Award No. 16842
Docket No. CL-17043

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY, AIRLINE 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-6222) that:

1. Carrier violated the provisions of the Clerks' Rules Agreement at Minneapolis, Minnesota on December 18th and 19th, 1965, when it failed to compensate employe Dorothy M. Eide at the penalty rate for working on her sixth and seventh days.

2. Carrier shall now be required to compensate employe Dorothy M. Eide an additional four (4) hours for work performed on December 18th and 19th, 1965 at the straight time rate of Position No. 145.

EMPLOYES' STATEMENT OF FACTS: Employe Dorothy M. Eide, who has a seniority date of August 23, 1965 in Seniority District No. 65, is a furloughed or unassigned employe in that district.

Employe Jane Boggs is the regularly assigned occupant of Switchboard Operator Position No. 145 at Minneapolis, Minnesota from 7 A. M. to 3 P. M., Tuesday through Saturday, with Sunday and Monday rest days. The rest days of Position No. 145, which is a 7-day position, are unassigned rest days.

On Monday, December 13, 1965, the first work day of her work week, Employe Eide was used to provide rest day relief on Position No. 145. Due to the absence of the regular occupant, Jane Boggs account of illness, Position No. 145 was temporarily vacant beginning on Tuesday, December 14, 1965 and Employe Eide was used on a day to day basis to fill the vacancy of unknown duration on Position No. 145 on Tuesday, December 14, Wednesday, December 15, Thursday, December 16, Friday, December 17, Saturday, December 18, and provided rest day relief thereon on Sunday, December 19 and Monday, December 20, 1965, thereby working and filling Position No. 145 on eight consecutive days. Submitted as Employes' Exhibit A is copy of statement from employe Dorothy M. Eide, dated October 3, 1966.

She was compensated for 8 hours at the straight time rate of pay of Position No. 145 for each of those eight days.

There is attached hereto as Carrier's Exhibit A copy of letter written by Mr. S. W. Amour, Vice President–Labor Relations, to Mr. H. C. Hopper, General Chairman, under date of August 2, 1966.

(Exhibits not reproduced.)

OPINION OF BOARD: The crucial issue in this case is what, under Rule 27 — 40 Hour Week, is the work week of an extra-unassigned furloughed employe under Facts, **infra.** We have studied the many cases cited in panel argument. We find not one of them to be in point. The issue is novel. It is complex.

A. UNDISPUTED FACTS

Switchboard Operator Position No. 145 (herein called the Position) — a seven day position — had an assigned work week of Tuesday through Saturday with Sunday and Monday rest days. The rest days were unassigned.

Claimant was an extra-unassigned furloughed employe.

On Monday, December 13, 1965, Claimant was assigned to work that unassigned rest day of the seven day Position.

Starting the following day, Tuesday, December 14, 1965, Claimant was assigned, on a day-to-day basis, to work the Position on its regularly assigned days because of a vacancy due to illness of the incumbent. She worked the regularly assigned work days of the Position from Tuesday, December 14 through Saturday, December 18 — five days. Then she continued on the Position working the consecutive unassigned days of the seven day position — Sunday, December 19; Monday, December 20. In all she worked eight consecutive days for each of which she was paid at the pro rata rate.

B. POSITION OF PARTIES

It is the position of Clerks that Claimant's work week as an extra-unassigned furloughed employe was that prescribed in Rule 27(i) — " a period of seven consecutive days starting with Monday." Therefore, Claimant "worked more than five days in a work week" and under Rule 32 (d) Carrier was contractually obligated to pay her "one and one-half times the basic straight time for the sixth and seventh days of (her) work week;" namely, Saturday, December 18 and Sunday, December 19. The Claim prays for the difference between the pro rata rate she was paid on those two specific days and the time and one-half rate.

Carrier contends that Claimant on December 14 took the assignment of a regular employe. Therefore, under Rule 28(h) she was confined to the work week of the regular employe. Further, that when Claimant completed her assignment to the unassigned tag end rest day of Monday, December 13, 1965, she reverted to the extra-unassigned furloughed list from which she was assigned, on the following day, to the vacancy created by the illness of the regular incumbent of the Position. Furthermore, whe she completed the five regularly assigned work days of the regular incumbent of the Position she again reverted to the extra-unassigned furloughed list from whence she was then assigned to work the following two unassigned rest days of the Position; namely, Sunday, December 19 and Monday, December 20. Citing Rule 32(c) Carrier states its position as being that Claimant moved from one assignment on Monday, December 13 to another on Tuesday, December 14 and

when she completed the work days of the regularly assigned employe on Saturday, December 18, she moved to another assignment — that of the unassigned rest days of the Position — on Sunday, December 19 and Monday, December 20, and between each assignment she reverted to "an extra or furloughed list." Consequently, the work performed by Claimant was excepted by the provisions of Rule 32(c) and (d) from payment of the overtime rate for "Work in excess of forty (40) straight time hours in any work week" and "more than five days in a work week."

C. PERTINENT PROVISIONS OF AGREEMENT

"RULE 27. 40 HOUR WEEK

* * * * *

(a) General.

There is hereby established **for all employes**, except those occupying positions listed in Rule 1(b), **a work week of forty (40) hours, consisting of five days of eight (8) hours each, with two consecutive days off in each seven**; the work weeks may be staggered in accordance with the Carrier's operational requirements; so far as practicable the days off shall be Saturday and Sunday. **This rule is subject to the following provisions:** . . . (Emphasis ours.)

(h) Rest Days of Extra or Furloughed Employes.

To the extent extra or furloughed employes may be utilized under this agreement or practices, 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.** (Emphasis ours.)

(i) Beginning of Work Week.

The term "work week" for regularly assigned employes shall mean a week beginning on the first day on which the assignment is bulletined to work, and for **unassigned employes shall mean a period of seven consecutive days starting with Monday."** (Emphasis ours.)

"RULE 28.

WORK ON UNASSIGNED DAYS

Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it **may** be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe." (Emphasis ours.)

"RULE 32. OVERTIME

* * * * *

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

(d) 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.)

D. RESOLUTION

We can, laconically, dispose of the Claim for Sunday, December 19. If Clerks' position is sound that Claimant's work week was for seven consecutive days beginning Monday, December 13, then Sunday, December 19, was the seventh day of her work week and Carrier was contractually bound to pay her the overtime rate for that day. If Carrier's position that Claimant took the assignment of the regular employe and had as her rest days the assignment of the regular employe should be sustained, Claimant had earned the rest days of the regular assignment and Carrier was obligated to pay her at the overtime rate for work performed on either of those days. One of the earned rest days under Carrier's theory of the case was Sunday, December 19. We, therefore, without further ado, will sustain the Claim relative to December 19.

Whether Claimant is or is not contractually entitled to overtime compensation for work performed on Saturday, December 18, must be predicated on a finding of her work week. If her work week is established by the Agreement as seven consecutive days beginning Monday, December 13, then Saturday, December 18, was the sixth day of work in her work week for which she should have been compensated at the overtime rate. If the Agreement establishes that on Tuesday, December 14, she assumed the work week of the employe regularly assigned to the Position then Saturday, December 18, was the fifth day of her work week and she was properly paid the pro rata rate for that day. Carrier's argument addressed to exceptions from the overtime rate, prescribed in Rule 32(c) and (d), **supra,** is irrelevant.

Rule 27(a), **supra,** makes plain that generally the work week **"for all employes"** shall be five days out of seven consecutive days beginning on the first day of the employe's work week. Rule 27(i), with particularity, defines the work week of: (1) regularly assigned employes; and (2) unassigned employes, each separate and distinct. That of unassigned employes, of which Claimant is one, is "a period of seven consecutive days starting with Monday. Rule 27(h), **supra,** does not qualify the contractually prescribed work week of unassigned employes. It merely specifies the rest days of an unassigned employe when he is filling the position of a regularly assigned employe. Carrier's argument that an unassigned employe filling the position of a regularly assigned employe finds no support in the Agreement. To so hold would be tantamount to finding that Rule 27(i), relative to unassigned employes, is meaningless surplusage. It would be applicable only when the unassigned

employe was not working in that when the unassigned employe would be assigned to a vacancy his work week would vacillate with each assignment and not firmly established as unequivocally set forth in Rule 27(i). Further, the construction sought by Carrier would permit it to work unassigned employes for 365 days a year without payment of the overtime rate simply by moving them from one assignment to another to avoid rest days on any of the assignments. Such would plainly be incongruity to the objectives of the 40 Hour Week Agreement.

We find, by application of Rule 27(i), that: (1) Claimant's work week began on Monday, December 13; and (2) that Saturday, December 18, was the sixth consecutive day of work in her work week. **Ergo**, we will sustain the Claim.

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 by the Carrier.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December 1968.

CARRIER MEMBERS' DISSENT TO AWARD NO. 16842, DOCKET CL-17043

The majority, after correctly stating the crucial issue in this dispute, states that not one of the awards cited in panel argument was found to be in point, and that the issue is novel as well as complex. That such statements are wholly in error is clearly shown by examination of Awards 6970, 6971, 6973, 7032, 7174, 9945, 10586, 10983 and 11528, all of which were cited during panel argument.

The factual situation in Award 6973 was four-square with that existing in the dispute in Award 16842 with respect to the claim for Saturday, December 18. Any attempt to distinguish the two cases can only be an effort to create a distinction without a difference.

In Award 6973 the Claimant worked in an extra capacity on a Monday in place of the regularly assigned Utility Clerk. Beginning on Tuesday and

continuing for a period of five days Claimant worked in place of the regularly assigned incumbent of the position of Assistant Rate and Transit Clerk and thereby assumed the work week, including the rest days, of that assignment. Because of having worked six consecutive days claim was made for the time and one-half rate for service performed on Saturday. In Award 16842 the work performed on Monday, December 13, was extra work on a tag-end or unassigned day and was not work performed in filling the position of a regularly assigned employe. Beginning on Tuesday and continuing for a period of five days Claimant worked in place of the regularly assigned incumbent of Position No. 145 and thereby assumed the work week, including the rest days, of that assignment. Because of having worked six consecutive days, claim was made for time and one-half rate for service performed on Saturday. The mere fact that the work on Monday in Award 16842 was work on an unassigned rest day does not distinguish it from Award 6973.

The majority proceeds to find correctly that Rule 27 (h) specifies the rest days of an unassigned employe when he is filling the position of a regularly assigned employe. But after so finding, the majority next makes the ambiguous and erroneous statement that: "Carrier's argument that an unassigned employe filling the position of a regularly assigned employe has as his work week, while so assigned, the work week of the regularly assigned employe finds no support in the Agreement." Rule 27 (h) clearly supports Carrier's argument and awards cited in panel argument have properly held to such effect. The claim for Saturday, December 18, should have been denied in accord with Rule 27 (h) and the principles stated in the awards cited in panel argument.

No dissent is registered to the sustention of the claim for time and one-half rate for the service performed on December 19, as this was an assigned rest day of Position No. 145. Claimant also performed service on Monday, December 20, another rest day of Position No. 145, but no claim for time and one-half rate was before us for that date.

If the opinion expressed by the majority in this award was a correct interpretation of the rules involved it would never have been possible for a Carrier to utilize the services of extra or unassigned employes on Saturdays and Sundays except at the punitive rate of pay; a result that clearly was not so intended by the Forty Hour Week Agreement, and which Agreement has never previously been so interpreted. See Award 6973, cited in panel argument.

The rambling dissertation of the majority that the construction of the rules as sought by the Carrier would permit working unassigned employes for 365 days a year without payment of the overtime rate simply by moving them from one assignment to another to avoid rest days on any of the assignments is but a figment of the imagination. The statement is so inane as to not require any comment. However, we cannot help but remark that throughout more than 19 years history of the Forty Hour Week Agreement, no claim of such description has ever been before this Board.

Award 16842 does violence to the rules of the Forty Hour Week Agreement and to the prior decisions of this Board. It is in palpable error and we therefore dissent.

G. C. White
R. E. Black
W. B. Jones
P. C. Carter
G. L. Naylor

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 16842 (DOCKET CL-17043)

The Opinion and Findings of the Board are correct.

The Claimant was an unassigned employe and worked on Monday, December 13, 1965; she was likewise an unassigned employe and worked on Monday, December 20, 1965. She also worked every day in between those eight consecutive days and, therefore, was entitled to the time and one-half rate for her sixth and seventh days, namely, Saturday and Sunday, December 19 and 20, 1965.

C. E. Kief
Labor Member
1-20-69

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