Award No. 5794
Docket No. CL-5840

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

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

WABASH RAILROAD COMPANY

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

(1) The Carrier violated provisions of Rule 12, Work Week, Sections one and three of the Memorandum of Agreement, Schedule for Clerks, effective September 1, 1949, signed at St. Louis on July 20, 1949, and Paragraph (b), **Service on Rest Days**, Memorandum of Agreement, Schedule for Clerks, signed at St. Louis on August 3, 1950, effective September 1, 1949, by requiring extra clerk J. W. Elsrode, Kansas City, Missouri, to work eight (8) consecutive days as Clerk, Monday, February 27, to Monday, March 6, inclusive, 1950, without a rest day, and twelve (12) consecutive days as Clerk, Thursday, March 9, to Monday, March 20, inclusive, 1950, without a rest day, and compensating Clerk Elsrode at straight time rate for each day so worked.

(2) J. W. Elsrode, extra clerk, be paid the difference between straight time rate which he was paid, and time and one-half rate, for eight (8) hours he was worked Saturday, March 4, and Sunday, March 5, having worked fifty-six (56) hours during period Monday, February 27, to Sunday, March 5, inclusive; also the difference between straight time rate which he was paid, and time and one-half for eight (8) hours he was worked Saturday, March 18, and Sunday, March 19, 1950, having worked fifty-six (56) hours during period, Monday, March 13, to Sunday, March 19, inclusive.

JOINT STATEMENT OF FACTS: J. W. Elsrode is an Extra Clerk and holds seniority on the Kansas City Terminal Division dating from November 25, 1949.

Mr. Elsrode was used to fill temporary vacancies on various clerical positions during the period, Monday, February 27, 1950, through Sunday, April 2, 1950, in the manner and to the extent set out below:

Date	Job	Job No.	Hours of Assignment Worked	Rest Days of Assignment Worked
Monday February 27	Cooper Clerk	70	7:30 AM to 4:30 PM	Saturday & Sunday
Tuesday February 28	Cooper Clerk	70	7:30 AM to 4:30 PM	Saturday & Sunday
Wednesday March 1	Cooper Clerk	70	7:30 AM to 4:30 PM	Saturday & Sunday
*Thursday March 2	Relief Clerk	3	4:00 AM to 12:00 noon	Tuesday & Wednesday

* Elsrode was paid at the punitive rate for the time worked between 4:00 A. M. and 7:30 A. M. on March 2, 1950.

Work in excess of forty (40) hours in a work week, or more than five (5) days in a work week, under such circumstances, is explicitly excepted from the overtime provisions of Rule 12.

The contentions of the Committee should be dismissed and the claim denied.

The Carrier affirmatively states that the substance of all matters referred to herein has been the subject of correspondence or discussion in conference between the representatives of the parties hereto and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The basis of the claim here is an alleged violation of the provisions of Rule 12 of the Memorandum of Agreement entered into by and between the Carrier and Organization effective September 1, 1949. This Rule contains the schedule for clerks. The Organization contends that J. W. Elsrode, on whose behalf the claim is made, was, in violation of the Agreement, required to work eight consecutive days as clerk, Monday, February 27, to Monday, March 6, 1950, inclusive, without a rest day, and twelve consecutive days as clerk, Thursday, March 9 to Monday, March 20, 1950, inclusive, without a rest day. It is insisted that he was entitled to Saturday and Sunday, March 4 and 5, and Saturday and Sunday, March 18 and 19, as rest days and hving been required to work on those days he was, under the provisions of the Rule, entitled to be compensated at the rate of time and one-half of the basic rate instead of the regular rate which was paid.

From the joint statement of facts on which the claim was presented it appears that Elsrode was an extra clerk with seniority on the Kansas City Terminal Division. On the days in question he was used to fill temporary vacancies in various clerical positions. He occupied none of the positions as assignee pursuant to bid.

Rule 12, Section 1 (a) of the Agreement in general terms established the 40 hour work week. Section 1 (i) defined the work week for assigned and unassigned employes. The work week of an assigned employe is defined as a week beginning on the first day on which the assignment is bulletined to work. The work week of an unassigned employe is defined as seven consecutive days starting on Monday.

Except as provided under Rule 12, Section 1 (g) the rest days of assigned and unassigned employes are the 6th and 7th days of their respective work weeks. This exception however has no application here.

The first paragraph of Rule 12, Section 3 (a) contains the following:

> "Work in excess of forty (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, * * *."

The second paragraph of this Rule contains the following:

> "Employes worked more than five (5) 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, * * *."

Elsrode was not a regularly assigned employe within the meaning of Rule 12, Section 1 (i), therefore a work week for him was seven days

commencing on Monday. It follows therefore that unless his employment as disclosed by the record is controlled by and falls within the exceptions contained in the two partially quoted paragraphs of Rule 12, Section 3 (a) the claim must be sustained.

It is to be observed that the exceptions apply (1) to an employe moving from one assignment to another, (2) from an extra or furloughed list, or (3) to an extra or furloughed list. Exceptions (2) and (3) are not of concern here.

Whether or not his employment fell within the exceptions depends upon the definition to be applied to the term "assignment" as it is used in the exceptions. A definition does not appear as a part of the expections.

The position of the Organization is that within the meaning of the Rule no employe may be regarded as occupying an assignment unless the position he is filling is being filled pursuant to bulletin and bid by him.

The Carrier does not accept this definition but contends substantially that assignment as used in the exceptions embraces any and all work which the employe is required to perform for which he is qualified under the agreement whether it be a bulletined and bid position or the filling of temporary vacancies as was the fact here. It further contends that removal from one temporary vacancy to another, as here, came within the exceptions, and thus it was entitled to have Elsrode continue on Saturday and Sunday at the straight time rate of the position on those days.

It appears that a key to the proper definition of assignment as used in the exceptions is to be found in Rule 12, Section 1 (i). The section is as follows:

> "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 (7) consecutive days starting with Monday."

This provision defines "regularly assigned" employes and names but fails in terms to define "unassigned" employes. It recognizes two classes of employes, the "regularly assigned" and the "unassigned". It, read with the two parts of paragraphs quoted from Rule 12, Section 3 (a), since there is no related matter on this subject in the agreement, at least inferentially recognizes but two classes of work, one which is performed under a regular assignment and one which is not.

It follows that an employe who, in his employment, falls within the second class is not performing work of an assignment, and when he moves from one such position to another he does not within the meaning of the exceptions discussed move from one assignment to another.

In Award 5494 where rules like these were interpreted the Division arrived at the same conclusion as the one reached here. In the opinion there work such as was performed by Elsrode was designated as having been performed by appointment as distinguished from assignment. See also 5495.

Award 5705, although not in point on the facts involved here, supports generally the conclusion that an unassigned employe performing unassigned work may not be regarded as occupying an "assignment".

In view of the foregoing the conclusion is that Elsrode was entitled to the rest days claimed and that for failure to allow them the Carrier is required to pay him time and one-half of the basic rate for the work done on those 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 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 Carrier failed to pay in accordance with the requirements of the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of May, 1952.

DISSENT TO AWARD NO. 5794, DOCKET NO. CL-5840

This award, together with the erroneous decision of Referee Whiting in Award 5494 which has been wrongfully permitted to control it, establish the principle that the penalty of overtime compensation shall attach to a condition which the carriers are powerless to prevent. Heretofore, and traditionally, the use of the overtime rate in the railroad industry has been properly confined to situations where the work or duty for which it becomes payable is avoidable and where the employer can exercise discretion with respect to its assignment. Its only legitimate purpose always has been conceived to be that of applying a penalty to discourage the doing of something by management which the employes consider undesirable.

On the admitted facts in this case the seniority rules of the contract required the carrier to assign work on a temporary vacancy to the claimant because the claimant was the senior qualified and available extra employe. If the carrier should have assigned a junior extra employe, as it might have done, it would have been liable for a "runaround." Being thus compelled to use the claimant, the carrier should not be penalized because the work thus given to him constituted work in excess of five days in a week. Referee Whiting recognized the principle in the award relied upon and failed to apply it only because he found that there was no proof in that case that the carrier was required to use the claimant.

The provisions of Rule 3 (a), permitting the payment of straight time rates in situations such as this, were conclusively shown to have been written into the contract for the express purpose of preventing just such a decision as this from being rendered.

Because this award misconstrues the contract and imposes a revolutionary and unjust rule on the parties, we dissent.

/s/ A. H. Jones
/s/ W. H. Castle
/s/ R. M. Butler
/s/ C. P. Dugan
/s/ J. E. Kemp