Award No. 4032
Docket No. CL-3965

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

(Guy A. Thompson, Trustee)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the Missouri Pacific Railroad Company violated the provisions of the National Vacation Agreement and of the current Clerks' Agreement, when it:

1. (a Failed and refused and continued to refuse to compensate Clerk G. H. Batte, Desk Clerk, North Little Rock, Arkansas Yard Office, rate $7.09 per day, assigned hours 7:59 A. M. to 3:59 P. M., seven days per week, at the punitive rate of his position for Sunday, August 22 and Sunday, August 29, 1943, but instead it denied him any compensation at all for these days which fell within the period he was away on vacation and on which days he would have worked and been paid at time and one half time had he not gone on vacation.

   (b) Required Clerk Batte, scheduled to go on vacation August 20 to 31, inclusive, to advance his vacation dates and begin his vacation on August 18, 1943, and denied him permission to resume work on his job until September 1, thereby forcing him to be away from his job fourteen days in order to secure a vacation of twelve days to which his compensatory service under the provisions of the Vacation Agreement entitled him; and

   (c) That G. H. Batte shall be paid for the Sunday of August 22 and 29 at $10.62 per day, or $21.24, which the Carrier improperly denied him, growing out of its violation of the National Vacation Agreement and the Clerk's Agreement.

2. (a) Failed and refused to compensate Clerk Earl D. LaOrange, Yard Clerk, Hoisington, Kansas, rate $5.59 per day, assigned hours 12:00 P. M. to 8:00 A. M., seven days per week, at the punitive rate of time and one half instead of pro rata rate which he was paid for Sunday, September 5 and Sunday, September 12, 1943, which dates fell within the period of his vacation days, September 1 to 12, both dates inclusive; and

   (b) That Clerk LaOrange shall be paid the difference in pro rata rate for Sunday, September 5 and Sunday, September 12, and punitive rate, or $2.79 for each day, or $5.58, which he was denied due to

Carrier's violation of the National Vacation Agreement and the Clerks' Agreement.

EMPLOYES' STATEMENT OF FACTS: The 1943 agreed to vacation schedule indicated Mr. Batte would go on vacation August 20 to 31, both dates inclusive. However, his vacation date was advanced by the Carrier and he was required to go on vacation beginning August 18, at which time he was instructed to report back upon his position on September 1, which meant that he was required to be off and away from his position a total of fourteen days in order to obtain a vacation of twelve days, thereby being made worse off by reason of taking his vacation because the position occupied by Mr. Batte has been a seven day assignment for many years and the Carrier had not provided a relief clerk to relieve him one day in seven—

(a) He was working seven days per week when and prior to the time he left on vacation; and

(b) He worked seven days per week when and subsequent to the time he returned from vacation;

(c) Due to the Carrier not permitting his twelve vacation days to run consecutively, but instead advanced his scheduled vacation date two days and then deducted from his accredited vacation days the "on paper only" and "non existent" days of rest of August 22 and 29.

While Mr. Batte was on vacation, his position was filled by Clerk Mr. F. Foryewicz, Inbound Desk Clerk, to which position he was regularly assigned. Mr. Foryewicz's position was filled through a rearrangement of the remainder of the force.

The 1943 vacation schedule listed Mr. LaOrange to go on vacation September 1 to September 15, 1943, inasmuch as the time the schedule was compiled and agreed to, Mr. LaOrange was occupying a six day per week assigned position of Check Clerk, which position was not one "necessary to the continuous operation of the Carrier." Therefore, the Sundays of September 5 and 12 would have been properly excluded from the twelve days' vacation to Mr. LaOrange under the provisons of the Vacation Agreement. However, prior to the time for him to depart on his vacation, Mr. LaOrange changed from a Check Clerk position, not "necessary to the continuous operation of the Carrier" to a Yard Clerk position which does come within the category of "necessary to the continuous operation of the Carrier." In the capacity of Check Clerk, assigned six days per week, he would not have been due to work on Labor Day, Monday, September 6.

Mr. LaOrange went on vacation September 1, and was instructed to report back for work at the expiration of twelve days, that is, to report for work on his position on September 13, with which instructions he complied. Mr. LaOrange was paid for twelve days, i.e., September 1 to 12 inclusive of the Sundays of September 5, Monday (holiday), September 6 and Sunday, September 12, at the pro rata rate of his position.

Mr. LaOrange took his vacation as he was instructed to do, and returned from vacation as and when he was instructed to return. He was entitled to twelve days' vacation with pay, including the penalty days, thus being made worse off by reason of his vacation, because

(a) He was working seven days per week on his regularly assigned position of Yard Clerk when and prior to the time he left on vacation;

(b) He worked seven days per week on his regularly assigned position when and subsequent to his return from vacation;

(c) Had he not gone on vacation he would have worked Sunday, September 5 and Sunday, September 12, which fell within his vacation period and would have been paid time and one half

The employes when they negotiated Rule 26 of the working agreement asked to have one day off in each seven. The rule does not provide one day off in seven with pay. They are not entitled to any more than six days work with pay and one day off without pay in each 7-day period and the vacation agreement does not specify that they shall be entitled to any more. The fact that they were required to work their rest days over a considerable period of time was not something that they acquired as a matter of right either by virtue of Rules 26 and 27 of the working agreement or the vacation agreement, but was a state of circumstances engendered by the manpower shortage at that particular time.

The Board's attention is also invited to Exhibit F attached hereto which is a memorandum prepared on December 27, 1943 by Mr. M. C. Coad, at that time Assistant Chief Personnel Officer, now Special Assistant to the President of the Brotherhood of Railway and Steamship Clerks, which memorandum summarizes the results of a conference with the General Chairman on that date.

The proposition submitted by the General Chairman whereby employes, who were on their vacation 14 consecutive days, two of which were their rest days, and where there was no relief man in the pool, would be paid 14 days at the pro rata rate should indicate that the organization was quite uncertain of their position but that underlying their contention was a desire and attempt to stretch the 12-day vacation provided by the agreement into a 14-day vacation with pay for 14 days at the pro rata rate.

Exhibit G appended hereto copies of correspondence exchanged between the Chief Personnel Officer and the General Chairman in March 1946 resolving the question of whether or not and under what circumstances the assigned rest day attaches to the position and when it attaches to the individual. You will note that this correspondence does not differentiate between the situation where a relief man is assigned and a situation where only the rest day is assigned and the regular occupant of the position may be working his rest days. Both are treated the same. It will be noted that in the General Chairman's reply he does not take exception to this factor. He treats assigned rest days as being what they in fact are, i.e., "rest days" and not a day on which the employe is entitled to work.

It must be understood that there is no requirement that an employe assigned to a position necessary to the continuous operation of the Carrier be allowed to work on his rest day when the relief assignment is not filled. The Carrier is privileged to relieve him on his rest day by placing an extra or furloughed employe on the job, or by allowing a regularly assigned employe to "move up" on the job.

The claim here presented in behalf of the claimants named, as recited in the Employes' Statement of Claim, is not supported by rules of the Clerks' Agreement or the National Vacation Agreement and, accordingly, should be denied by your Honorable Board.

(Exhibits not Reproduced.)

OPINION OF BOARD: On all dates here in question the two claimants in this dispute held regular assignments to positions necessary to the continuous operation of the Carrier. Each, on paper at least, had been regularly assigned to work six days per week, Mondays to Saturdays, inclusive, with Sunday designated as a rest day.

The case requires consideration and construction of the working Agreement between the parties, effective July 1, 1943, as well as the National Vacation Agreement of December 17, 1941, and its Interpretations. To facilitate progress of the Opinion, involved provisions of such instruments will be quoted before relation of further facts or discussion of the issues.

Rule 26 of the current Agreement reads:

> "Work performed on Sundays and the following legal holidays—namely, New Year's Day, Washington's Birthday, Decoration Day,

Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation or by proclamation shall be considered the holiday)—shall be paid at the rate of time and one-half, except that employes necessary to the continuous operation of the carrier and who are regularly assigned to such service will be assigned one regular day off duty in seven, Sunday if possible, and if required to work on such regularly assigned seventh day off duty will be paid at the rate of time and one-half time; when such assigned day off duty is not Sunday, work on Sunday will be paid for a straight time rate."

Provisions to be found in the Vacation Agreement and in question are:

Article 1, which reads:

"Effective with the calendar year 1942, an annual vacation of six (6) consecutive work days with pay will be granted to each employe covered by this agreement who renders compensated service on not less than one hundred sixty (160) days during the preceding calendar year."

Article 2 (a-1), which states:

"Subject to the provisions of Section 1 as to qualifications for each year, effective with the calendar year 1942 annual vacations with pay of nine and twelve consecutive work days will be granted to the following employes, after two and three years of continuous service respectively:

(a) The following described employes if represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

(1) Clerks * * *"

Article 4 (a), which provides:

"Vacations may be taken from January 1st to December 31st and due regard consistent with requirements of service shall be given to the desires and preferences of the employes in seniority order when fixing the dates for their vacations.

The local committee of each organization signatory hereto and the representatives of the Carrier will cooperate in assigning vacation dates."

Article 11, in which it is stated that:

"While the intention of this agreement is that the vacation period will be continuous, the vacation may, at the request of an employe, be given in installments if the management consents thereto."

Another, and the final section of the Vacation Agreement requiring consideration, is Article 7 (a). It reads:

"Allowances for each day for which an employe is entitled to a vacation with pay will be calculated on the following basis:

(a) An employe having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment."

Under circumstances which make their interpretation as binding upon them as the terms of the Vacation instrument itself the parties have interpreted under date of June 10, 1942 the Article last quoted to mean:

"This contemplates that an employe having a regular assignment will not be any better or worse off, while on vacation, as to

the daily compensation paid by the carrier than if he had remained at work on such assignment, this not to include casual or unassigned overtime or amounts received from others than the employing carrier."

Desk Clerk, C. H. Batte, the first claimant herein named, as stated in his claim, was granted and/or required by the Carrier to go on his regular vacation commencing August 18 and terminating August 31, 1943. In that period were two designated rest days, Sunday, August 22, and Sunday, August 29. During the time he was away on his vacation he was compensated for 12 days at the pro rata daily rate and denied compensation for the two Sundays. He claims he should have been paid for those two days at the punitive rate of time and one-half.

Yard Clerk, E. D. LaOrange, the second claimant, was granted and/or required by the Carrier to go on his regular vacation September 1 to 12, 1943, inclusive. Within those dates were two designated rest days of his position, Sunday, September 5, and Sunday, September 12. Labor Day, September 6, was also in such period but is not here involved and need not be further considered. Claimant was allowed compensation and paid for the two Sundays at his daily pro rata rate. His claim for pay at the punitive rate for such two days was denied.

The parties agree that both claimants qualified under Articles 1 and 2 (a-1) of the Vacation Agreement and were entitled to vacations of twelve consecutive work days with pay in 1943. They also concede that while they were away on their vacations their positions were filled by two relief employes who worked every day of such vacation periods and who were each paid time and a half for the two Sundays they were each required to work on vacation relief.

It is not disputed that when Rule 26 became effective and for some time after August and September, 1943, when it became apparent the instant claims were to be pressed, no relief employes were employed or assigned to relieve these two claimants on their designated rest days (Sunday) although normally Carriers assign so-called relief positions or employes to work regularly the seventh day on positions necessary to the continuous operation of the Carrier such as are here involved. Neither is it controverted there were no extra or unassigned employes available for relief on the two positions. Nor is it denied that claimants were in fact each required, both before and after their vacation periods, between the effective date of the current working Agreement and some time in September 1943, to work all Sundays, except of course the two of their respective vacation periods, for which they received the punitive or overtime rate. Indeed the Carrier states they were required to work their rest days prior to and following their vacation while the petitioner charges without refutation that they were required to work each such Sunday and were subject to discipline if they refused to do so.

With specific reference to claimant Batte the petitioner's contentions can be summarized as follows:

That the Carrier violated;

(1) Article 2 (a-1) of the Vacation Agreement in not allowing him 12 consecutive work days of vacation, August 20 through 31, instead of requiring him to take 14 days, namely August 18 through 31, with 12 days pro rata pay;

(2) Article 7 (a) of such Agreement and its Interpretation, heretofore quoted, by denying him payment for Sundays, August 22 and 29, at the overtime or time and one-half rate, which was the payment made to the person occupying such position on relief;

(3) Article 11 by, in effect, requiring Batte to take his vacation in installments, namely, August 18 through 23 and August 25 through 30;

(4) The Seniority Rules of the working Agreement in requiring him to remain away from work two days beyond his proper vacation period.

As to claimant LaOrange, petitioner asserts that he was properly allowed twelve consecutive work days as contemplated by Article 2 (a) supra but that under Article 7 (a) supra, he was entitled to pay at the punitive rate for the two Sundays instead of pro rata as paid. Decision of the principal or monetary phase of this claim raises the same questions, and arguments advanced in support thereof are practically the same, as those in the Batte claim. Therefore, from this point on until specific reference is again made to the LaOrange claim this Opinion will proceed as if the Batte claim only was in controversy.

At the outset it should be pointed out that standing alone there is nothing in Rule 26 which, even by inference, supports the petitioner's theory that Batte was entitled to pay at the punitive rate therein specified for Sundays not worked. So far as employes in general are concerned the rule expressly provides for and contemplates "work performed" on such day and in cases of employes necessary to continuous operation contains the following additional phrase, "if required to work." Thus it clearly appears that such rule has no application unless provisions of the Vacation Agreement bring it into play by requiring pay for Sundays not worked and that even then its application is limited to fixing the rate of payment.

The axis on which decision of all other questions herein involved turns is whether in the situation disclosed by the record Sunday was a regularly assigned work day or a regularly assigned rest day of Batte's position. Once such question is decided the solution of the others becomes comparatively simple.

In the first paragraph of this Opinion the following statement appears, "Each, on paper at least, has been regularly assigned to work six days per week, Mondays to Saturdays, inclusive, with Sunday designated as a rest day." Such statement was purposely made in that form so that the contentions of the respective parties with respect thereto could be stated. For the same reason there has heretofore been set forth a full and complete statement of the prevailing conditions under which Batte worked his position on Sunday both before and after his vacation period.

On the point in question the Carrier asserts that on or about July 1, 1943, in line with Rule 26 of the current Agreement, it prepared a relief schedule designating Sunday as the relief day for the position held by Batte and that thereafter his regular assignment to such position was six work days, Mondays to Saturdays, with Sunday designated as a rest day. It contends that thereafter when required to work on such day Batte was not at work on a regularly assigned work day but working a rest day, or overtime, for which he was entitled to and received compensation at a punitive rate. This contention, it may be added, is entitled to some weight in and of itself by reason of the fact that prior to the date of the new Agreement and under the terms of its predecessor employes could be regularly assigned to a position with seven work days a week, inclusive of Sunday, without any provision being made for a rest day but were entitled to pro rata time only for the seventh day of such assignment whereas the new Agreement not only requires an assigned rest day but provides for a penalty payment when the regular incumbent works it.

The assertion made by the Carrier as to the status of Batte's assignment after the new Agreement went into force and effect is impliedly, if not actually conceded. The effect of petitioner's contention is that even so the Carrier's failure to provide a relief clerk for the position and its requirement that Batte work the position on Sundays under the conditions heretofore related, notwithstanding Rule 26 and its subsequent assignment of a rest day, resulted in an actual designation of Sunday as a work day or at least in its becoming a regularly assigned work day of the position.

Once Sunday has been designated or regularly assigned as the rest day of a regularly assigned position—as here—we do not believe the fact the Carrier requires the occupant of that position to work it thereafter, occasionally or continuously, results in changing its designated status. It is still a rest day for which, when worked, the punitive rate is collected. The Carrier was not required to designate the claimant as the person to fill the assigned relief position here involved but could have filled it at any time with a proper relief clerk. Indeed, under the facts, if claimant had remained at home he could not have compelled the Carrier to permit him to work the two Sundays in question had he seen fit to attempt to do so.

Under the conditions heretofore related and in the light of all the facts and circumstances disclosed by the record this Division can only hold that Sunday was the regularly designated rest day and not a regularly assigned work day of claimant's position. The fact, as pointed out, that Batte would have been subject to discipline had he not worked as instructed is not significant in determining the status of Sunday. Our understanding is the nature of his position was such that even though there had been no question raised as to the regularity of the designation of Sunday as his rest day, he would nevertheless have been subject to discipline in the event of a call and refusal to serve.

Now that the point common to all others has been determined we turn to alleged violations of the Agreement on which petitioner relies.

We think the claim Article 2 (a-1) of the Vacation Agreement was violated in that in allowing Batte fourteen days vacation with two rest days included he was not allowed "twelve consecutive work days" as therein required is definitely answered by this Division in recent Awards Nos. 3996 and 4003. We reaffirm what is reasonably to be inferred from Award 3996 and what is expressly held in Award 4003 to the effect the phrase just above quoted means twelve consecutive days on which the regularly assigned work of the position is to be performed and that the two Sundays included in Batte's vacation not being regularly assigned work days of his position were properly excluded in fixing the days of his vacation. It follows that in granting him fourteen full days instead of twelve the Carrier did not violate this Article of the Agreement.

What has just been stated disposes of the contention Article 11 of the Vacation Agreement was violated in that he was required to take his vacation in installments. How else could a Sunday which is a rest day and no part of the regularly assigned work days of a position be taken into account in fixing vacations periods in excess of seven—as here twelve—days duration.

The claim that Article 7 (a) of the Vacation Agreement and its Interpretation were violated because claimant was denied payment for the two Sundays, August 22 and 29, at the punitive rate, which was the rate paid for those days to the person occupying such position on relief, cannot be upheld for two reasons. In the first place Article 7 (a) contemplates payment shall be made to the holder of the regular assignment on the basis of the daily compensation paid by the Carrier for "such" assignment. The word "such" in our opinion limits payment to regularly assigned work days. That was done. In the next place, the Interpretation expressly excepts payment of unassigned overtime. Under Award 1401 Sunday work performed on a punitive rate is regarded as overtime. The two Sundays for which the relief occupant received payment at the punitive rate were unassigned overtime so far as claimant is concerned. He did not work them. Neither did he have any assignment to work them.

We have not overlooked claimant's contention that the Interpretation states he is to be no worse off than if he had remained at work. In our opinion such Interpretation must be construed in the light of the limiting phrases to be found therein, namely "on such assignment" and "or unassigned overtime." When so construed the language on which claimant relies

comprehends compensation paid by the Carrier for the regularly assigned work days of the claimant's position.

Based on our conclusions as to other issues petitioner's contention respecting violation of the Seniority Rules of the working Agreement falls of its own weight.

Turning again to the LaOrange claim, what has heretofore been held requires the denial of his claim for pay at the punitive rate. It discloses, however, the Carrier improperly included two Sundays in his vacation period and that he was actually entitled to two more days vacation on pro rata pay. The claim involves the amount due him for his vacation period and is therefore broad enough to permit of its disposition on an equitable basis. By the Carrier's action LaOrange lost two days of his vacation period which cannot be adjusted. We therefore hold he is entitled to two days pro rata additional vacation pay. The fact the Carrier may have voluntarily paid this claimant for two Sundays as a result of its erroneous construction of the Agreement does not relieve it from its obligation to pay for the two vacation days denied him.

Other contentions advanced by the parties have been considered and rejected without recital or comment as not being of sufficient importance to change the result here announced. To discuss them would only prolong what is already a too lengthy Opinion, due in the main to the detailed preparation, excellent presentation and spirited argument of the cause.

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 was not violated except in the one particular outlined in the next to last paragraph of the Opinion.

AWARD

Claim 1 (a) (b) (c) denied.

Claim 2 (a) (b) sustained in part, denied in part. Claimant is allowed two days pro rata pay as indicated, and on the basis set forth, in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 9th day of August, 1948.