Award Number 17571
Docket Number CL-18007
NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Murray M. Rohman, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

THE CHESAPEAKE AND OHIO RAILWAY COMPANY (Pere Marquette District)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6546) that:

1. The Carrier violated the rules of the Clerks' Agreement by its failure and refusal to properly compensate Mr. Tom Braford for service performed on July 18, 19, 29 and 30, 1967.

2. The Carrier shall now be required to compensate Mr. Tom Braford the difference between pro rata rate and time and one-half for service performed on his rest days, July 18, 19, 29, and 30, 1967.

EMPLOYES' STATEMENT OF FACTS: Mr. Tom Braford holds title to position of Ticket Clerk, 3:30 P.M. to 12:00 Midnight, Thursday through Monday, with Tuesday and Wednesday as rest days. On July 17, 1967, Ticket Clerk Hinken who is assigned to a Monday to Friday work week with Saturday and Sunday as rest days was scheduled for vacation. Mr. Braford assumed the duties of this position, and therefore worked July 13, 14, 15, 16, on his own position, and then on July 17 worked Mr. Hinken's position, continuing to work from July 17 to the 21st, taking the rest days July 22 and July 23, 1967 of Mr. Hinken's position. Mr. Braford continued relieving on Mr. Hinken's position from July 24, 1967 to July 28, 1967, inclusive. Starting on July 29, 1967, Ticket Clerk Thorpe was scheduled for vacation through August 2, 1967, resulting in Mr. Braford working ten (10) straight days, which included the rest days of Mr. Hinken's position, July 29 and 30, 1967.

Claim was filed with the Terminal Trainmaster (Employes' Exhibit No. 1), on behalf of Claimant by the Local Chairman. Claim was declined by the Terminal Trainmaster (Employes' Exhibit No. 2). Appeal was filed by General Chairman with Mr. K. E. Bomar, Superintendent, (Employes' Exhibit No. 3). Superintendent Bomar declined the claim (Employes' Exhibit No. 4). Appeal was then filed with Mr. C. E. Weaver, Jr., Assistant Vice President-Labor Relations, under date of December 4, 1967, (Employes Exhibit No. 5). Mr. Weaver denied the appeal, his letter of January 26, 1968, (Employes' Exhibit No. 6).

Conferences were held on March 13, 1968, April 18, 1968, and September 4, 1968. After a full discussion of the claim, Carrier advised the organization

"RULE 25 (4)—SERVICE ON REST DAYS

"Service rendered by employees on assigned rest days shall be paid for in accordance with the provisions of Rule 30 (b). Employees performing service on assigned rest days when being used to relieve an employee assigned to such day, will be paid eight (8) hours at time and one-half at the rate of the position occupied or their regular rate, whichever is higher."

(Exhibits Not Reproduced)

OPINION OF BOARD: The parties are in agreement as to the facts involved in the instant dispute. The Claimant is regularly assigned to a Ticket Clerk position, Thursday through Monday, rest days Tuesday and Wednesday.

On July 17, 1967, Ticket Clerk Hinken was scheduled for vacation. His duty days were Monday to Friday, rest days Saturday and Sunday. Pursuant to the then existing practice, the Claimant was permitted to fill the assignment of Hinken. Accordingly, the Claimant worked his own regular assignment for four days, July 13 through July 16. Thereafter, he worked Hinken's position from July 17 through 21, with July 22 and 23, as rest days on Hinken's position. He also relieved on this same position from July 24 through 28.

On July 29, Ticket Clerk Thorpe was scheduled for vacation. The Claimant filled this assignment through August 2, 1967, which necessitated his working a total of ten days without rest. In this regard, he missed the rest days of July 29 and 30, part of Hinken's position. Finally, on August 3, Claimant was scheduled for his own vacation.

In summary, it is the Organization's contention that the Carrier violated the effective Agreement by failing to properly compensate the Claimant for work performed on the sixth and seventh day in his work week. In actuality, the Claimant worked a total of nineteen days with only two rest days. This resulted from working four days on his own position from July 13 through 16. Five days on Hinken's position from July 17 through 21, with rest days of July 22 and 23. He then worked five additional days on Hinken's position from July 24 through 28, and filled Thorpe's assignment from July 29 through August 2, without rest days.

The Carrier, in turn argues, despite the fact that under the National Vacation Agreement an employee absent on vacation does not constitute a vacancy, nevertheless, such is considered the same as other short vacancies under Rule 10. Hence, under the Rules, regular employees are permitted to exercise their seniority to short vacancies and then return to their permanent assignments. Furthermore, previously, the overtime rate had not been paid as such moves were at the voluntary request of the employee; even though the employee worked more than forty hours in a week. The Carrier stresses that it relies on the exception contained in Rules 25(3) (b) and (c), to wit:

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

Thus, the first question posed is whether the exception, due to moving from one assignment to another, is applicable? In our view, this provision exempts the Carrier from payment of premium rates in the event an employee exercises his seniority to an existing vacancy. However, at the outset, the

Carrier conceded that under Rule 12(b), an employee absent on vacation is not considered a vacancy.

In this context, pursuant to Award Nos. 6503 and 6561, the Claimant would be entitled to payment of the premium rate for July 29 and 30. It is recognized that he worked Hinken's position from July 24 through 28. Therefore, he was entitled to the rest days of July 29 and 30—which were a part of Hinken's assignment.

The Organization also urges that the Claimant is entitled to the premium rate for July 18 and 19. It will be recalled that he worked four days on his regular assignment, from July 13, through 16. Then on July 17—his fifth day—he relieved on Hinken's assignment. However, he did take the rest days of Hinken's first week assignment on July 22 and 23. Thus, he worked nine straight days at the pro rata rate.

We would note that subsequent to the instant dispute, the parties in 1968, negotiated a provision under Rule 10, prohibiting a similar occurrence. However, in the instant dispute, the Claimant, voluntarily applied for Hinken's position on the basis of his seniority. It is our view that under these circumstances, where an employee of his own volition accepts an assignment and works on what otherwise would have been his rest days, he is not entitled to overtime pay. (See Award 13234).

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 to extent indicated per opinion.

AWARD

Claim sustained for July 29 and 30, 1967.

Claim denied for July 18 and 19, 1967.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of October 1969.

LABOR MEMBER'S DISSENT TO AWARD 17571 (DOCKET CL-18007)

(Referee Rohman)

There are two (2) serious errors in this Award.

The first error is the language used and the authority relied on by the Referee to decline two of the four days claimed in the dispute.

Many prior Awards were presented to the Referee which provides that the phrase "due to moving from one assignment to another" becomes applicable only where a regularly assigned employe exercises his seniority by bidding on a position or by displacing a junior employe, in which case such employe relinquishes all claims to his former position and acquires rights to the position he bids or displaces on. Among those Awards were the following:

Award No.	Referee
5494	Whiting
5495	Whiting
5794	Yeager
5796	Yeager
6382	Keliher
6383	Keliher
10640	LaBelle
10775	Russell
11084	Ray
12076	Dolnick
12819	Yagoda
12968	West
13293	Zack
15803	House
16842	Dorsey
17205	Franden

In this dispute, no such results occurred—the Claimant did not bid on a position or displace a junior employe to obtain a position and thereby relinquish his own former position. He ratained all rights to his own position and returned to it at the end of his temporary assignments.

Notwithstanding the above facts and Board authority, the Referee chose to base his erroneous decision on Award 13234 (Hall) in which that Referee cited one of his own previous awards as authority, Award 11491 (MW-FW&D), involving cost of meals and lodging while away from headquarters. Aside from that fact, Award 13234 (MW-D&RGW) dealt with the exercise of seniority under the provisions of a travel time rule, which is a far cry from the issue we had before us in this dispute. It also involved a reduction of force, the exercise of displacement rights over a junior employe, and the number of days during which such displacement could be exercised. Those rules likewise had no significance in this dispute. The author of Award 13234 also cited Award 5518 (Whiting) which involved a dispute (MW-CB&Q) again based on a travel time rule; he also cited Award 12003 (Stark) involving "Work Away From Headquarters" (MW-AT&SF).

Neither Award 13234 nor Awards cited therein considered the 40-Hour Work Week Agreement and the provisions thereof on which the Board was requested to base its decision in this dispute.

The Referee stated in Award 17571, in the last paragraph of Opinion of Board, that:

> "We would note that subsequent to the instant dispute, the parties in 1968, negotiated a provision under Rule 10, prohibiting a similar occurrence. However, in the instant dispute, the Claimant, voluntarily applied for Hinken's position on the basis of his seniority. It is our view that under these circumstances, where an employee

of his own volition accepts an assignment and works on what otherwise would have been his rest days, he is not entitled to overtime pay. (See Award 13234)."

The negotiations and resulting revision of Rule 10 in 1968 contained no retroactive provisions, which makes reference thereto both irrelevant and immaterial. The remainder of the above quote is, to say the least, favorable to Carrier. Even though monetary payment was awarded to Claimant under the Award, the remainder of the decision benefits carriers. That fact is obvious: the Carrier Member of the Board hastily moved for the adoption of this Award.

I dissent.

/s/ C. E. KIEF
C. E. Kief, Labor Member
11-26-69

Central Publishing Co., Indianapolis, Ind. 46206 Printed in U.S.A.