Award No. 11084
Docket No. CL-10705

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roy R. Ray, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the rules of the Clerks' Agreement at Marion, Ohio, when it utilized the services of employe Mrs. J. E. Reed on August 19, 1957, and

That Carrier shall now compensate employe Mrs. J. E. Reed one-half day's rate of pay in addition to what she has received on the position of Clerk in Car Distributor's Office, Marion, Ohio, for August 19, 1957. (Claim No. 1190)

EMPLOYES' STATEMENT OF FACTS: In April, 1957, Mrs. Reed requested her vacation during the week of July 16th to 20th, which was granted. Mrs. Wise, Record Clerk, requested and was granted her vacation during the week of August 19th to 23rd, 1957. Due to the fact that her son was coming home on furlough from Military Service, Mrs. Reed requested that her vacation period be changed to August 13th to 17th, 1957, which was granted. Mrs. Reed was asked by the Carrier if she desired to work Mrs. Wise's position and secure the advantage of Mrs. Wise's higher rate while Mrs. Wise was on vacation. She was also asked by the Carrier if she desired to work starting August 19th, the first day of Mrs. Wise's work week. Mrs. Reed did not ask to work the position.

Mrs. Reed's work week of her regularly assigned position was Tuesday through Saturday, her rest days being Sunday, August 18th, and Monday, August 19th, Employes Exhibit "F." Mrs. Wise's regularly-assigned work week was Monday through Friday, her rest days being Saturday and Sunday. Mrs. Reed worked her rest day, Monday, August 19th, for which service she was paid at pro rata rate. Claim was filed on behalf of the employe on October 16th, claiming the difference between pro rata rate and penalty rate for service on Mrs. Reed's earned rest day. As a result of filing claim on behalf of Mrs. Reed, the employe was notified to appear for an investigation, per letter dated December 6, 1957, employes exhibit "A." The investigation was held, employes exhibit "B." Claim was handled in regular order of

tached to the position of clerk-stenographer. The record clearly supports this fact and in accordance with the rules a denial Award is required.

Award 6383 cited by the Organization fails to support its theory for the same reasons that Award 6382, supra, lends no support to its theory.

The following statement:

> "The claimant in this case retained her regular assignment and did not acquire rights to the position on which she temporarily relieved a regularly-assigned employe."

appearing at the bottom of p. 7, is not only inconsistent with the facts and rules as well as the decisions of this Board, but is inconsistent with plain logic and good reasoning. The uncontroverted facts shown that Claimant did acquire all of the conditions attached to the position of report clerk, such as rate of pay, hours of the assignment, rest days and attendant duties and responsibility. She simply cannot retain the conditions of her position and at the same time acquire the conditions of a second position. If extra clerk Hendel acquired the conditions of Claimant's position, including rest days assigned thereto, and Rule 20-2(h) says that he did acquire them, they could not possibly belong to the Claimant.

At the top of p. 8, the Organization cites Award 6504, which it says "falls four square across the claim herein referred to." For an opposite holding, see Awards 6503 and 6561 by the same Referee. Also, see the dissent to Award 6504.

The Carrier has hereinbefore shown that Award 6973 clearly points out that the rest day claimed by the Claimant did not belong to her but did properly belong to extra employe Hendel.

Finally the Organization contends that "Vacation days off chargeable to employes vacation are the same as work days." This is but another inaccurate statement. Referee Morse put the question to rest in 1942 when he ruled:

> "Clearly, vacation time is not to be counted in figuring the 160-day vacation-eligibility requirement for the reason that **while the employe is on vacation he is not performing service for the Carrier."** (Emphasis ours).

In conclusion, the Carrier submits that the Organization has pointed to nothing which would tend to support its position. On the other hand, the Carrier has shown that it has not only complied with the rules of the Agreement, hus has applied them consistent with Awards 5255 and 7163, as well as other Awards cited herein and heretofore in this Docket.

Based upon the facts contained in the record when viewed in the light of the Agreement, the claim should be denied.

OPINION OF BOARD: Claimant, a Clerk-Stenographer, had an assigned work week of Tuesday through Saturday with rest days on Sunday and Monday. She was on vacation Tuesday through Saturday, August 13-17, 1957. Before going on vacation she was offered an opportunity to work as Record Clerk, at a higher rate, in the place of Mrs. Wise who would be on vacation Monday through Friday, August 19-23, 1957. (Mrs. Wise's regularly assigned work week). She accepted the offer and reported for work on Monday, August 19th

working through Friday, August 23rd, after which she returned to her regular position of Clerk-Stenographer. For her work on Monday, August 19th she was paid at the pro rata rate. Claim was filed for the difference between the pro rata rate and the penalty rate. Petitioner contends that since Monday was Claimant's rest day she was entitled to the overtime rate by virtue of the provisions of Rule 20-3(e). This rule provides: "Service rendered by an employe on his assigned rest day or days relieving an employe assigned to such day shall be paid at 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."

Carrier argues that the claim should be denied by reason of the exception contained in Rules 20-3(b) and (c). These rules provide for the payment of time and one-half for "work in excess of forty (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 asserts that Claimant moved from one assignment to another within the meaning of that exception, and that in doing so, she took all the conditions of that assignment including the rest days thereof.

We think that this case is governed by Rule 20-3(e) specifically covering compensation for service on an employe's rest days, and that the claim must be sustained. Claimant filled the vacation assignment after she had earned the rest days of her regular position. The fact that she was on her vacation for five days preceding her two rest days makes not difference. For the purposes of the present case it is the same as if she had worked those five days. Claimant could not carry the rest days with her when she filled the Record Clerk position for five days during Mrs. Wise's vacation. They remained as earned rest days of her regular position. When she relieved the vacationing Record Clerk on her earned rest day the appropriate provisions of Rule 20-3(e) for service on rest days became applicable to that day, August 19th. We find nothing in the Agreement to indicate that, under the circumstances of this case, the parties intended by the exception to the overtime provisions of Rule 20-3(b) and (c) to modify or repeal the provisions of Rule 20-3(e). Our holding is in accord with our earlier Award 10640.

However, even if Rule 20-3(b) and (c) could be considered as qualifying the provisions of Rule 20-3(e) we do not think the exception as to work performed due to "moving from one assignment to another" is applicable to the facts of this case. The precise meaning of the phrase is not set forth anywhere in the Agreement. But when the entire Agreement is read as a whole we feel that the phrase is applicable only where a regularly assigned employe moves from one assignment to another in the exercise of seniority bidding or displacement rights. In such a case he relinquishes all claims to his former assignment and acquires rights to and assumes all the conditions of the new position. We are fully aware of all the awards relied upon by Carrier (among others 5811, 6561, 6973) which support the position that filling a temporary vacancy due to vacation is "moving from one assignment to another." But we believe the more sound position is that set forth in Award 6382. In the instant case Claimant retained her regular assignment; she did not fill the Record Clerk position as the result of a successful bid and did not acquire any rights to the position on which she was temporarily relieving a regularly assigned employe on vacation.

For the foregoing reasons we hold that Carrier violated the Agreement when it failed to pay Claimant the time and one-half rate for August 19, 1957.

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

That the parties waived oral hearing;

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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January, 1963.

DISSENT TO AWARD No. 11084, DOCKET NO. CL-10705

The Majority holds that "moving from one assignment to another" applies only in the exercise of seniority. The Majority then concludes that for purposes of the rule, the exercise of seniority is limited to bidding and displacement rights. This is erroneous. Even if the moving from one assignment to another applies only in the exercise of seniority, the exercise of seniority is not confined to bidding and displacement rights. A mere reading of the Agreement makes this readily apparent. Carrier is required to observe seniority in filling temporary vacancies. It is also required to observe the principle of seniority in filling assignments of vacationing employes when a regular vacation relief worker is not used. The Claimant, in this case, was the senior employe desiring the vacation work and, as such, Carrier was obligated to assign her. In acquiring the work by reason of her seniority the Claimant obviously exercised her seniority and it is absurd to hold otherwise.

For these and other reasons we dissent.

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ W. H. Castle

/s/ D. S. Dugan

/s/ T. F. Strunck