Award No. 6504

Docket No. MW-6533

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William M. Leiserson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

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

(1) The Carrier violated the effective agreement when it compensated Trackman Roland Proulx at the straight time rate of pay instead of the overtime rate of pay for eight (8) hours' service rendered on Saturday, July 1, 1950:

(2) Trackman Roland Proulx be paid the difference between what he did receive at his straight time rate of pay and what he should have received at the time and one-half rate of pay for service rendered on July 1, 1950.

EMPLOYES' STATEMENT OF FACTS: Trackman Roland Proulx held a regular assignment as such in Section Crew 189 at Lowell, Massachusetts. Section Crew No. 189 is regularly assigned to work Monday through Friday with Saturdays and Sundays as rest days.

The Patrol Crew in the same district had a regular assigned work week of Tuesday through Saturday with Sundays and Mondays as rest days. Patrol Foreman Stancombe was assigned a paid vacation beginning on July 1, 1950.

Trackman Proulx rendered service in his regular assignment on Monday, June 26, 1950 through Friday, June 30, 1950. Mr. Proulx was instructed by his supervisor to temporarily fill in as foreman during the period Patrol Foreman Stancombe was on vacation, beginning on Saturday, July 1, 1950.

Mr. Proulx was paid at the straight time rate for Saturday, July 1, 1950.

Claim was filed requesting that Trackman Proulx be paid the difference between what he did receive at his straight time rate of pay and what he should have received at his time and one-half rate of pay for services performed on July 1, 1950.

Claim was declined.

claimant "assumed all the conditions of the higher rated position, including the hours assigned, rest days and rates of pay" which did exceed the rate of pay of his trackman's assignment. There is no merit in this claim and it should be denied.

All factual data and argument used herein has been brought to the attention of Petitioner.

OPINION OF BOARD: The essential facts in the case are not disputed. A Trackman worked his regular assignment from Monday June 26, through Friday June 30. The next day was one of his rest days. On that Saturday, July 1, a Patrol Foreman whose work week on another assignment began that day, went off on his vacation; and in response to a request from the Carrier, the Trackman agreed to serve in the Foreman's place. Thus the Trackman worked on the rest day of his own assignment, July 1. He was paid the Foreman's straight-time rate for the day, which was higher than his rate as a Trackman.

The Maintenance of Way Organization charges that this was a violation of its working Agreement with the Carrier, and claims that he should have been paid at the rate of time and one-half. It cites Rules 28, 30-A, 30-D and 31 of the Agreement in support of its position.

The Carrier relies on the same rules to justify the payment of straight time; and in addition, it claims that the Trackman was "promoted" on the basis of seniority, ability and merit under Rule 16-A. Also, that the Vacation Agreement provides that it shall not be required to assume greater expense because of granting a vacation than would be incurred if no vacation was granted.

As to the alleged promotion, it is clear that the Trackman was used to relieve the Foreman during his vacation, and no promotion was involved. With respect to the Vacation Agreement, this was made many years before the 40-Hour Work Week Agreement was negotiated, and in Award 5805, where the parties were the same as here and the dispute much the same, this Division ruled that it must be decided on the basis of the rules in the 40-Hour Week Agreement.[1]

No. 28 of these rules is titled "Rest Day and Holiday Service." It stipulates:

> "Employes who are required to work on their rest days or the following holidays, (. . . days named . . .) shall be compensated therefor at the rate of time and one-half. * * *" (Omitted sentence deals with extra or furloughed employes.)

Rule 30-A is headed "Overtime":

> Paragraphs (b) and (c) of this rule provide for payment of time and one-half the basic straight time rate for work in excess of 40 hours in any work week and for more than 5 days in a work

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[1]The Carrier also invoked the court doctrine of laches to request that the claim be dismissed. The doctrine has no application here where the statute which establishes the Adjustment Board provides no time limitation on claims, and the record shows that the claim was handled by the parties in the "usual manner" as required by the law. The Railway Labor Act does provide for prompt handling of disputes arising out of working agreements as well as other labor disputes on the railroads. But the experience of the Adjustment Board, and that of the Mediation Board, to say nothing of the United Nations, has shown that attempts to adjust disputes by peaceful methods take a long time, for which neither the employes nor the carriers are solely responsible.

week, respectively, and both paragraphs contain the following proviso: "except where such work is performed by an employe due to moving from one assignment to another. * * *"

Rule 30-D, titled "Service On Rest Days", reads in pertinent part:

"Service rendered by employes on assigned rest days shall be paid for under existing call rules unless relieving an employe assigned to such day in which case they will be paid under existing rest day rules. * * *"

Rule 31 is the Call Rule. It provides for payment of time and one-half on a minute basis with a minimum of 2 hours and 40 minutes for employes "called to perform work not continuous with the regular work period."

On the basis of these rules the Employes argue that work on rest days must be compensated at the rate of time and one-half. The Carrier's position is that the Trackman moved from one assignment to another within the meaning of the exception in Rule 30-A (b) and (c), and therefore he was properly paid the straight time rate of the position to which he moved.

"Moving from one assignment to another" may occur under two different circumstances: (1) where an employe exercises his seniority to displace a junior employe on an another assignment or where he wins a bid on a new positioner to fill a vacancy on an old one; (2) where an employe moves to fill a short vacancy relieving some one who is temporarily absent from another assignment. The first clearly falls within the exception in 30-A, and the employe takes all the conditions, including the pay and rest days, of the assignment to which he moves. The second may or may not fall within the exception, depending on the facts and the wording of the applicable rules in each particular case. This Division has therefore held in some cases of this kind that the exception applied and the straight time rate was properly paid, while in others it ruled that the exception was not applicable and sustained for time and one-half.

In Award 6503, the Division (with the present Referee participating) denied a claim for the punitive overtime rate where the claimant moved to relieve an employe on another assignment, and we cited Awards 4592 and 6408 to the same effect. A similar claim was also denied in Award 5811. On the other hand, in Awards 5494, 5805 and 6440, the Division upheld claims for time and one-half, although in all three cases the Carriers' justification for paying straight time was based on the exception, "due to moving from one assignment to another". What may thus appear like contradictory decisions are really not contradictory. The facts or the applicable rules or both were different in the two groups of cases. One difference hinged on whether the Carrier was obligated or not under the seniority rules to move the employe to another assignment on penalty of paying him for not so doing; another on whether the facts in the case showed he actually worked on his own assignment and was not really moved. A third difference may be due to a variation in the wording of the rule covering Service on Rest Days.

In Award 5805, for example, the Carrier was not compelled by the seniority rule to use the claimant to fill the short vacancy. It could have hired some one else; therefore, overtime pay was due. But in Award 5811 it was held that the Carrier could not avoid using the claimant; thus the rate of the position to which claimant moved was properly paid. And it is significant that the same Referee participated in making both these decisions. In Award 6440, the facts in the case required payment of the overtime rate; it turned out that the claimant had actually worked his own assignment though he had been instructed to move to another.

In Award No. 6503, we also denied a claim for overtime pay on the ground that claimant moved from one assignment to another, as provided

in the exception to the 40-hour and the 5-day work week rules. The present Referee participated in that case, and finds the applicable rules there were different from the rules in the instant case in a very important respect. In Award 6503, it was clear that the claimant, there as here, moved from his assignment on his rest day to relieve an employe on another assignment which worked that day. The record in that case was equally clear that the intent of the Agreement between the parties was to pay employes when relieving others the rate of the assignment to which they moved. This was not mentioned in the Opinion in Award 6503 because the parties had not yet agreed on the final wording of the rule governing movement of an employe to relieve another on a different assignment. For this reason, reference to the unagreed upon rule was omitted.

The Agreement in evidence in that case contained two proposed rules under paragraph (i) of Rule 37, one submitted by the Carrier, the other by the Employes. Both were titled, "Service on Rest Days," and an attached typed note stated that a dispute as to the wording was "resubmitted" to the Forty Hour Committee. But with respect to rest day service relieving an employe assigned to work that day, there was no disagreement between the parties. Both proposed the following clause: "in which case they will be paid for eight (8) hours at the rate of the position occupied or the regular rate, whichever is higher." Plainly these words showed the intent of both parties to keep the provision for relieving an employe temporarily absent from another assignment consistent with the exception due to moving from one assignment to another. This consistency is maintained in the 40-Hour Week Rules on many railroads, and we cited an example in Award 6501 where Rule 36 (e) provided that rest day service shall be paid for under the Call Rule, "unless relieving an employee assigned to such day in which case he shall be paid for eight (8) hours at the rate of the position occupied or their regular rate, whichever is higher."

In the instant case, however, it is important to note that Rule 30-D which provides for an employe on his rest day relieving another assigned to work that day, contains no such language as the clauses quoted in the preceding paragraph. An examination of the 40-Hour Work Week Rules shows that paragraphs (b) and (c) of Rule 30-A are the same as in most other Agreements. But Rule 30-D which provides for "service on Rest Days" reads differently from the way such rules are worded in other Agreements, as for example in the Agreements involved in Award 6501 and in the proposals of both parties for Rule 37 (i) in Award 6503. In those cases, it was specifically stated that the rate of the position relieved or the rate of the relieving employe, whichever is higher, would be paid. Here there is no such provision.

Reference to Rule 30-D shows that it provides for service on rest days to be paid under Call Rules, "unless relieving an employee assigned to such day in which case they will be paid under existing rest day rules." Turning to Rule 28 which specifies the pay for rest day service, as well as for holiday service, this Rule prescribes that both "shall be compensated at the rate of time and one-half". Regardless, therefore, whether the seniority rules did or did not obligate the Carrier to use the Trackman on his rest day to relieve the Patrol Foreman who was assigned to work that day, it is clear that provisions of Rules 30-D and 28 required the Carrier to pay the Trackman at the rate of time and one-half for the day. We cannot, by interpretation, change the plain meaning of these two rules.

Rules 28 and 30-D were violated, and the claim must be sustained.

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

The Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 16th day of February, 1954.

DISSENT TO AWARD 6504, DOCKET MW-6533

This Award reaches a result directly contrary to an award just made by the same Referee under almost identical facts (Award 6503). An attempt is made to distinguish the two cases. The distinction stated is that in Award 6503, the proposed "Service on Rest Days" rule (not yet adopted by the parties) provided that an employe required to work on his rest day relieving another employe assigned to work on that day would be paid "for eight (8) hours at the rate of the position occupied or the regular rate, whichever is higher." The Referee now says that his decision in Award 6503 was based upon the above quoted language because, he says, this language shows that the parties did not intend a man who worked on his rest day relieving another person assigned to work on that day to be paid at time and one-half It is interesting to note that the Referee did not so state the basis of his opinion in Award 6503, but has only now seen fit to disclose that basis as an excuse for distinguishing the present Award from the prior one—a convenient use of hindsight. In any event, he now says that the result in this present docket must be different from the result in Award 6503 because in the present case the "Service on Rest Days" rule (30-D) does not contain the above quoted language.

Rule 30-D provides for pay for service performed on an employe's rest day. The form involved in this case as well as the form involved in Award 6503, both provide a distinction between an employe who works on his rest day **not** in the place of some other employe and the employe who works on his rest day relieving another employe assigned to work on that day. The distinguishing language referred to by the Referee "at the rate of the position occupied or the regular rate, whichever is higher" only intends to preserve to the employe a **basic rate** of pay no lower than his regular rate. In other words, he gets the basic rate of his own regular job or the rate of the job upon which he is relieving—whichever is higher. This language has nothing to do with whether an individual is entitled to be paid at time and one-half or straight time.

The primary error made by the majority in this present dispute is the assumption that Rule 30-D governs its disposition. That Rule does not support the conclusion reached in this dispute. First of all, Rule 30-D relates to work performed on an "assigned" rest day. The rest days referred to are obviously the rest days of an **assignment**—individuals do not have rest days apart from the "assigned" rest days of the assignment or job upon which the individual is working. Consequently, if an individual is employed on assignment or Job A, the rest days to which he is entitled are those assigned to Job A. If he moves to Job B which has different assigned rest days, then

he is entitled to the rest days of Job B—but he cannot keep or retain the rest days of Job A when he is not employed on that job. No individual can "carry" rest days with him from one assignment to another; he takes those of the job upon which he is employed at the time, as this Division, with this same Referee, so clearly stated in Award 6503. While the Claimant here occupied the job of trackman, he was entitled to the rest days assigned to the trackman's position, namely, Saturday and Sunday. But when he occupied the job of track patrol foreman, he was entitled to the rest days of the patrol foreman's position. The patrol foreman's assignment was an entirely different one from the trackman's assignment; it had different duties, different rest days, different rates of pay, etc. There is no possible means by which the Claimant in this case, while working on the position of patrol foreman, could carry with him and retain the rest days of the position of trackman. Consequently, when the Claimant worked on Saturday, July 1, 1950, filling a vancancy in the patrol foreman's position, he was working on a work day of the work week of the foreman's position and he was, therefore, not working on any "assigned" rest day.[1] For this reason alone, Rule 30-D would not entitle the Claimant to compensation at time and one-half for the work performed on this Saturday. As this Board and this same Referee said in Award 6503, "he took the conditions, including the rate of pay, of the assignment on which he worked the two days." The record discloses the assigned work week of the patrol foreman's position was Tuesday through Saturday, assigned rest days Sunday and Monday. It should be noted that Claimant Proulx took the rest days of the patrol foreman, namely, Sunday and Monday, July 2 and 3.

In the second place, even if it could be held that the Claimant in this case, by working on the Saturday in question, was performing work on his "assigned" rest day and, consequently, on the sixth day of his work week, nevertheless, Rule 30-D would not govern his right to compensation but such right would be governed by 30-A, which provides the measure of compensation for work performed in excess of 40 hours or in excess of five days in a work week. That rule contains an exception to the payment of overtime "where such work is performed by an employe due to moving from one assignment to another."

That exception is applicable to all work performed beyond 5 days, or 40 hours, when moving from one assignment to another, including such work performed on a rest day. In other words, if a man performs work beyond 5 days in moving from one assignment to another, he is not entitled to be paid at time and one-half for the work on the 6th or 7th day. The mere fact that one of those days may have been the rest day of the assignment which he has left cannot entitle him to penalty pay. The exception in Rule 30-A covers all work beyond 5 days, whether performed on a rest day or not.

If it could be held that an employe who, because of changing from one assignment to another, worked 6 days (the sixth being one of the rest days of his normal assignment) was entitled to overtime under Rule 30-D for the sixth day, then the exception contained in Rule 30-A (which exempts the Carrier from paying overtime for the sixth or seventh day under these very circumstances) would be meaningless surplusage. It is obvious that the ex-

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[1] The Award misstates the true facts when, in the first paragraph of the Opinion it holds:

> "The essential facts in the case are not disputed. A Trackman worked his regular assignment from Monday, June 26, through Friday, June 30. The next day was one of his rest days. On that Saturday, July 1, **a Patrol Foreman whose work week on another assignment began that day** (July 1), went off on his vacation; * * *." (Parenthetical interpolation ours; emphasis added.)

The true facts are that the assigned work week of the position of patrol foreman was Tuesday through Saturday, rest days Sunday and Monday.

ception to the payment of the penalty rate contained in Rule 30-A applies to work on the sixth or seventh day of a **work week** (i.e., beyond 5 days or 40 hours) and thus, of necessity, covers work on a rest day (which is always the sixth or seventh day of the **work week**) when due to moving from one assignment to another.

The majority has clearly admitted that the Claimant here "moved from one assignment to another." Thus it says in the Opinion:

> "In Award 6503, it was clear that the claimant, **there as here,** moved from his assignment on his rest day to relieve an employe on another assignment which worked that day." (Emphasis added.)

Consequently, if Saturday, July 1, 1950, was the Claimant's rest day, then it was also, of necessity, the sixth day of his **work week.** Work on that day, then, was "beyond 40 hours" and on "more than 5 days," and since it was due to moving from one assignment to another, it fell squarely within the exception in Rule 30-A and the claim should have been denied, as was the claim in Award 6503, decided by the same Referee.

Further, the record discloses that Carrier was obligated to place Claimant on the higher-rated position of patrol foreman, by reason of seniority.

For these reasons we dissent.

/s/ C. P. Dugan

/s/ W. H. Castle

/s/ R. M. Butler

/s/ J. E. Kemp

/s/ E. T. Horsley