Award No. 14198
Docket No. CL-14829

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5585) that:

1. Carrier violated the Clerks' Rules Agreement at Savannah, Illinois, when it compensated employe E. S. Anderson at the straight time rate of pay for service performed by him in excess of 5 days, or 40 hours, in a work week.

2. Carrier shall now be required to compensate employe E. S. Anderson for an additional four hours at the straight time rate of pay of Relief Position No. 4 for Saturday, November 16, 1963.

EMPLOYES' STATEMENT OF FACTS: Employe E. S. Anderson is the regularly assigned occupant of Yard Clerk Position No. 2684 (new No. 2501) from 7:45 A.M. to 3:45 P.M., Monday through Friday, with rest days of Saturday and Sunday.

The following positions are involved in the instant claim:

Pos. No.	Title	Occupant	Assigned hrs.	Assigned days	Rest days	Relieved by
2684 (2501)	Yd Clk	E. Anderson	7:45A–3:45P	Mon–Fri	Sat&Sun	J. Everhart
Rel No. 4		J. Everhart	7:45A–3:45P	Sat–Wed	Thurs&Fri	

Relieves Pos. 2684 (new 2501) on Saturday and Sunday

Pos. 2685 (new 2502) on Monday

Pos. 2700 (new 2516) on Tuesday and Wednesday

Rule 9(g) reads as follows:

"New positions or vacancies of thirty (30) days or less duration shall be considered as temporary, and may be filled by an employe without bulletining; if filled, the senior qualified employe requesting same will be assigned thereto."

Employe E. Anderson, the regularly assigned occupant of Yard Clerk Position No. 2684 (new No. 2501) at Savanna in Seniority District No. 32, which is assigned from 7:45 A. M. to 3:45 P. M. Monday through Friday with Saturday and Sunday rest days, requested the temporary vacancy of unknown duration on Relief Position No. 4 commencing November 16, 1963 under the provisions of aforequoted Rule 9(g) and being the senior qualified employe making such request he was allowed to exercise his seniority and was assigned thereto for an indefinite period, and the Carrier says he was assigned thereto for an indefinite period because despite the fact that in the instant case the temporary vacancy on Relief Position No. 4 lasted for only one day, i.e., November 16, 1963, yet it will be readily and clearly apparent that the temporary vacancy on Relief Position No. 4 could have conceivably lasted for 1 week, 1 month, 1 year, or longer, dependent upon the seriousness of employe Everhart's illness.

Rule 32(d) reads as follows:

"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 or to or from an extra or furloughed list, or where days off are being accumulated under paragraph (g) of Rule 27." (Emphasis ours.)

In accordance with the specific provisions of aforequoted Rule 32(d), Claimant Anderson received the straight time rate of pay for the service he performed on Relief Position No. 4 on November 16, 1963, and properly so, because such work was performed due to his moving from one assignment (Yard Clerk Position No. 2684 (2501) to another (Relief Position No. 4)), said move from one assignment to another occurring as a result of an exercise of seniority under the provisions of Rule 9(g) on the part of Claimant Anderson.

There is attached as Carrier's Exhibit A copy of letter written by Mr. S. W. Amour, Assistant to Vice President, to Mr. H. V. Gilligan, General Chairman, under date of February 20, 1964.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts in the instant case do not seem to be in dispute. Claimant was the regularly assigned clerk on Position No. 2501 with rest days of Saturday and Sunday. The regular occupant of Position No. 4 was absent due to illness on Saturday, November 16, 1963. Claimant filled the position for which he was paid 8 hours at pro rata rate, but alleges that the proper rate was time and a half, which it is claimed that he is entitled to receive, since he worked on Saturday which was his assigned rest day on his regular position.

The current Agreement between the parties provides, insofar as is pertinent to the instant dispute, as follows:

Rule 9(g):

"New positions or vacancies of thirty (30) days or less duration shall be considered as temporary and may be filled by an employe without bulletining; if filled, the senior qualified employe requesting same will be assigned thereto."

Rule 32(c) – Overtime:

"Work in excess of forty (40 straight time hours in any work week shall be paid for at one and one-half times the basic straight time rate **except where such work is performed by an employe due to moving from one assignment to another. . . .**" (Emphasis ours.)

POSITION OF PARTIES: The Organization argues that the Claimant did not "exercise his seniority" within the general intent and meaning of that term as it is customarily used. While the Claimant may have been the senior qualified employe requesting to work Position No. 2684 on November 16, 1963, he neither gave up his rights to his regular position nor did he displace the regular incumbent of Relief Position No. 4. He simply relieved a regularly assigned employe for one day. The employes contend that Claimant should have been paid time and one-half on the date in question and this contention is bottomed on the provisions contained in Rule 33 (c) which states:

"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 the higher, with a minimum of eight (8) hours **at the rate of time and one-half.**" (Emphasis ours.)

The quintessence of the Organization's claim is positioned on the proposition that the phrase "moving from one assignment to another" applies only to those situations where an employe exercised his seniority by bidding or exercising displacement rights. In support of this position the Employes cite numerous awards of referees where this concept is enunciated. (See Award 11084, Ray.)

Carrier for its part argues that the Agreement between the parties must be read in its entirety, and this perforce requires giving full effect to Rule 32, subsections (c) and (d) in both of which provisions there is contained an explicit exception, viz:

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

Carrier introduces additional ammunition to its contentions by pointing out that in Award 11084, Referee Ray:

1) in effect took the language "moving from one assignment to another" — which language is unqualified — and restricted its application to so-called permanent assignments;

2) amended the Agreement of the parties which contract contained no restriction regarding the reason for moving from one assignment to another and then limited it to those instances where the employe exercised his **"seniority bidding or displacement rights"** * * *" (Emphasis ours.)

Carrier also lays heavy stress on the distinction between the recognition of an employe's seniority rights by the Carrier in the direction of the working force and in the exercise of seniority rights by an employe. This point is elucidated by the argument advanced by Carrier that if an employe is compelled by the rules to accept a position, Carrier's conduct in calling him to that position is merely an act in recognition of the employe's seniority rights. On the other hand, however, if an employe is under no compulsion to accept a given position to which his seniority entitled him, his moving to that position constitutes an exercise of seniority rights. In support of this contention Carrier cites Awards 5488, 10988, 5293, 12003 and 13234.

The nub of the Carrier's argument is that the Claimant in the instant case could have remained on his regular assignment and would not have been used to fill the assignment in question but he chose not to do so and exercised his seniority in exactly the same manner as in a situation where the job was bulletined. He submitted his request for the assignment; since he was the senior man who requested the position he was assigned to it; this is the same procedure followed in filling any so-called permanent vacancy that is bulletined, viz: the senior employe who asks for the job must be assigned to it.

Carrier then cites in extenso two landmark cases, both decided by Dr. William Leiserson (Awards 6503 and 6561), upon which Carrier places heavy reliance:

AWARD 6503

"The facts in the case make plain that claimant did not move from his regular assignment to fill a temporary vacancy on another assignment. His own assignment was to rest on January 6 and 7. He had the right to insist on those two days of rest by reason of his assignment, he did not have to accept the two days' work on the other assignment. He could have let the other applicant for the vacancy work the two days. Instead of choosing to rest, he chose to apply for the work on the other assignment. When he made that choice of his own accord, the Carrier was obligated by the seniority rules to give him that work. Having so chosen, **he took the conditions, including the rate of pay, of the assignment on which he worked the two days. Had the temporary vacancy lasted** five days, he would have been entitled to the rest days of this assignment." (Emphasis ours.)

It is concisely stated in Award 12003 that:

* * * * *

"The common thread running through the sustaining awards is that the employe on temporary assignment has no choice in determining whether he should accept that assignment. . . ."

* * * * *

But the facts in the instant case, which were not controverted in the record, demonstrate clearly that the Claimant was under no compulsion to accept the assignment. To the exact contrary the record shows, and it is not denied, that Claimant, as a purely voluntary act and entirely of his own volition, chose to take the instant assignment and actually exercised his seniority to accomplish that purpose. He submitted his request for the said assignment and, as the senior employe who asked for the job, the Carrier was required by its contract to award same to him.

It would appear that the Claimant not only wants the right to exercise his seniority to secure a temporary vacancy under Rule 9(g), but he wants to be able to exercise that seniority in order to earn overtime pay. But the Agreement in Rule 32(c) explicitly, in clear and unambiguous language, provides that "Work in excess of forty (40) straight time hours in any work week shall be paid for at one and one-half times the basic straight time rate **except where such work is performed by an employe due to moving from one assignmnet to another. . . .**" (Emphasis ours.) The Organization does not deny that Claimant moved from his regular assignment to the temporary one in question, but the Employes seek to add to this clear contract language a qualification which is not found there, viz: "that the phrase is applicable only where a regularly assigned employe moves from one assignment to another in the exercise of seniority bidding or to displacement rights. * * *" There is no such qualification in the said Agreement of the parties.

It is well settled and hardly needs the citation of authorities for the Board to remark, at this juncture that while the Organization makes what appears to be a persuasive argument in support of its request for a sustaining award in order to do so authority for such action must be found in the Agreement itself. There is no provision in the instant case. We can only conclude by quoting the following from Award 11446:

* * * * *

> "We have no right to change, alter or modify the Agreement. If it was the intention of the Petitioner to compel employes who fill temporary vacancies to observe the rest days of these positions, the Agreement should so state. . . ."

* * * * *

The exception set forth in Rule 32(c) applies to the facts in the instant case; the Claimant is not entitled to overtime pay. It is an elementary principle of contract law that the intention of the parties must be determined from the "four corners of the contract." Especially is this true when, in order to reach the conclusion requested by the Organization, it would be necessary for the Board to add the concept described fully supra (moving from one assignment to another is applicable only where a regularly assigned employe so moves in the exercise of seniority bidding or to displacement rights) to the contract which the parties negotiated. This we have no power to do.

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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1966.

LABOR MEMBER'S DISSENT TO AWARD 14198, DOCKET CL-14829

Award 14198, Docket CL-14829 is in error. It is contrary to valid and binding precedent in like disputes between these same parties, especially Awards 10771 and 11528, which were not even mentioned by the Referee when writing his decision.

Such unfortunate action ignores the doctrine of res judicata and stare decisis and treats as meaningless the fact that the Railway Labor Act specifically states and intends that this Board render final and binding decisions. Section 3, first (m) of the Railway Labor Act, reads, in part:

> "The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the repective parties to the controversy, **and the awards shall be final and binding upon both parties to the dispute,** * * *."
> (Emphasis ours.)

Docket CL-10184 was decided September 7, 1962, over a year before the instant claim came into being. The controversy there was between the same parties as the present case. The argument there, as here, was whether Claimant was entitled to time and one-half, rather than straight time, account working the rest day(s) of a position on which he had worked the five preceding days.

So that there can be no misunderstanding between the facts in the two cases, i.e., CL-10184, Award 10771, as compared with the present case, CL-14829, Award 14198, in the present case the facts are briefly as follows:

Claimant, the regular assigned incumbent of Position No. 2684, worked on Position No. 2684 Monday, Tuesday, Wednesday, Thursday, Friday and, in the absence of the regular relief employe, also worked Position No. 2684 on

Saturday. (In the Opinion the Referee refers to Position Nos .2501 and 2684; however, 2501 was the new Position No. for 2684 as clearly shown in the record and Relief Position No. 4 was scheduled to relieve Claimant on the Saturday and Sunday rest days of Position No. 2684.)

Thus, the facts were the same, and the controversy, i.e., whether or not Claimant was entitled to time and one-half for work performed on the rest days of his assignment after having previously worked the five preceding days, was the same.

In deciding Docket CL-10184 by Award 10771, this Board said in part that:

> "Perry did the same work, at the same place, at the same time on his sixth and seventh days as he did on the preceding five. He was not in a different seniority district or group and he was not an extra employe. In fact, he was a regularly assigned employe whose rest days could not be changed without due notice. Since his rest days were not changed, and he worked on those days, the Employes have made a prima facie case for overtime pay under Rule 33(c).
>
> This rule provides that:
>
> > 'Service rendered by an employe on his assigned rest day, or days, relieving an employe assigned to such day shall be paid at 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.'
>
> The Carrier argues, however, that Perry filled a temporary vacancy within the meaning of Rule 9(g), that the procedures in Section 2 of the Memorandum Agreement of 1954 were followed to fill the vacancy, that this constituted moving to a new assignment, and, accordingly, that this is an exception to the payment of overtime under Rules 32 (c) and (d).
>
> Assuming that Perry filled a temporary vacancy, as contended by the Carrier, it does not follow that Perry was on a new assignment. Section 2 of the 1954 Memorandum of Agreement, which outlines procedures for filling temporary vacancies under Rule 9(g), applies to eligible employes 'after reporting for work on the day of the temporary vacancy.' Clearly this implies appointment to work other than what the employe had been scheduled to perform when he reported for work that day. This has the makings of a new assignment. But Perry was called by the Carrier to do precisely the same work he did during his regular assignment. At the point he was called by the Carrier no other employe could have handled the work. Accordingly, rather than take a new assignment, Perry worked overtime on the two days in question.
>
> Even if it could be construed that Perry changed assignments when he filled a temporary vacancy, we do not see how this could operate as an exception to the clear and specific provision in Rule 33(c) that service on rest days shall be compensated at the rate of time and one-half. Awards 9487, 9942 and 9943, among

others. The rule is universally accepted that special rules prevail over general rules. Awards 6382, 9487, 9942, 9943 among others. Therefore, Employe Perry's claim should be sustained.

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

Items 1 and 3 sustained. Item 2, denied."

That Award was, of course, furnished to both parties.

Clearly, without more, that prior Award on the point between the same parties required a sustaining decision in this case. See Award 14199 adopted the same date as the instant Award and involving similar contentions.

Such inconsistency in decisions, summarily reversing, or at least ignoring prior well reasoned Awards, seemingly merely as a matter of choice in deciding the instant case, simply does not serve the purpose for which this Board was established.

Not only did prior Award 10771 require the instant claim be sustained, but the clear and unambiguous language of Rule 33(c) was not subject to any exceptions, and ignoring it, in order to follow Awards 6503 and 6561, is inexcusable.

I therefore dissent to this erroneous Award.

D. E. Watkins
Labor Member
3-29-66

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