim.

All known relevant argumentative facts and documentary evidence are included herein. All data submitted in support of Carrier's position has been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was regularly assigned to Messenger position X-78, Group 2, Monday through Friday, rest days Saturday and Sunday, and held seniority in Group 1. Because, after working five days on his regular assignment, he worked Group 1 General Clerk position X-1351 on his Saturday rest day on account of the illness of the regular incumbent of that position, Claimant contends that he should have been compensated for such service on the basis of the overtime rate rather than the pro rata rate in accordance with Rules 30 (b), (c), (e) and (g) of the applicable Agreement.

The Carrier maintains, aside from the merits, that the denial decision dated April 29, 1955, of its highest officer authorized to make a decision on the claim was accepted by reason of the failure of the Employees to advise within sixty

days that such decision was not acceptable and that the appeal here is not timely under Article V of the August 21, 1954 National Agreement.

These contentions are without merit. There was no obligation on the Employes to give a sixty day rejection notice in the circumstances mentioned. Award 2135, Second Division. The docket shows that the Employee's notice of intention to file ex parte submission was received in the office of the Executive Secretary of this Division on January 19, 1956. This was sufficient and timely compliance with the applicable time limit requirements of the Agreement referred to. Award 9203.

On the merits, the Carrier contends that there always has been an understanding between the parties that an employee holding both Group 1 and Group 2 seniority while regularly assigned to a Group 2 position is to be considered an extra or unassigned Group 1 employee, that the Agreement authorizes the use of employees regularly assigned to one group as an extra employee in another group, under certain circumstances, and that Claimant moved from one assignment to another under the exceptions from the overtime rate provided in Rules 30 (b) and (c).

The evidence in the record does not establish any understanding or practice of the parties whereby employees who are regularly assigned to a position in Group 2 and also hold seniority in Group 1 may be considered as extra or unassigned employees in Group 1. Furthermore, on the agreement here, we held in connection with Rule 30 (f) in Award 9541, involving these parties, that an employee regularly assigned to a position in Group 2 was not an unassigned employee in Group 1 merely because he also held seniority in that Group. See Award 9257.

We cannot say that by protecting a one day sickness vacancy on the first of his two regularly assigned and earned rest days, Claimant performed such work "due to moving from one assignment to another" within the meaning of the exceptions from the overtime requirements provided in Rules 30 (b) and (c). Our observations in Award 9636 that

"The work performed by Claimant on Saturday was not 'due to moving from one assignment to another', since he was filling a purely temporary assignment because of the illness of its occupant, and returned to his own position when the latter was able to resume work. He was not promoted or moved to a new assignment."

are particularly pertinent to the circumstances presented here. See Awards 5494, 5795, 5796, 5805, 6382, 6383, 6440, 6479, 6504, 6970, 7391, 8145, 8273, 8527, 9487.

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 Employee involved in this dispute are respectively Carrier and Employee 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 was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 26th day of May 1961.

DISSENT TO AWARDS NOS. 9942 AND 9943,
DOCKETS NOS. CL-8403 AND CL-8793

In each of these cases the claimant employee worked the five (5) consecutive work days of the work week of a regular assignment in one class or seniority group and then worked the rest days thereof on another regular assignment of another class or seniority group by reason of seniority held in that other class or group.

The Majority erred in awarding punitive pay for the service performed on those rest days because they totally ignored Awards 5629, 5705, 5798, 6018, 6266 and 7295 denying similar claims involving like circumstances on the basis that the claimant employees' use on such rest days was by reason of rights attained in the other class or group which were separate and distinct from their rights in the first class or group worked and cannot be coupled thereto for the purpose of obtaining additional monetary benefits, and chose to follow Employee cited Awards involving, with but one exception, entirely different circumstances, viz., the disputed rest day work was performed on assignments in the same class or seniority group as were the assignments on which the rest days had been earned. The exception is Award 8897, involving circumstances such as are involved in these Awards 9942 and 9943, which is an erroneous Award for the reasons stated in the dissent thereto.

For the foregoing reasons, among others, the Carrier Members dissent to these Awards 9942 and 9943.

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ D. S. Dugan

/s/ J. F. Mullen

LABOR MEMBER'S REPLY TO CARRIER MEMBERS' DISSENT
TO AWARD NOS. 9942 and 9943, DOCKET NOS. CL-8403 and CL-8793.

The Dissenters' position is based primarily upon the false proposition that an employee can be used on an earned rest day in another seniority group or class at the pro rata rate, as he is "moving from one assignment to another" within the meaning of the overtime provisions of the agreement. They cite several awards in support of this untenable contention, which I will show are either irrelevant or erroneous.

By grouping both cases in one Dissent, the Dissenters admit that the same principles apply to both situations where an employee is regularly assigned in one group or class (Award 9942) and the other where an extra or unassigned employee (Award 9943), who, after working five consecutive days in one assignment are then called upon to perform service in another group or class on their assigned rest days. That this is the proper interpretation of the governing rules is apparent from a review of those provisions of the 40-Hour Week Agreement governing "Service on Rest Days" and "Rest Days of Extra or Furloughed Employees." These provisions are substantially the same on the two Carriers here involved.

The Service on Rest Day Rules in both Agreements provide in substance that:

"Service rendered by an employee on his assigned rest day, or days, relieving an employee assigned to such day shall or will be paid at the rate of position occupied at his regular rate, whichever is higher, with a minimum of eight (8) hours at the rate of time and one-half."

Rules 11-1(a) (St.L.SW), here pertinent, reads as follows:

" * * * When a furloughed or extra employee takes the assignment of a regular employee, he assumes the conditions of such assignment, including the work week and rest days thereof." (Emphasis ours)

It is crystal clear that an extra employee, filling the assignment of a regular employee, is entitled to the work week and rest days thereof, provided the vacancy is for five or more work days so that he can earn the rest days thereof. Award 6970. Under such circumstances, he steps into the shoes of the regular incumbent of the position, assuming the conditions of such assignment, and is entitled to the rest days thereof. The same principle applies to an extra employee and a regular employee. After working on one assignment for five days, they are entitled to the rest days of such assignment and if used thereon are entitled to the time and one-half rate under the Service on Rest Days Rule. See Awards 5494, 5795, 5796, 5805, 6382, 6383, 6440, 6479, 6504, 6970, 7391, 8145, 8273, 8527, and 9487.

The Service on Rest Day Rule is a special rule that prevails over the general provisions of the overtime rule. In Award 4496, Referee Carter ruled:

"* * * It is a general rule of contract construction that special rules prevail over general rules, leaving the latter to operate in the field not covered by the former. * * *" (Also, see Award 6757)

It will be noted that there are no exceptions contained in the Service on Rest Days Rules similar to those in the overtime provisions relative to an employee "moving from one assignment to another or to or from an extra or furloughed list." Therefore an employee cannot move from an assigned rest day to an assigned work day at the pro rata rate under this Rule. This Board has no authority to add such an exception to the Service on Rest Day Rule (Award 5369), as some Referees appear to have done in some of the Awards cited by the Dissenters.

It is also a cardinal principle of contract interpretation that the exceptions contained in a rule have no application unless the circumstances bring the case within the confines thereof. In Award 6281, Referee Wenke said:

“* * * Of course, before the question of an exception becomes material the situation must exist to which the exception has application.”

It is interesting to note that even the overtime provisions do not contain an exception that an “employee moving from one group or class to another” is not entitled to the time and one-half rate for work in excess of 40 straight time hours in any work week, or for work performed on the sixth and seventh days of their work weeks, as the Dissenters claim. There is another cardinal principle of contract interpretation that where certain exceptions are specifically stated, no others will be implied. In Award 4646 Referee Connell stated:

“* * * and where conditions or exceptions are set forth specifically, no other or further exceptions will be implied. See Awards Nos. 2009, 3825 and 4551.”

Another cardinal principle of contract interpretation is that rights specifically given in a rule, such as the requirement that employee be compensated at the rate of time and one-half for service performed under the Service on Rest Day Rule, cannot be abrogated in another section by implication. In Award 2490, Referee Carter adhered to such principle, with the following:

“We adhere to the proposition that a valuable right cannot be abrogated by implication in one section of an agreement when such right was expressly and plainly granted in another section. It will be assumed that the contracting parties intended that some effect be given to both sections and that limitations of one upon the other would not be made except when it appears clearly that they were so intended.”

That Referee Carter overlooked this principle in Award 7295, is quite obvious. That the other referees that authored some of the awards, relied upon by the Dissenters, were also confused as to the application of these fundamental principles of contract construction, is clear.

The Award used as a precedent, or authority for the denial of the Employees' claims in Awards 5798, 6266, 7295 was Award 5629. A review of Award 5629, Referee Wenke, will show that the circumstances, rules and agreements were entirely distinguishable from those confronting the Board in the awards upon which the Dissenters rely. This conclusion is self-evident from the following:

Award 5629 covered a dispute between the Order of Railroad Telegraphers and Pennsylvania Railroad, involving claim that a regularly assigned agent should have been called on his assigned rest day under the Work on Unassigned Day Rule in preference to an extra employee, who also had rights under the Clerks' Agreement and had performed 40 hours of work that week under the Clerks' Agreement. It will be observed that the claim was not presented on behalf of the employee that performed work on the sixth and seventh day of his work week, or on his rest days, but rather by a regular employee who performed no work on such days, claiming that he should have been used. Therefore, the factual circumstances are entirely different, even though the work in dispute had been performed under the same agreement, which was not the case in Award 5629. Here we have an entirely different situation where employees actually performed the work under one agreement and claim they are entitled to the time and one-half rate for services performed on their assigned rest days.

How Award 5629 could be used as authority for denial of claims similar to those before us here by so many referees is beyond my comprehension. That

there was no mystery about the involved issue is plain from a reading of Award 5629 in which Referee Wyckoff stated:

"SECOND. The Regulation came word for word from the National Forty Hour Work Week Agreement (Article II Section 3(i); but we must construe it 'as a separate agreement by and on behalf of each of said carriers and its said employes' (id, Article VIII). This is an indication that the adoption of the Regulation did not contemplate its application to the performance of work in a combination of positions in different classes or crafts.

It is true that the Carrier is the sole employer, but the employment rights of the employes are by agreement segregated and distributed into crafts. This being so, in situations where an employe acquires status under two agreements, the contractual distribution into crafts is violated if his status under one agreement is given any affect upon his status under the other, whether to his advantage or to his disadvantage (see Award 3674).

In view of the foregoing considerations, we conclude that the 40 hours of work mentioned in the Regulation refers only to work under the Agents' Agreement.

Nothing in this Award is intended to sanction the use of employes from one craft to perform work under another craft for the purpose of circumventing the provisions of the Forty Hour Work Week Agreement. It is the Substitute Agent clause in the Agreement itself, and not this Award, which authorizes the use of the Clerk to perform Agents' work." (Emphasis ours.)

A careful review of Award 5629 clearly shows that it cannot be used as a precedent, or authority for denying a claim by an employe for the time and one-half rate for service performed on assigned rest days, where such service, as here, is rendered under the same agreement, regardless of whether such service was performed in one or separate seniority groups or classes. The use of this award by certain referees in denial of claims of a nature similar to those confronting us here, leads to the conclusion that they either did not think, or they did not know the difference between the division of employes into different seniority groups or classes under one agreement, and agreements between certain craft or class of employes, the latter being involved in Award 5629. Regardless of their state of mind, they were guilty of the very thing the Court admonished against in 44 Ohio Appeals 493, when it stated:

"Constructive thinking is not wholly common in judicial opinions, for the reason that index learning has brought into convenient use thousands of precedents, and the first impulse in legal investigation is to 'find a case' * * * Cowper put the thought in cold type:

'To follow foolish precedents and wink both eyes is easier than to think.'

* * * ."

This Division has also had occasion to reject a previous decision as a precedent, where the issues were clearly distinguishable, or the Award was grossly in error.

Award 4819 (Shake):

"Giving Award No. 1167 the full consideration to which it is entitled as a precedent of this Board, we cannot regard it as highly persuasive, much less controlling, in this case. To ignore the distinguishing facts and follow that award in the instant case would result in a dangerous precedent for the gradual and piece-meal substitution of a code of Board-made rules for the clearly expressed provisions of the negotiated agreement of the parties." (Emphasis ours.)

Award 7917 (Shugrue):

" * * * precedents are no more persuasive than the logic of the reasoning underlying their determination, * * * . "

Award 6094 (Whiting):

" * * * It appears that the result reached in Award No. 5717, by reliance upon the awards cited, is contrary to the clear and unambiguous language of the rules agreed upon by these parties, * * * . Hence we decline to be governed thereby."

A review of the Awards cited by the Dissenters are either erroneous, or factually distinguishable as the following analysis will show:

Award 5705 (Wenke) covered a situation where regularly assigned Group 3 employees, who had seniority in Group 1, were working extra in Group 1, filling vacancies four days in the latter Group before performing the work in dispute, which they claimed was work performed on rest days of their Group 3 assignment. It will be noted that they did not work their own assignment for five days in one group and then transferred to another group on assigned rest day, as was the case in the subject disputes. The Award lends no support to the Dissenters' contentions.

Award 5798, Referee Yeager, is the first case that erroneously relied upon Award 5629 in denying claim for the punitive rate for work performed in Group 1 after claimant had performed five days work on her own assignment of Messenger in another Group. The Referee avoided, and apparently gave no consideration to the Special Rule governing Service on Rest Days. He predicates his decision on the overtime provisions of the Agreement and Award 5629, which led to erroneous conclusion that:

"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."

The erroneous conclusions reached by Referee Yeager in this award, which relies upon an award not in point, leads to the unalterable conclusion that he ignored all well established principles relating to contract interpretation and the value of other decisions as persuasive or controlling precedents. The Award is palpably wrong.

Award 6018, Referee Parker, involved a dispute between the same parties as in Award 5705. Claimant in Award 6018 was an extra employe in both Group 1 and 3. The first week in dispute, he worked three days in Group

1 and two days in Group 3. During the other weeks in question, Claimant worked extra in excess of five days or 40 hours in the two groups and should have been compensated for the sixth and seventh days at the punitive rate. The error of the Award lies in following Award 5798, which in turn relied upon Award 5629. It is clear, however, that the rules and factual situation in Award 6018 are entirely distinguishable from those in the two Awards under consideration.

The record in Award 6266 shows that claimants worked five days or forty hours on their regular assignments in Group 3, being further called on rest days to work in Group 1. Claimants had no established seniority rights in Group 1. It is clear that Referee McMahon committed grievous error when he admitted: "We have found no precedent awards having a similar statement of facts as herein presented" and then held: "We agree with the reasoning of the Board as set out in Awards 5705, 5811, 6018 and the claims as filed are without merit."

The Awards relied upon by Referee McMahon involved employees who had seniority in another group, or as in the case of award 5811, they had seniority rights to higher rated positions that were vacant because the regular incumbents were on vacation. It is also apparent that Claimants in the latter filled vacancies of five work days or more and thereby assumed the rest days thereof. They did not move to such vacancies on assigned rest day, as was the case in Award 6266. Referee McMahon committed grievous error by following Awards that were based primarily upon the premise that Carrier was compelled to use claimants because of their seniority, while the employees in his award had no seniority in the group in which the work was performed. It is clear that Referee McMahon broke all the rules relating to the interpretations of agreement, as well as those principles applying to precedents referred to above. Apparently, it is easier to follow "foolish precedents" than it is to think.

Award 7295 was authored by Referee Carter, which involved the same parties as in Award 5798. Referee Carter falls into the same error as the other Referees when he relied upon their Awards, Nos. 5629, 5705, 5798, 6018, 6970, 6971, in denial of claim. The record clearly shows that Claimant earned two rest days by working one assignment for five days. No reasons are given by Referee Carter in support of his erroneous and untenable conclusions, except the above cited awards. Referee Carter clearly deviated from the principles he enunciated in Award 6970, 6971 and 6973. Apparently, he was confused about the differences between craft or classes of employees, covered by different agreements and group or classes of employees covered by one agreement.

The above analysis of the Awards cited by the Dissenters, points up the fallacy of relying upon "foolish precedents" in rendering "opinions" based on erroneous awards, or awards that are clearly distinguishable. The seriousness of such decisions was well summed up by Judge Shake in Award 4819, supra, when he said:

"To ignore the distinguishing facts and follow that award in the instant case would result in a dangerous precedent for the gradual and piece-meal substitution of a code of Board-made rules for the clearly expressed provisions of the negotiated agreement of the parties."

Awards 9942 and 9943 are correct and in accord with the facts of record and the governing rules of the involved agreements.

/s/ J. B. Haines
J. B. Haines
Labor Member