Award No. 9943

Docket No. CL-8793

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

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

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

(1) That Carrier violated the Clerks' current Agreement when it worked Mr. Warren E. Hill, Florida Street Station, St. Louis, Missouri, on October 30th and 31st and November 13th and 14th, 1954, and compensated him at the straight time rate instead of the overtime rate.

(2) That Mr. Warren E. Hill be paid the difference between the straight time rate he was paid and the time and one-half rate for October 30th and 31st and November 13th and 14th, 1954.

EMPLOYES' STATEMENT OF FACTS: On the dates in question Mr. Warren E. Hill was a furloughed employe with Group 2 seniority from June 9, 1952, and Group 3 seniority from March 18, 1952. From Monday, October 25, through Friday, October 29, 1954, Mr. Hill was used on a temporary vacancy in Group 2 as Messenger, Florida Street Freight Station, working 40 hours, five days and then called to protect Group 3 work on Saturday and Sunday, October 30th and 31st, which caused him to work fifty-six hours, seven days from Monday, October 25th, through Sunday, October 31st, and from Monday, November 8th, through Friday, November 12, 1954, he was again used temporarily to fill the Messenger position and on Saturday and Sunday, November 13th and 14th, was called to protect Group 3 work, again working fifty-six hours, seven days from Monday, November 8th, through Sunday, November 14th.

For the work in excess of forty hours each week, that is, for work on the sixth and seventh days, his rest days, he was paid the straight time rate instead of the overtime rate.

Claim was originated by Local Chairman J. E. Nickens with Agent A. F. Keck, St. Louis, on November 22, 1954, and was declined on November 23, 1954. (Employes' Exhibits A-1 and A-2)

working as a messenger would arise only for rest days to which he was entitled while working in that group and under that seniority roster. Previous holdings of this Board clearly sustain this principle. See Awards 5629, 5705, 5798, 6018, 6970, 6971."

Awards 5796 and 6382, cited by Employes in support of their position, are likewise not analogous to the present case. In the case covered by Award 5796, the unassigned employe involved performed extra work on two different messenger positions for twelve consecutive days in the same seniority classification or seniority group whereas in this instant case, the Claimant moved from an assignment in one seniority Group to another assignment in an entirely different seniority Group, to which he was entitled by virtue of seniority held in that group. The claim involved in case covered by Award 6382, was for punitive rate of pay for a regularly assigned employe on rest days he was required to work vacancy of another position in the same seniority group and is therefore not applicable in this instant dispute. It will be noted that none of the Awards rendered by the Board, sustaining claims of Employes for punitive time for work in excess of 40 hours or five days per week, that have been cited as precedents in support of the Employes position, involve the moving of such employe from one seniority group to another to protect vacancies, which was the case here.

Since Carrier elected to fill the position in question it was obliged under provisions of Rule 11-1(a) reading:

"(a) Furloughed or extra employes **shall** be used to fill * * * temporary vacancy for which they are qualified and available, in accordance with their seniority."

to use the claimant. He having completed a temporary assignment in Group 2 on Friday, having no regular assignment, obviously returned to the furloughed list and became available for service in Group 3 for which he was qualified, in seniority order, as of the time of his return to the furloughed list. Service in Group 3 on the dates in question did not constitute work in excess of forty hours as provided by Rules 32-4 and 32-5 since it clearly fell within the scope of the exception reading:

"* * * 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, * * *."

Carrier submits that Claimant Hill was properly used to fill the Group 3 vacancies on October 30 and 31 and November 13 and 14, 1954, a point not contested by Employes, and that he was properly compensated at straight time rate as provided by exceptions to Rule 32-4 and 32-5, that claim is entirely without merit or support of the rules and should be denied.

All data herein has been presented to representative of the Employes.

OPINION OF BOARD: Claimant was a furloughed employe holding seniority in Groups 2 and 3 prior to Monday, October 25, 1954. Effective that date, the regularly assigned incumbent of Group 2 Messenger position, Florida Street Station, St. Louis, Missouri, was assigned to fill OS & D Clerk vacancy through Friday, October 29, 1954. As a result, Claimant was assigned to fill the temporary vacancy on the Group 2 Messenger position Monday, October 25, 1954, through Friday, October 29, 1954. After working that vacancy on those days, Claimant, on Saturday, October 30, 1954, filled a temporary vacancy

in Group 3 on Trucker Position No. 3 and on Sunday, October 31, 1954, he filled a temporary vacancy in Group 3 on Trucker position No. 4.

Claimant was again assigned to fill the temporary vacancy on the Group 2 Messenger position Monday, November 8, 1954 through Friday, November 12, 1954. After working that vacancy on those days, Claimant filled a Trucker position on Saturday, November 13, 1954, and the record discloses that there is some disagreement as to whether that was on a temporary vacancy or on a tag-end rest day. On Sunday, November 14, 1954, Claimant filled a relief assignment of Trucker in Group 3.

Claimant contends that for services on Saturdays and Sundays, October 30 and 31, and November 13 and 14, 1954, respectively, he was entitled to be compensated on the basis of the overtime rate rather than the pro rata rate which was paid to him, and relies on Rule 27-3 (h) of the Supplement Agreement effective September 1, 1949 and Rule 32-7 (c) (1) of the Memorandum of Agreement which incorported certain rules in the Supplemental Agreement.

In addition to contesting the timeliness of this appeal under Article V, Section 1 (c) of August 21, 1954 National Agreement, the Carrier defends on the grounds that Claimant did not work in excess of five days in any one work week, that his service for the five day work week in each instance was in a Group 2 position while his service on the two rest days of that Group 2 position in each instance was on Group 3 positions, that Claimant was called from the furloughed list for assignment in each group hence had the status of an extra or furloughed employe, that his assignment in each group was independent of his assignment in the other and by reason of the seniority he held in each group, and that, in addition, Claimant's Saturday and Sunday work fell within the overtime exceptions in that he either moved to or from an extra or furloughed list, or moved from one assignment to another.

The defense based on the time limits cannot be sustained. The docket shows that the decision of the Carrier's highest officer on the claim was rendered June 2, 1955 and that the employe's intention to file ex parte submission was received in the office of the Division's Executive Secretary between February 27, 1956 and March 1, 1956. This was sufficient and timely compliance with the time limit requirements. Award 9203.

Rule 27-3 (h) reads as follows:

> "To the extent extra or furloughed men may be utilized under this Agreement, their days off need not be consecutive; however, if they take the assignment of a regular employe they will have as their days off the regular days off of that assignment."

The undisputed facts show that Claimant was a furloughed man and that beginning on Monday, October 25, 1954, and beginning on Monday, November 8, 1954, he took and worked on each occasion the assignment of a regular employe assigned to the Group 2 Messenger position. On this basis, it is clear from the Rule quoted above that Claimant's days off were the Saturdays and Sundays involved in this claim which were the "regular days off" of the assignment of the regular employe taken by him. Since those days were his contractual days off under the Rule, it cannot be said that he returned to the furlough list on those days. As a result, and under the facts shown by the record, the service on rest day provisions established by Rule 32-7 (c) (1) apply to the days involved. See Awards 5873, 6479, 6504, 6970, 8897, 9487. There is no reason to conclude that the exceptions provided in Rules 32-4 and

32-5 were intended to nullify Rule 27-3 (h) and Rule 32-7 (c) (1) in the circumstances presented here.

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 Employe involved in this dispute are respectively Carrier and Employe 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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 26th day of May, 1961.

DISSENT TO AWARDS NOS. 9942 AND 9943,
DOCKETS NOS. CL-8403 AND CL-8793

In each of these cases the claimant employe worked the five (5) consecutive work days of the work week of a regular assignment in one class or seniority group and then worked the rest days thereof on another assignment of another class or seniority group by reason of seniority held in that other class or group.

The Majority erred in awarding punitive pay for the service performed on those rest days because they totally ignored **Awards 5629, 5705, 5798, 6018, 6266 and 7295** denying similar claims involving like circumstances on the basis that the claimant employes' use on such rest days by reason of rights attained in the other class or group which were separate and distinct from their rights in the first class or group worked and cannot be coupled thereto for the purpose of obtaining additional monetary benefits, and chose to follow Employe cited Awards involving, with but one exception, entirely different circumstances, viz., the disputed rest day work was performed on assignments in the same class or seniority group as were the assignments on which the rest days had been earned. The exception is **Award 8897**, involving circumstances such as are involved in these **Awards 9942 and 9943**, which is an erroneous Award for the reasons stated in the dissent thereto.

For the foregoing reasons, among others, the Carrier Members dissent to these **Awards 9942 and 9943.**

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ D. S. Dugan

/s/ J .F. Mullen

LABOR MEMBER'S REPLY TO CARRIER MEMBERS' DISSENT TO AWARD NOS. 9942 and 9943, DOCKET NOS. CL-8403 and CL-8793

The Dissenters' position is based primarily upon the false proposition that an employe can be used on an earned rest day in another seniority group or class at the pro rata rate, as he is "moving from one assignment to another" within the meaning of the overtime provisions of the agreement. They cite several awards in support of this untenable contention, which I will show are either irrelevant or erroneous.

By grouping both cases in one Dissent, the Dissenters admit that the same principles apply to both situations where an employe is regularly assigned in one group or class (Award 9942) and the other where an extra or unassigned employe (Award 9943), who, after working five consecutive days in one assignment, are then called upon to perform service in another group or class on their assigned rest days. That this is the proper interpretation of the governing rules is apparent from a review of those provisions of the 40-Hour Week Agreement governing "Service on Rest Days" and "Rest Days of Extra or Furloughed Employes". These provisions are substantially the same on the two Carriers here involved.

The Service on Rest Day Rules in both Agreements provide in substance that:

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

Rule 11-1(a) (St.L.SW), here pertinent, reads as follows:

> **"* * * When a furloughed or extra employe takes the assignment of a regular employe, he assumes the conditions of such assignment, including the work week and rest days thereof."** (Emphasis ours)

It is crystal clear that an extra employe, filling the assignment of a regular employe, is entitled to the work week and rest days thereof, provided the vacancy is for five or more work days so that he can earn the rest days thereof. Award 6970. Under such circumstances, he steps into the shoes of the regular incumbent of the position, assuming the conditions of such assignment, and is entitled to the rest days thereof. The same principle applies to an extra employe and a regular employe. After working on one assignment for five days, they are entitled to the rest days of such assignment and if used thereon are entitled to the time and one-half rate under the Service on Rest Days Rule. See Awards 5494, 5795, 5796, 5805, 6382, 6383, 6440, 6479, 6504, 6970, 7391, 8145, 8273, 8527, and 9487.

The Service on Rest Day Rule is a special rule that prevails over the general provisions of the overtime rule. In Award 4496, Referee Carter ruled:

> "* * * It is a general rule of contract construction that special rules prevail over general rules, leaving the latter to operate in the field not covered by the former. * * *." (Also, see Award 6757)

It will be noted that there are no exceptions contained in the Service on Rest Days Rules similar to those in the overtime provisions relative to an employe "moving from one assignment to another or to or from an extra or furloughed list." Therefore an employe cannot move from an assigned rest day to an assigned work day at the pro rata rate under this Rule. This Board has no authority to add such an exception to the Service on Rest Day Rule (Award 5369, as some Referees appear to have done in some of the Awards cited by the Dissenters.

It is also a cardinal principle of contract interpretation that the exceptions contained in a rule have no application unless the circumstances bring the case within the confines thereof. In Award 6281, Referee Wenke said:

> "* * * Of course, before the question of an exception becomes material the situation must exist to which the exception has application."

It is interesting to note that even the overtime provisions do not contain an exception that an "employe moving from one group or class to another" is not entitled to the time and one-half rate for work in excess of 40 straight time hours in any work week, or for work performed on the sixth and seventh days of their work week, as the Dissenters claim. There is another cardinal principle of contract interpretation that where certain exceptions are specifically stated, no other will be implied. In Award 4646 Referee Connel stated:

> "* * * and where conditions or exceptions are set forth specifically, no other or further exceptions will be implied. See Awards Nos. 2009, 3825 and 4551."

> Another cardinal principle of contract interpretations is that rights specifically given in a rule, such as the requirement that employe be compensated at the rate of time and one-half for services performed under the Service on Rest Day Rule, cannot be abrogated in another section by implication. In Award 2490, Referee Carter adhered to such principle, with the following:

> "We adhere to the proposition that a valuable right cannot be abrogated by implication in one section of an agreement when such right was expressly and plainly granted in another section. It will be assumed that the contracting parties intended that some effect be given to both sections and that limitations of one upon the other would not be made except when it appears clearly that they were so intended."

That Referee Carter overlooked this principle in Award 7295, is quite obvious. That the other referees that authored some of the awards, relied upon by the Dissenters, were also confused as to the application of these fundamental principles of contract construction, is clear.

The Award used as a precedent, or authority for the denial of the Employes' claims in Awards 5798, 6266, 7295 was Award 5629. A review of Award 5629, Referee Wenke, will show that the circumstances, rules and agreements were entirely distinguishable from those confronting the Board in the awards upon which the Dissenters rely. This conclusion is self-evident from the following:

Award 5629 covered a dispute between the Order of Railroad Telegraphers and Pennsylvania Railroad, involving claim that a regularly assigned agent should have been called on his assigned rest day under the Work or Unassigned Day Rule in preference to an extra employe, who also had rights under the Clerks' Agreement and had performed 40 hours of work that week under the Clerks' Agreement. It will be observed that the claim was not presented on behalf of the employe that performed work on the sixth and seventh day of his work week, or on his rest days, but rather by a regular employe who performed no work on such days, claiming that he should have been used. Therefore, the factual circumstances are entirely different, even though the work in dispute had been performed under the same agreement, which was not the case in Award 5629. Here we have an entirely different situation where employes actually performed the work under one agreement and claim they are entitled to the time and one-half rate for services performed on their assigned rest days.

How Award 5629 could be used as authority for denial of claims similar to those before us here by so many referees is beyond my comprehension. That there was no mystery about the involved issue is plain from a reading of Award 5629 in which Refree Wyckoff stated:

> "SECOND. The Regulation came word for word from the National Forty Hour Work Week Agreement (Article II Section 3(i)); but we must construe it 'as a separate agreement by and on behalf of each of said carriers and its said employes' (id, Article VIII). This is an indication that the adoption of the Regulation did not contemplate its application **to the performance of work in a combination of positions in different classes or crafts.**
>
> It is true that the Carrier is the sole employer, **but the employment rights of the employes are by agreement segregated and distributed into crafts.** This being so, in situations **where an employe acquires status under two agreements, the contractual distribution into crafts is violated if his status under one agreement is given any effect upon his status under the other,** whether to his advantage or to his disadvantage (see Award 3674.
>
> In view of the foregoing considerations, we conclude that the 40 hours of work mentioned in the Regulation refers only to work under the Agents' Agreement.
>
> Nothing in this Award is intended to sanction the use of employes from one craft to perform work under another craft for the purpose of circumventing the provisions of the Forty Hour Work Week Agreement. **It is the Substitute Agent clause in the Agreement itself, and not this Award, which authorizes the use of the Clerk to perform Agents' work."** (Emphasis ours)

A careful review of Award 5629 clearly shows that it cannot be used as a precedent, or authority for denying a claim by an employe for the time and

one-half rate for service performed on assigned rest days, where such service, as here, is rendered under the same agreement, regardless of whether such service was performed in one or separate seniority groups or classes. The use of this award by certain referees in denial of claims of a nature similar to those confronting us here, leads to the conclusion that they either did not think, or they did not know the difference between the division of employes into different seniority groups or classes under one agreement, and agreements between certain crafts or class of employes, the latter being involved in Award 5629. Regardless of their state of mind, they were guilty of the very thing the Court admonished against in 44 Ohio Appeals 493, when it stated:

> "Constructive thinking is not wholly common in judicial opinions, for the reason that index learning has brought into convenient use thousands of precedents, and the first impulse in legal investigation is to 'find a case' * * * Cowper put the thought in cold type:
>
> > "To follow foolish precedents and wink both eyes is easier than to think.'
>
> * * *."

This Division has also had occasion to reject a previous decision as a precedent, where the issues were clearly distinguishable, or the Award was grossly in error.

Award 4819 (Shake):

> "Giving Award No. 1167 the full consideration to which it is entitled as a precedent of this Board, we cannot regard it as highly persuasive, much less controlling, in this case. **To ignore the distinguishing facts and follow that award in the instant case would result in a dangerous precedent for the gradual and piece-meal substitution of a code of Board-made rules for the clearly expressed provisions of the negotiated agreement of the parties.**" (Emphasis ours)

Award 7917 (Shugrue):

> "* * * precedents are no more persuasive than the logic of the reasoning underlying their determination, * * *."

Award 6094 (Whiting):

> "* * * It appears that the result reached in Award No. 5717, by reliance upon the awards cited, is contrary to the clear and unambiguous language of the rules agreed upon by these parties, * * *. Hence we decline to be governed thereby."

A review of the Awards cited by the Dissenters are either erroneous, or factually distinguishable as the following analysis will show:

Award 5705 (Wenke) covered a situation where regularly assigned Group 3 employes, who had seniority in Group 1, were working extra in Group 1, filling vacacies four days in the latter Group before performing the work in dispute, which they claimed was work performed on rest days of their Group 3 assignment. It will be noted that they did not work their own assignment for five days in one group and then transferred to another group on assigned

rest day, as was the case in the subject disputes. The Award lends no support to the Dissenters' contentions.

Award 5798, Referee Yeager, is the first case that erroneously relied upon Award 5629 in denying claim for the punitive rate for work performed in Group 1 after claimant had performed five days work on her own assignment of Messenger in another Group. The Referee avoided, and apparently gave no consideration to the Special Rule governing Service on Rest Days. He predicates his decision on the overtime provisions of the Agreement and Award 5629, which led to erroneous conclusion that:

> "The rights which Miss Sadler had to her rest days by virtue of her work under the Messenger roster may not be imposed as a burden on the obligation of the Carrier to give to her the work which she performed in the office of the Chief Dispatcher."

The erroneous conclusions reached by Referee Yeager in this award, which relies upon an award not in point, leads to the unalterable conclusion that he ignored all well established principles relating to contract interpretation and the value of other decisions as persuasive or controlling precedents. The Award is palpably wrong.

Award 6018, Referee Parker, involved a dispute between the same parties as in Award 5705. Claimant in Award 6018 was an extra employe in both Group 1 and 3. The first week in dispute, he worked three days in Group 1 and two days in Group 3. During the other weeks in question, Claimant worked extra in excess of five days or 40 hours in the two groups and should have been compensated for the sixth and seventh days at the punitive rate. The error of the Award lies in following Award 5798, which in turn relied upon Award 5629. It is clear, however, that the rules and factual situation in Award 6018 are entirely distinguishable from those in the two Awards under consideration.

The record in Award 6266 shows that claimants worked five days or forty hours on their regular assignments in Group 3, being further called on rest days to work in Group 1. Claimants had not established seniority rights in Group 1. It is clear that Referee McMahon committed grievous error when he admitted "We have found no precedent awards having similar statement of facts as herein presented" and then held: "We agree with the reasoning of the Board as set out in Awards 5705, 5711, 6018 and the claims as filed are without merit."

The Awards relied upon by Referee McMahon involved employes who had seniority in another group, or as in the case of award 5811, they had seniority rights to higher rated positions that were vacant because the regular incumbents were on vacation. It is also apparent Claimants in the latter filled vacancies of five work days or more and thereby assumed the rest days thereof. They did not move to such vacancies on assigned rest day, as was the case in Award 6266. Referee McMahon committed grievous error by following Awards that were based primarily upon the premise that Carrier was compelled to use claimants because of their seniority, while the employes in his award had no seniority in the group in which the work was performed. It is clear that Referee McMahon broke all the rules relating to the interpretations of agreement, as well as those principles applying to precedents referred to above. Apparently, it is easier to follow "foolish precedents" than it is to think.

Award 7295 was authored by Referee Carter, which involved the same parties as in Award 5798. Referee Carter falls into the same error as the other Referees when he relied upon their Awards, Nos. 5629, 5705, 5798, 6018,

6970, 6971, in denial of claim. The record clearly shows that Claimant earned two rest days by working one assignment for five days. No reasons are given by Referee Carter in support of his erroneous and untenable conclusions, except the above cited awards. Referee Carter clearly deviated from the principles he enunciated in Award 6970, 6971 and 6973. Apparently, he was confused about the differences between craft or classes of employes, covered by different agreements and group or classes of employes covered by one agreement.

The above analysis of the Awards cited by the Dissenters, points up the fallacy of relying upon "foolish precedents" in rendering "opinions" based on erroneous awards, or awards that are clearly distinguishable. The seriousness of such decisions was well summed up by Judge Shake in Award 4819, supra, when he said:

> "To ignore the distinguishing facts and follow that award in the instant case would result in a dangerous precedent for the gradual and piece-meal substitution of a code of Board-made rules for the clearly expressed provisions of the negotiated agreement of the parties."

Awards 9942 and 9943 are correct and in accord with the facts of record and the governing rules of the involved agreements.

/s/ J. B. Haines

J. B. Haines
Labor Member