Award No. 11763
Docket No. TE-10347

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

(Western Lines)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka & Santa Fe Railway System that:

1. The Carrier violated the Agreement between the parties when it required or permitted certain regularly assigned employes, on their assigned rest days, to displace extra employes assigned to temporary vacancies and thereafter refused and continues to refuse to pay the regularly assigned employes at the time and one-half rate for work performed on their assigned rest days and refused and continues to refuse to compensate said extra employes for each day they were entitled to fill temporary vacancies; and

2. The Carrier shall now be required to compensate claimants listed below as follows:

J. A. Carabajal

(Case No. 1)

The difference between the time and one-half and pro rata rates for work performed December 30 and 31, 1956;

J. D. Honaker

Eight hours' pay each day, December 30 and 31, 1956, when he was not permitted to work the position at Isleta, N. M., to which he had been assigned.

F. J. Sanchez

(Case No. 2)

The difference between the time and one-half and pro rata rates for work performed on December 30 and 31, 1956;

D. Montoya

The difference between the time and one-half and pro rata rates for work performed on December 28 and 29, 1956;

R. E. Sandoval

Eight hours' pay each day December 28 and 29, 1956, when he was not permitted to work the position at Glorietta, N. M., to which he had been assigned.

M. A. Jones

(Case No. 3)

The difference between the time and one-half and pro rata rates for work performed June 23 and 24, 1957;

V. C. Stewart

Eight hours' pay each day June 23 and 24, 1957, when he was not permitted to work the position at Belen, N. M., to which he had been assigned;

J. A. Carabajal

(Case No. 4)

The difference between the time and one-half and pro rata rates for work performed June 16 and 17, 1957;

J. F. Thompson

Eight hours' pay each day June 16 and 17, 1957, when he was not permitted to work the position at Isleta, N. M., to which he had been assigned.

D. Bonin

(Case No. 5)

The difference between the time and one-half and pro rata rates for work performed August 10 and 11, 1957;

J. Moya

Eight hours' pay each day August 10 and 11, 1957, when he was not permitted to work the position at Raton, N. M., to which he had been assigned.

EMPLOYES' STATEMENT OF FACTS: An Agreement between the parties, bearing effective date of June 1, 1951, is in evidence.

Article 12(b) of the Vacation Agreement, signed at Chicago, December 17, 1941, provides that absences of employes from duty while on vacations does not constitute "'vacancies' in their positions under any agreement." The parties, however, have agreed to the method of filling positions of employes absent

Sections 19-a, 19-b, Article XVII and Article XX, Section 8-a. A complete denial of the Employes' claim is therefore respectfully requested, for the reasons hereinbefore expressed.

The Carrier is uninformed as to the arguments the Organization will advance in its ex parte submission, and accordingly reserves the right to submit such additional facts, evidence and argument as it may conclude are required in replying to the Organization's ex parte submission.

All that is contained herein is either known or available to the Employes or their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: At all the stations involved in the claim more than one shift is worked and employes assigned to positions covered by the Agreement are permitted to move to preferred shifts during the period of time regularly assigned employes are absent on vacation. The manner in which this is to be accomplished is prescribed in Article XX, Section 8-a, of the Agreement which reads:

> "Section 8-a. When a temporary vacancy of thirty (30) days or less occurs in an office where more than one (1) shift is worked, the employes in that office will be notified thereof and, if qualified, will be permitted, if they so desire, to advance to preferred tricks therein, including the Agent's position (other than supervisory) at the location, according to their Division seniority; the trick left vacant to be filled from the extra list. A point where the position of Agent is listed in the wage scale and is located in a separate building or office from the telegraphers performing station work will, for the purposes of this Section 8-a, be considered as one office. The Railway Company is not to be committed to any additional expense because of changes in shifts resulting from the application of this Section."

The Facts

The facts are not in dispute.

In each of the cases listed in the claim, a regular employe went on vacation — another regular employe in the same office, upon his own application, advanced to the preferred trick of the vacationing employe — the resulting vacancy was filled by an extra man. In Case No. 2 there were two advancements of regular employes ahead of the vacancy filled by an extra employe. The parties are in agreement that all of these assignments were made in compliance with Article XX, Section 8-a.

In each of the cases the work week of the vacationing employe consisted of five consecutive work days and two consecutive rest days. In each case the vacationing employe went on vacation on the first work day following his rest days and the advanced regular employe and the extra man began filling the vacancies created by the vacation and advancement of the regular employe(s), each enjoying all the emoluments of the positions except the two rest days immediately preceding the first work day on which the vacationing employe returned to his position.

An example will demonstrate the factual situation which gave rise to the dispute: Employe A was regularly assigned to a position with five work days, Monday through Friday, with rest days Saturday and Sunday. Employe B was regularly assigned to a position with five work days, Friday through Tuesday, with rest days Wednesday and Thursday. Employe A began his vacation on a Monday and returned to work two weeks from that day. Employe B advanced to the position of Employe A to fill the vacation vacancy. The first week on this assignment Employe B worked the position on its regularly scheduled work days and observed the Saturday and Sunday rest days. The next week he worked the regularly scheduled work days of Employe A's position — Monday through Friday. Then, instead of observing the Saturday and Sunday rest days attached to and part of Employe A's position, Employe B, at his own request, returned to and worked his regularly assigned position on those days. As consequences, Employe B worked seven consecutive days, and, Employe C, an extra, who had been filling Employe B's position, was deprived of work on that Saturday and Sunday.

Contentions of the Parties

Petitioner contends that: (1) When Employe B advanced to Employe A's position for the vacation vacancy, he stood in the place and stead of Employe A as to the emoluments of A's position which include its rest days; (2) The vacation vacancy did not terminate until the date on which Employe A was scheduled to return to work; and, Employe B was assigned, at his own request, to protect Employe A's position to the termination of A's vacation period; (3) Carrier, in permitting Employe B to fail to observe the rest days of Employe A during the vaction period, violated the Agreement, particularly, its 40-hour work week provisions; (4) Employe B, having worked a consecutive sixth and seventh day, should have been compensated at the overtime rate for those days; and (5) Employe C, the extra, having been deprived of two days of work, because of the violation, should be made whole.

Carrier contends: (1) Employe B had ownership of his regularly assigned position and was possessed of the right to return to it at any time he chose; (2) Employe A's vacation vacancy terminated on the last day of his vacation period on which he was regularly scheduled to work; (3) Carrier "is not committed to any additional expense because of changes in shifts resulting from the application of" Article XX, Section 8-a; and, (4) Article III, Section 19-b, of the Agreement, which reads:

> "*Section 19-b. Employes worked more than five 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. . . ."

expressly bars an overtime rate of pay to Employe B "due to moving from one assignment to another."

The Issues

The issues are:

1. Did Carrier violate Article XX, Section 8-a, and the 40-hour work week provisions by permitting Employe B to fail to observe the rest days of Employe A's position which he had earned?

2. Is Employe B entitled to overtime pay for having worked a sixth and seventh consecutive day?

3. Was Employe C deprived of two days' work because of a violation of the Agreement, for which he should be made whole?

Resolution of the Issues

While there has not been before this Division, heretofore, a petition to interpret a provision identical to Article XX-8(a) in relationship with 40-hour work week provisions, we have had occasion to decide when a temporary vacancy terminates and who is entitled to the rest days. In Award No. 6976:

> ". . . We have held that a regularly assigned employe transferred to a temporary vacancy is entitled to the rest days of the temporary vacancy because rest days are a condition of and attached to a position, Award Nos. 5811 and 6408.
>
> "In view of those awards and since it is clear that the regular occupant of the position involved was not returning to work until the first day of the next work week, it is apparent that the temporary vacancy did not terminate until the end of the assigned work week and that the regular occupant did not displace the temporary holder of the position until the start of the next work week. Hence, the claim must be sustained."

We are mindful, also, of the Emergency Board's explanation of the objectives of the 40-hour work week:

> "The Board intended to have the employes achieve a work week of five 8-hour days, without loss in earnings. Its purposes were two: (1) to give employes 2 days rest each week and (2) to spread and maintain employment. Its purpose was not to obtain more pay for employes through overtime on the 6th and 7th day of the week, and it sought through the penalty provisions to discourage such work schedules."

Interpreting Article XX, Section 8-a in the light of our findings in Award No. 6976 and the Emergency Board's explanation, **supra**, we find that: (1) the vacation vacancies, in each of the 5 cases in the claim, did not terminate until the regularly assigned vacationing employe was scheduled to return to his position; and, (2) the regular employe who had advanced to the vacancy had earned the rest days of that position and his being permitted to return to work his regular assignment on those days, putting the extra man out of work, violated the provisions of the 40-hour work week provisions designed "to spread and maintain employment."

The Remedy

In each of the 5 cases in the claim, petitioner prays that the regularly assigned employes, who advanced due to the vacation vacancy, be awarded the difference between straight time and overtime rates of pay for a sixth and seventh consecutive days of work. We have held, uniformly, that specific provisions of an agreement prevail over general provisions. Turning to Ar-

ticle III, Section 19-b of the Agreement, we find a specific provision which declares that overtime rates will not be paid for the sixth and seventh days "where such work is performed by an employe due to moving from one assignment to another." Since the regular employes who advanced due to the vacation vacancy come within this category, we will deny the claim as to them.

As to the extra employes, each of whom lost two days' work because of the violation, Carrier denies they have any contractual right to be made whole because Article XX, Section 8-a, provides that it is not "committed to any additional expense because of changes in shifts resulting from the application of this Section." It hardly seems necessary to point out that had there been no violation Carrier would not have had "any additional expense." Where the expense flows from the Carrier's violation of the Agreement, it cannot be pleaded, successfully, as a bar to the contractual rights of employes. In each of the five cases set forth in the claim, we will sustain the claim on behalf of the extra employe.

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 Carrier violated the Agreement.

AWARD

Claim sustained in part and denied in part as set forth in that part of the Opinion captioned "The Remedy."

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 1st day of October 1963.

SPECIAL CONCURRING OPINION, AWARD 11763
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It appears to me that with one exception this award correctly disposes of the dispute involved.

The exception lies in the first paragraph of that portion of the Opinion of Board titled "The Remedy." I believe the Referee was led into error there primarily by mistaking the grounds for claiming the difference between pro rata and time and one-half in behalf of the regularly assigned employes. The claim was not "for a sixth and seventh consecutive days of work," as the

Referee puts it. The claim was predicated on the allegation that the days in question were properly rest days for those employes as is clearly shown in Part 1 of the Statement of Claim.

This is not a distinction without a difference as might be thought. There are two situations covered by different rules. Compensation for service on rest days is provided by Article III, Section 20, sub-section "b" applying to the employes here involved, while payment for service on the sixth and seventh consecutive days of an employe's work week is provided in Article III, Section 19. It is in this latter rule that the exception quoted in the first paragraph of "The Remedy" is found. There is no such exception in Section 20-b, which provides the time and one-half rate for service on an employe's rest day "whether the required service is on their regular positions or on other work."

The Referee correctly decided that the days in question were rest days for the claimant employes. He also correctly observes that "specific provisions of an agreement prevail over general provisions." But, then instead of applying the specific rule which by its terms is confined solely to "determining the compensation for employes who are required to work on their assigned rest days," and which contains no exceptions, he applied another rule which relates to extended overtime, as distinguished from service on rest days, and which contains the exception by which these employes' claims were denied. I believe he erred in so doing.

For the reason indicated, I do not accept Award 11763 as sound precedent for applying the weekly overtime provisions of an agreement to any situation where the issue involves — as it did here — the question of determining an employe's rest days as distinguished from work on the "sixth and seventh consecutive days." Where the parties have agreed to different rules for different work situations, we have no authority to confuse the one with the other.

In all other respects I consider the award to be well reasoned and correct.

J. W. Whitehouse
Labor Member

DISSENT TO AWARD NO. 11763, DOCKET NO. TE-10347

This Award is in error in allowing compensation to the extra employes.

Rule XX is a special provision covering the precise facts before us and as such takes precedence over any general provisions such as the Vacation Agreement. There is nothing in Rule XX-8a that prohibits these regular claimants from returning to their own assignment on work days thereof, or conversely which requires Carrier to force them to abide the rest days of the vacation position. In fact, as Carrier has stated, it could well have been vulnerable under the guarantee rule if it followed the procedure recommended by the Board.

As stated in analogous Award 11446 which denied a claim of furloughed employes under these facts:

> "* * * If it was the intention of the Petitioner to compel employes who fill temporary vacancies to observe the rest days of those positions, the Agreement should so state. * * *"

The vacation vacancy terminated on the last work day thereof. Even if this were not so, and the Board here so found, when the temporary vacancy terminated is not determinative of the issues in the absence of a provision restricting the right of the regular employes to return to their assignments, as was the case in Award 6976, relied upon by the Board:

> "'* * *, an employe holding a temporary vacancy at his own request may not return to his regularly assigned position until the temporary vacancy terminates or he is displaced from the temporary vacancy.'"

The result of this Award is to find a priority in extra employes over regular employes to fill the assignments of the regular employes on assigned work days thereof. This represents a radical departure from normal seniority concepts.

The days in question were work days of a regular relief assignment. That should have been the point of focus in the claim of the extra men, and not the fact that those days were incidentally rest days of a temporary vacancy with which the extra men were not concerned. The limit of the extra Claimants' interest was the vacancy on the regular relief position. Their rights thereto were limited to compensation on days worked. As extra employes they could not have rights to work such regular positions superior to those of the regular employes. Likewise, they could not premise such rights on an alleged mishandling of the regular employes on some other vacancy, since that would involve a matter restricted only to the Carrier and the regular employes.

T. F. Strunck

D. S. Dugan

P. C. Carter

W. H. Castle

G. C. White