Award No. 5464
Docket No. CL-5415

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Alex Elson, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

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

(a) Carrier violated and continues to violate the Rules of the Clerks' Agreement when it refused and continues to refuse to compensate Car Record Clerk James W. Johnson, West Oakland, California, at the rate of time and one-half for service performed on the sixth (6th) consecutive day, Saturday, November 19, 1949, which service was in excess of 40 straight time hours or five (5) days in his work week.

(b) That Car Record Clerk James W. Johnson shall now be compensated for eight (8) hours at the rate of time and one-half in lieu of eight (8) hours' straight time compensation allowed for service performed on Saturday, November 19, 1949.

EMPLOYES' STATEMENT OF FACTS: 1. There is in evidence an Agreement between the South Pacific Company—Pacific Lines (hereinafter referred to as the Carrier) and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter referred to as the Petitioner) bearing effective date of October 1, 1940, which Agreement (hereinafter referred to as the Agreement) was in effect on the date involved in the instant claim. The Agreement was amended or revised by a Memorandum of Agreement dated July 8, 1949, and supplement thereto dated June 30, 1950, which became effective September 1, 1949, to conform with the National 40-Hour Week Agreement signed at Chicago, Illinois, March 19, 1949. Copy of the Agreement of October 1, 1940, and subsequent revisions and/or amendments are on file with this Board and by reference are made a part of this dispute.

2. Position No. 26, Car Record, West Oakland, California, with assigned hours, 11:59 P. M. to 7:59 A. M., rate of pay $12.62 per day, rest days Saturday and Sunday, was advertised for seniority choice on Clerks' Assignment and Vacancy Notice No. 20, dated October 1, 1949. Mr. James W. Johnson (hereinafter referred to as the Claimant) was awarded the position on Clerks' Assignment and Vacancy Notice No. 21 dated October 16, 1949. The Claimant's position therefore was established under the provisions of Rule 9 (i) of the Agreement, reading as follows:

consecutive days worked subsequent to the rest day of the former work week.

The Division's attention is directed to the fact that Rule 42 is a special rule covering a particular situation. It is a well established principle of contract construction that special rules prevail over general rules, leaving the latter to operate in the field not covered by the former. (See Award 4507 of this Division.)

The parties previously agreed that Rule 42 was controlling over Rules 3 and 25. (See Carrier's Exhibit "C", page 3.) It is the carrier's position that Rule 42 likewise is controlling over the corresponding provisions which were incorporated into Rule 20.

In addition to pointing out the controlling nature of Rule 42, the carrier calls attention to the exception incorporated into both paragraphs (b) and (c) of Rule 20, namely: "* * * * except where such work is performed by an employe moving from one assignment to another or to or from an extra list * * *."

The above exception is taken verbatim from Agreement signed at Chicago on March 19, 1949.

The phrase "moving from one assignment to another" prima facie contemplates change in work week by reason of the exercise of seniority. Under the rules agreed to by the parties, a change in the assigned rest days constitutes sufficient change to accord the employe affected the right of exercising his seniority either actively by displacing a junior employe or constructively by electing to remain on the changed assignment. In granting the employe such displacement privileges, the rules also contemplate that regardless of the manner in which he elects to exercise his seniority, he will take all the conditions of the assignment which he assumes (including the new work week), and that claim for time and one-half by reason of the number of days elapsing between the rest days of the former work week and rest days of the new work week is precluded under the agreement. This construction logically applies not only to Rules 3 and 25 of the current agreement, but to revised Rule 20 as well.

The carrier is bound by the provision of the rule which permits the employe to exercise his seniority, and the carrier asserts that the petitioner is likewise bound by the agreed upon interpretation which precludes claim for compensation at rate of time and one-half on a day off of the former work week.

CONCLUSION

The carrier asserts that it has conclusively established that the claim in this docket is without merit and therefore submits that it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant, prior to November 16, 1949, occupied Position No. 26, Car Record Clerk, West Oakland office, with assigned rest days of Saturday and Sunday. On Wednesday, November 16, 1949, claimant was notified that the rest days of his assignment were to be Sunday and Monday. He did not request to displace a junior employe under the provision of Rule 42, and worked on Saturday of that week, since that day became a regular work day of his assignment. He therefore worked six consecutive days, Monday through Saturday of that week. He was paid the straight time rate for work on Saturday, the sixth day.

The claim is based primarily on Rules 20 (b) and (c) which read as follows:

"Rule 20.

Overtime

(b). 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 list, or where days off are being accumulated under paragraph captioned 'Nonconsecutive Rest days.'"

(c). 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 list, or where days off are being accumulated under paragraph (g) (3) of Rule 9."

The Carrier opposes the claim on the basis of Rule 42 (a) which reads as follows:

"Rule 42.

(a). When established starting time of a regular position is changed more than one (1) hour for more than six (6) consecutive days, or four (4) hours or more on any day per week, or the assigned day off duty is changed, the employe affected may, within ten (10) calendar days thereafter, upon forty-eight (48) hours' notice from time of making request, displace a junior employe."

The Carrier relies on an Agreement made November 6, 1925. Under this Agreement Rule 42 was made applicable to changes in assigned rest days, and it was further agreed that the exercise of rights under Rule 42 would preclude claims under Rules 3 and 25. Carrier also relies on the disposition of a Claim in 1940 which it asserts was made in accordance with the 1925 Agreement, involving an employe named Kahler.

We have carefully considered the 1925 Agreement and the Agreements of the parties and their practice since that time. First, we are not persuaded that the Carrier's interpretation of the 1925 Agreement is correct. The footnote to the Agreement providing that exercise of rights by an employe under Rule 42 would preclude claims under Rule 3 (guarantee rule) and Rule 25 (overtime rule) is ambiguous. The exercise of rights under Rule 42 would seem to involve the exercise of seniority rights. If an employe elects not to displace a junior employe when one of his days of rest is changed, is he receiving a right under Rule 42? Since the purpose of Rule 42 is to give the to exercise seniority when there is a change in rest days, the right to continue on in the assignment with the changed rest days is a right which the employe has without Rule 42. Accordingly, he is not exercising rights within the meaning of Rule 42 when he continues with the assignment.

Second, the Agreements of the parties have undergone considerable change since 1925. Rule 25 was eliminated effective September 1, 1949, and Rule 3 has now become Rule 3 (c).

Third, Rule 69 of the Agreement of the parties, effective October 1, 1940, several months after the Kahler claim was disposed of specifically states that the 1940 Agreement supersedes all previous Agreements.

Fourth, the record shows that subsequent to 1940, when the Kahler claim was handled, and subsequent to September 1, 1949, the Carrier has paid claims comparable to the instant claim.

Finally, Rule 20 (b) was entered into on July 8, 1949, as part of the 40 Hour Week Agreement to replace old Rule 25, and Rule 20 (c) was

entered into June 30, 1950. These rules are part of the last written Agreement of the parties. They deal specially with the subject as to when the overtime penalty is to be paid by the Carrier. While they contain exceptions they do not contain the exception that the Carrier claims in the instant case. The rule is that under such circumstances this Board may not imply any other exception. Awards Nos. 2009, 3825, 4551 and 4854.

We are not impressed with the Carrier's argument that the language used in Rules 20 (a) and 20 (b) "except where such work is performed by an employe due to moving from one assignment to another" covers a change in rest days. An employe who remains on an assignment when the only change is in the rest days is not "moving from one assignment to another."

We believe that Rules 20 (b) and (c) support the instant claim and should be allowed. See Awards Nos. 5113 and 2165.

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

That both parties to this dispute waived oral hearing thereon;

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

The Agreement was violated by the Carrier.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of September, 1951.