Award No. 14199
Docket No. CL-14844

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-5520) that:

1. Carrier violated the Clerks' Rules Agreement at Savanna, Illinois when it compensated employe F. S. Cimino 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 F. S. Cimino for an additional four (4) hours at the straight time rate of pay of Position No. 2694 for Tuesday, July 23, 1963.

EMPLOYES' STATEMENT OF FACTS: Employe F. S. Cimino is the regularly assigned occupant of Position No. 2694 at Savanna, Illinois. His hours of service are from 7:45 A.M. to 3:45 P. M., Tuesday through Saturday, with rest days on Sunday and Monday.

Employe R. Keehner is the regularly assigned occupant of Position No. 2698 at Savanna, Illinois. His hours of service are from 11:45 P. M. to 7:45 A. M., Wednesday through Sunday, with rest days on Monday and Tuesday.

Employe R. Keehner was assigned one week vacation from July 17th through the 21st and inasmuch as this period was not included in a regularly assigned vacation relief assignment and no vacation relief employe was hired to fill the position, senior employe F. S. Cimino requested the temporary vacancy and was assigned thereto on July 17, 1963.

Employe Cimino occupied the position for the five working days of the position, July 17th through 21st, and observed one rest day, July 22nd, and returned to his regular assignment on Position No. 2694 on Tuesday, July

because such work was performed due to his moving from one assignment (Messenger Position No. 2698) to another (Yard Clerk Position No. 2694), said move from one assignment to another occurring as a result of an exercise of seniority under the provisions of Rules 9(g) and 9(h) on the part of claimant Cimino.

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 October 17, 1963 and as Carrier's Exhibit B copy of letter written by Mr. Amour to Mr. Gilligan under date of December 11, 1963.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts in the instant case are not in dispute and may be briefly summarized as follows: The Claimant moved to a temporary vacancy where he worked 5 days, observed one rest day and then returned to his previous position. Here he worked the seventh (7th) day and claims time and one-half for work performed on the seventh day.

The Organization claims that while both parties agree that Claimant had the right to request and be assigned to the temporary vacancy under the provisions of Rule 9(g) and Claimant also had the right to return to his former position under the provisions of Rule 9(h) neither of these two provisions of the Rules are involved in the instant case. Petitioner concedes that the latter point has been determined in Award 11446 which issue was there decided in favor of the Carrier and is not in dispute in the instant case. However, the Employes argue that Award 11446 did not dispose of the narrow question here raised in the case at bar which is simply whether Claimant should be paid at the overtime rate for work performed on earned rest days.

In support of its position the Organization calls our attention to Award 10771 where Carrier's arguments were raised and rejected by Referee Ables, who, in pertinent part, met these issues as follows:

> "* * * The Carrier's case hinges on the argument that Perry moved to a new assignment; therefore, making the exception to the overtime rule applicable.
>
> We think the Employes make a stronger case.
>
> * * * * *
>
> The Carrier argues, however, that Perry filed 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).
>
> * * * * *
>
> 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. * * *."

See also Award 11528 where Referee Dolnick meets the same issue, i.e.: Claimants worked on their earned rest days and the principle invoked as underlying these Awards is to pay employes the punitive rate for work performed on rest days.

The Carrier, for its part, advances the same arguments which appear in Award No. 14198 and takes the position that the same ruling made in that case should be equally controlling in disposing of the instant case.

We disagree with the Carrier. On the narrow issue here raised we concur with Awards 10771 and 11528 and are further persuaded that the opinion of Referee Whiting found in Award 5494, is cogently reasoned and dispositive of the matter at issue. It would appear that the Organization's contention that Claimant should be paid at the overtime rate for work performed in excess of 40 hours during the period in question is both in accord with a sound interpretation of the Rules applicable in the instant matter and consistent with previously adjudicated cases.

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 its Agreement.

AWARD

Claim sustained.

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.

CARRIER MEMBERS' DISSENT TO AWARD 14199, DOCKET CL-14844 (Referee Seff)

The undisputed facts of this case bring it within the exception to Rule 32 (d) providing for straight time rate "where such work is performed by an employe due to moving from one assignment to another * * *."

Pursuant to Rule 9 (g) claimant was properly filling an assignment designated as messenger position No. 2698 with hours 11:45 P.M. to 7:45 A. M., Wednesday through Sunday. On the date in issue, claimant, of his own volition, exercised his displacement right under Rule 9 (h) and moved to a different assignment designated as yard clerk position No. 2694 with hours 7:45 A. M. to 3:45 P. M., Tuesday through Saturday.

There can be no question that claimant moved from one distinct assignment to another with different assigned hours, days, etc., in the exercise of a contractual right. This choice by claimant prevented carrier from accomplishing the work at the straight time rate by other employes.

The Majority's refusal to apply Rule 32 (d) and its failure to deny this claim for the reasons advanced in Award 14198 constitutes grave error, and we dissent.

W. M. Roberts
G. L. Naylor
C. H. Manoogian
R. A. DeRossett
3-16-66.

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 14199, DOCKET CL-14844

Award 14199, Docket CL-14844 (unlike this same Referee's Award 14198 in Docket CL-14829) clearly honors the doctrines of res judicata and stare decisis.

No Referee can properly be accused of grave error when, as here, his Award is based squarely on valid and binding decisions involving the same controversy between the same parties under similar factual situations.

"Grave error" quite appropriately describes the denial Award 14198 and, by reference to my dissent thereto, wherein the controversy between the parties is clearly set out, the soundness of the decision in this Award 14199 is clearly demonstrated. Two "wrongs" would not have made a "right."

Award 14199 is clearly correct while Award 14198 is completely in error.

D. E. Watkins
Labor Member — 4-12-66.

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.