Award No. 9487
Docket No. CL-8764

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 WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: This is a claim of the System Committee of the Brotherhood that:

a. The Carrier violated and continues to violate the rules of the Clerks' Agreement by its failure and refusal to properly compensate employes for work performed on their rest day or days.

b. The Carrier shall now be required to compensate Mr. F. J. Martinez, regularly assigned to position of Relief Clerk No. 8, Stockton Yard, California, for the difference between the pro-rata rate and the punitive rate for service performed on his assigned rest days, December 3rd and 4th, 1953.

c. The Carrier shall now be required to compensate Assistant Chief Yard Clerk Lawrence Daniel, Stockton Yard, California, for the difference between the pro-rata rate and the punitive rate for service performed on his assigned rest days, November 30th, December 1st, 7th, and 8th, 1953.

d. All other employes who have been used to perform service on their rest day or days and paid therefore at the pro-rata rate, shall now be additionally compensated for the difference between the pro-rata and the rate of time and one-half for service performed on such rest days.

EMPLOYES' STATEMENT OF FACTS: This dispute covers a continuing violation on this property, due to the Carrier's failure and refusal to properly compensate employes, holding regular assignments, for service performed on their rest day or days. Claim "b" hereof refers to the specific case of Mr. F. J. Martinez, Relief Clerk No. 8, who was used to fill a vacancy on the position of Interchange Clerk, Stockton Yard, on December 3rd and 4th, 1953, because of the regular occupant of said position being on vacation. This claim was filed by Mr. Martinez on December 4th and Declined on December 9, 1953. Thereafter it was appealed to Superintendent G. W.

"(b) A shop craft employe on the third shift is allowed a 6 day vacation. It is necessary to fill his position and an employe is transferred from the second shift. The transferring employe claims that schedule rules with respect to changing shifts and doubling over apply to filling vacation vacancies and claims time and one-half for the first shift he works in filling the vacationing employe's position and time and one-half for the first shift he works upon return to his position. It is the Carrier's position that these punitive payments are not required."

In sustaining the Carrier's position in this dispute, Referee Morse stated as follows:

"It is the referee's opinion that the Carrier's position on this illustration is absolutely sound and within the meaning and intent of the vacation agreement . . . He is convinced that it was not the intent of the parties, nor is it reasonable to assume that they could have intended, that when a Carrier grants an employe a vacation and his job is such that it must be filled with a relief worker, an additional cost of overtime pay must be incurred for the first first shift."

In view of the provision of Article 12(b) that, in filling a vacation vacancy where a regular relief employe is not used, effort is to be made to observe the principle of seniority, Carrier has felt that it should be guided by Clerks' Rule 31(e) which prescribes how effect will be given to seniority in filling short vacancies.

Thus, it can be seen that the above interpretation of the vacation agreement is entirely consistent with the proper application of Clerks' Rule 31(e) and 29 which provide that the move made by the claimant in this instance was a change of assignment in the exercise of seniority rights and, as such, excepted from overtime pay by the express language of Clerks' Rule 20 (b).

In summary, Carrier emphatically asserts that claimants were properly compensated at the straight time rate for service performed on the dates named in the Statement of Claim and that the instant claims for payment at the time and one-half rate on said dates are without support under the controlling rules of the Agreement. Carrier strongly urges that the instant claim be denied.

All of the above has been presented to the Employes.

(Exhibits not reproduced.)

OPINION OF BOARD: On November 30, 1953, Chief Yard Clerk at Stockton, California, began his annual vacation. The position was offered to and accepted by Claimant Daniel, regularly assigned Assistant Chief Clerk, Wednesday through Sunday, rest days Monday and Tuesday. He filled the position from Monday, November 30, 1953 through December 12, 1953, returning to his regular assignment on Sunday, December 13, 1953.

The Interchange Clerk, regularly assigned Wednesday through Sunday, rest days Monday and Tuesday, accepted Claimant Daniel's position. Claimant Martinez, regularly assigned Relief Clerk, Saturday through Wednesday, rest days Thursday and Friday, was offered and accepted the Interchange Clerk position. He filled that position from Wednesday, December 2, 1953,

through Saturday, December 12, 1953, returning to his regular assignment on Sunday, December 13, 1953. The position of Claimant Martinez was filled by a furloughed employe.

Claim was presented on behalf of Claimant Martinez for the difference between the pro rata rate and the time and one-half rate for service performed on Thursday and Friday, December 3 and 4, respectively, the rest days of his regular position.

Claim was presented on behalf of Claimant Daniel for the difference between the pro-rata rate and the time and one-half rate for November 30, December 1, 7 and 8, the rest days of his regular position.

Petitioner relies on Rule 20 (g) 2 of the applicable agreement which provides for payment of "the rate of the position occupied or his regular rate, whichever is higher, with a minimum of eight (8) hours at the rate of time and one-half" for "Service rendered by an employe on his assigned rest day or days, relieving an employe assigned to such day."

Carrier contends that the claims should be denied by reason of the exception contained in Rules 20 (b) and (c). Those Rules provide for payment at the rate of time and one-half for "work in excess of 40 straight time hours in any work week" and for "work on the sixth and seventh days of their work week, except where such work is performed by an employe due to moving from one assignment to another". Carrier argues that Claimants moved from one assignment to another within the meaning of that exception, and that in doing so, they took all the conditions of those assignments, including rest days.

Rule 13 (a) of the agreement establishes "a work week of forty (40) hours, consisting of five days of eight (8) hours each, with two consecutive days off in each seven". A note at the beginning of the Rule states that "The expressions 'position' and 'work' used in this rule refer to service, duties or operations necessary to be perfomed the specified number of days per week, and not to the work week of individual employes". The term "work week" for regularly assigned employes is defined in Rule 13 (i) to "mean a week beginning on the first day on which the assignment is bulletined to work".

When Claimant Martinez filled the Interchange Clerk position on Wednesday, December 2, he had worked only four days of the work week of his regular assignment as Relief Clerk. On that day he began the work week of the Interchange Clerk position which included Wednesday and Thursday as work days and the following Monday and Tuesday as rest days. He took those rest days because he was then working in that assignment. He was not working as Relief Clerk and, as a result, was not entitled to the rest days of that position. We said in Award 6561:

> "This Division has repeatedly ruled that the specified rest days are an integral part of the work week of each bulletined assignment, that they are not attached to the individual employe so that he may carry them with him as he moves from one assignment to another."

For this reason, the claim on behalf of Daniel with respect to December 7 and 8 also must be denied. See Awards 6408, 9083.

However, the Daniel's claim with respect to November 30 and December 1 involves different considerations. Unlike Claiman Martinez, Claimant Daniel filled the vacation absence after he had earned the rest days of the work week of his regular position by working as Assistant Chief Clerk the five work days of that work week. This stems from Rule 13 (a) whereby the parties established a work week of five days of work "with two consecutive days off in each seven". The rest days which followed the five days of work were an "integral part" of the work week of the Assistant Chief Clerk position. See Award 6561. Because, as we have said, Claimant Daniel could not carry them with him when he filled the vacation absence, they remained as earned rest days of the work week of his regular position. When he relieved the vacationing employe on those earned rest days, the appropriate provisions of the service on rest days Rule became applicable to those days which were November 30 and December 1. See Awards 5873, 6382, 6383, 6479, 6504, 6970, 6971, 6973, 8527. We find nothing in the Agreement to suggest that, under the circumstances of this phase of the Daniel's claim, the parties intended, by the exception to the overtime provisions contained in Rules 20 (b) and (c), to repeal the principles which they established by Rules 13 (a) and 20 (g) (2).

There is no basis in the record for an assumption that by filling the vacation absence Claimant Daniel relinquished the earned rest days of the work week of his regular position. The record establishes that the Carrier offered the vacation absence to him and that he accepted it. The filling of that vacation absence is not comparable to a situation in which a regular employe is displaced or a position is filled as the result of a successful bid. Article 12 (b) of the Vacation Agreement removes the vacation absence from the mandatory operation of strict seniority rules; "regular relief employe" may be utilized regardless of seniority, and, if such employe is not utilized, effort will be made to observe seniority. See Awards 5192, 5461, 5976, 6874, 7773, 8128, 8707, 9323.

The result reached here in regard to Daniel's claim does not contradict Awards 5811 and 6503. The former turned on the conclusion that absolute seniority compelled assignment of the claimants there to the higher rated positions on penalty for not so doing, and the effect of any rules concerning the work week was not discussed. Award 6504 distinguished Award 6503, with the same Referee participating in both cases, on the ground of differences in rules and that the record in the latter case showed "that the intent of the Agreement between the parties was to pay employes when relieving others the rate of the assignment to which they had moved."

This Division, with the same Referee who participated in Award 5811, said in Award 6973:

> "We are cited to Awards 6479 and 6504. We think these Awards are consistent with the views we have here expressed. In those cases, Claimants worked the five days of their work week and were then used to relieve on other positions. In relieving such positions, they were not voluntarily displacing the regular employes or assuming them as the result of a successful bid, nor did they move to relieve regular employes before their rest days were earned. They were worked on the rest days of their work weeks and were entitled to rest day pay therefor. Such work can properly be claimed by a junior extra employe at the straight time rate and, if no junior extra or furloughed employe is available, it may be worked as rest day work at the rest day rate of pay."

With respect to claim (d), the record does not disclose any evidence concerning "other employes", and it must be denied.

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 violated to the extent stated in the Opinion.

AWARD

Claims (a) and (c) sustained with respect to November 30 and December 1, denied in all other respects.

Claims (b) and (d) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1960.

DISSENT TO AWARD NO. 9487, DOCKET NO. CL-8764

The conclusions reached by the majority in denying one of the claims and sustaining the other in part result from a misapprehension of the Awards cited and produce a distinction without a difference.

It would unduly lengthen this Dissent to distinguish the Awards the majority relies upon to bring about the erroneous conclusions and suffice it to say, most of the Awards cited involved the use of extra employes, a matter not here involved.

In the claims before the Division in this Docket there were employes absent on vacation and, with no mitigating circumstances to prevent observing seniority in filling the assignments of the employes so absent, Carrier observed the principle of seniority in filling these assignments because Claimants were the senior employes desiring same. Claimants, therefore, exercised their seniority to fill the assignments of the vacationing employes and thereby moved from one assignment to another within the meaning of the exception in paragraphs (b) and (c) of Rule 20. The filling of the assignments of the vacationing employes was a promotion for these Claimants and, furthermore, neither Claimant worked in excess of forty hours or five days in the work week assigned his regular position, nor in excess of forty hours or five days in the work week assigned the position of the vacationing employe. Accordingly, both claims should have been denied in their entirety and as this was not done, the Award is erroneous. Compare our **Awards 5811, 6408,**

6503, 6561, and 7086, and **Second Division Awards 1563, 1804, 2318, and 2842,** among others.

For the reasons stated, we dissent.

/s/ C. P. Dugan

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ J. E. Kemp

/s/ J. F. Mullen

ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NO. 9487, DOCKET NO. CL-8764.

It is readily understandable why the Dissenters did not see fit "to distinguish the awards the majority relies upon" in their Dissent, as such awards clearly support the "Opinion" of the majority. The controlling principle of working an employe on earned rest days, after working on one assignment five work days in any work week, is the same regardless of whether the employe is extra or regularly assigned. In fact, a regularly assigned employe is in a more favorable position on such days, as the special rule governing "Service on Rest Days" is controlling. This Rule provides:

"Rule 20(g) Service on Rest Days:

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

This is a special rule which prevails over the general overtime provisions of the agreement, the latter containing the execption of "where such work is performed by an employe due to moving from one assignment to another or to or from the furloughed list, * * *.", upon which the Carrier Members rely in support of their position.

That a special rule prevails over a general rule is academic. See Awards 5636, 5894, 6278 and 6732. Furthermore, it is settled by the decisions of this Board, as well as decisions of the United States Supreme Court, that rights established by a collective agreement cannot be bartered away by an individual beneficiary covered by it. Award No. 522; The Order of Railway Telegraphers vs. Railway Express Agency, U.S. Supreme Court, February 28, 1944. Also, see Third Division Award Nos. 2602, 3256, 3353, 3416, 4461, 5174, 5444, 5927. Consequently, an employe cannot abrogate the provisions of an agreement by his voluntary agreement or in exercising his seniority rights.

The substance of Carrier Members' contention is that this Board should have added to the above language of Rule 20(g) (2) the following:

"* * *, except where such work is performed by an employe due to moving from one assignment to another."

It is fundamental that this Board has no authority to add to or subtract from the clear and unambiguous language of the parties agreement. This would be contract making, which is outside the jurisdiction vested in the Board by the Railway Labor Act.

A review of the awards cited by Carrier Members will show that they are erroneous, irrelevant, immaterial, or sustain the issue before us here.

Award 5811 involved a dispute that arose prior to the 40-Hour Week Agreement, consequently, the "Service on Rest Days" Rule was not there involved.

Award 6408 involved a telegrapher who was paid the time and one-half rate for the first two rest days that he worked the temporary position. He had completed five days of work on his regular assignment and Carrier agreed that he was entitled to time and one-half for service performed thereafter on assigned rest days. This question was not before the Board. However, Claimant alleged that he was also entitled to the punitive rate for the following two rest days of his regular assignment. This was denied by the Board. This Award clearly sustains the decision in the instant Award.

Award 6504 distinguishes Award 6503, authored by the same Referee, wherein he pointed out that the "Service on Rest Day" Rules were different. In the instant case, the rule is the same as in Award 6504.

Award 6561 involved a situation where claimant worked his own assignment for three days and then moved to another temporary assignment, before earning the assigned rest days of his regular assignment. This Award is in accordance with the decision here.

Award 7086 is patently erroneous as the Referee ignored the provisions of Special Rule 38(d), Service on Rest Days, in reaching his untenable conclusions.

In Second Division Award 1563 the overtime provisions of the Agreement were involved and other special rules relating to seniority. There was no rule similar to Rule 20(g)(2) involved in that dispute. Consequently, it is irrelevant to the issue presented here. This is also true of Award 1804.

In Second Division Award 2318, Claimant had been paid time and one-half for changing shifts on Friday, July 16, and was paid the time and one-half rate for service performed on his regularly assigned rest days, Saturday and Sunday, July 17 and 18. The Board held: "Claimant can have no further claim for these days whether or not they were paid under the proper rule." His claim for the penalty for Saturdays and Sundays thereafter was denied as he assumed the conditions of another assignment. This Award clearly supports the decision here.

The "among others" awards referred to by the Dissenters, were presented by them when the dispute was argued before the Referee. They have been reviewed carefully and found to fall in the same categories as those above. We can feel sure that they would have been specifically cited by the Dissenters had such awards been more in line with their assertions than those cited by numbers.

It is obvious that there is a distinction between situations where an employe asserts his seniority rights to fill another assignment before working

five days on his regular position, and those where he worked five days on his own assignment, thereby earning the rest days of such assignment. The first situation falls under the overtime provisions of the agreement, while the latter falls under the "Service on Rest Days" Rule and must be paid for at the time and one-half rate.

The instant Award is proper and based on the clear and unambiguous provisions of the controlling rules and supported by numerous awards of this Division.

(s) J. B. Haines
Labor Member

REPLY TO LABOR MEMBER'S ANSWER TO DISSENT TO AWARD NO. 9487, DOCKET NO. CL-8764

It is not our purpose to get into a writing contest regarding this Award. We showed in our Dissent, as briefly as possible, why the Award was erroneous, citing Awards which support our position. Awards may be distinguished and counter-distinguished on unimportant points. It is enough to say that the Awards to which we referred are at point as they involved cases where a regularly assigned employe, who was temporarily filling another position having rest days different from those assigned his regular position, sought to have the rest days assigned his regular position follow him to the position he temporarily filled in order to create a basis on which he could collect the overtime rate. The claims were denied.

In the subject Award there was no voluntary agreement by or with the employe and we are at a loss to understand how the exercise of seniority, a right accorded by the Agreement, can be construed as being a violation of the Agreement.

/s/ C. P. Dugan

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ J. E. Kemp

/s/ J. F. Mullen