Award No. 18001
Docket No. CL-18221

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

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

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6579) that:

(1) Carrier violated the Clerks' current Agreement when it failed to properly compensate Claimant at the time and one-half rate for service rendered on his regular assigned Friday and Saturday rest days, September 8 and 9, 1967.

(2) That Mr. J. W. Hartley be paid the difference between the pro rata rate he was paid and the time and one-half rate he should have been paid September 8 and 9, 1967.

EMPLOYES' STATEMENT OF FACTS: Mr. J. W. Hartley is the regularly assigned occupant of Relief Clerk No. 10 position, East St. Louis, Illinois, Sunday through Thursday, with **Friday and Saturday rest days**, and Mr. R. E. Stinson is the regularly assigned occupant of a General Clerk position, Tuesday through Saturday, with **Sunday and Monday rest days.**

Tuesday, September 5, through Saturday, September 9, 1967, General Clerk Stinson was absent on vacation and, in the absence of a qualified furloughed or unassigned employe, **Claimant was requested** to work the General Clerk position, which resulted in his having to work his regularly assigned Friday and Saturday rest days, September 8 and 9, 1967. Account working his assigned rest days, he rendered overtime slips for nine hours and twenty minutes and eight hours' time, respectively, at the time and one-half rate, but they were declined by Agent Spradlin, who had **requested him** to work the General Clerk position. (Employes' Exhibits A-1 and A-2.)

Claim in writing was then filed with Agent Spradlin by Local Chairman A. M. Cooper on November 10, 1967, and same was denied. The claim was then appealed to Superintendent, Mr. W. J. Lacy, on December 1, 1967, and was denied by him January 5, 1968. (Employes' Exhibits A-3, A-4, B-1 and B-2.) It was then appealed to First Assistant Manager–Personnel, Mr. W. L. Cowan, February 29, 1968, and was denied by him April 2, 1968. The claim was

OPINION OF BOARD: There is no dispute that the Claimant worked Friday and Saturday, September 8 and 9, 1967, nor that he worked nine (9) consecutive days from September 3 through September 11, 1967. The issue is whether the Claimant regularly held Yard Clerk Position No. 1 or Relief Clerk No. 10 from September 5 through September 11, 1967.

Prior to September 3, 1967, Claimant, J. W. Hartley, held the Yard Clerk Position No. 1, Thursday through Monday, with Tuesday and Wednesday as rest days. He displaced, E. H. Smith, Relief Clerk No. 10 effective September 5, 1967 as evidenced by a letter from Carrier's Agent to Mr. Smith dated September 2, 1967 which reads as follows:

> "You have been displaced from your present assignment as Relief Clerk No. 10 by senior employe J. W. Hartley effective 3 P. M., Tuesday, September 5th, 1967.
>
> You may exercise your seniority in line with the current Agreement."

The rest days for Relief Clerk No. 10 position were Friday and Saturday.

Friday and Saturday, September 1 and 2 were Claimant's rest days on his then Yard Clerk Position No. 1 and he worked that assignment on Sunday and Monday, September 3 and 4. On Tuesday, September 5, 1967 Claimant relieved R. E. Stinson, General Clerk, who was on vacation and whose work week was Tuesday through Saturday with rest days Sunday and Monday. He worked that position five consecutive days Wednesday through Saturday, September 5 through 9.

There is a dispute whether the Claimant worked on Sunday and Monday, September 10 and 11 as Yard Clerk Position No. 1 or as Relief Clerk No. 10. Carrier alleges that "Claimant Hartley reverted to his regular position of Yard Clerk on Sunday, September 10 and worked his assignment on that date and September 11." He rested on Tuesday and Wednesday, September 12 and 13 and he did not actually displace the employe on Relief Clerk No. 10 position until September 14, 1967. Although Employes allege that the Claimant held the Relief Clerk No. 10 position on September 5 (with rest days Sunday and Monday) there is no categorical denial that he actually worked the Yard Clerk Position No. 1 on Sunday and Monday, September 10 and 11 nor is there any categorical denial that he rested on Tuesday and Wednesday, September 12 and 13.

From all of the convincing evidence in the record, it is clear that although Claimant may have been entitled to the Relief Clerk No. 10 assignment on September 5 and thereafter, he did not actually work that position until Thursday, September 14.

But this evidence does not per se invalidate the claim. By Carrier's letter of September 2, 1967, above quoted, he was entitled to and was assigned to the position of Relief Clerk No. 10 effective on September 5. A vacation vacancy occurred on that day. No qualified furloughed or extra employes were then available to fill that vacancy. Claimant did not voluntarily elect to take that temporary position; he was requested to fill the vacancy. There is no evidence in the record that he could have refused the assignment. In a letter dated January 5, 1968 to the Division Chairman, the Superintendent said that "Mr. Hartley stepped up to General Clerk position September 5 through 9, 1967 and assumed all working conditions and rest days of that position."

Again, on April 2, 1968, the First Assistant Manager–Personnel wrote: "Claimant J. W. Hartley was properly advanced to fill the vacation absence in this case under application of Rule 11-1(c)." This was not a voluntary offering by Claimant; it was a direct assignment by the Carrier.

Even if Claimant had the right to decline the vacation assignment, it is understandable why he would hesitate to do so. Employer-employe relations are not enhanced by declining assignments unless there is a direct violation of a specific rule. Under the circumstances here, Carrier had the right to direct Claimant to fill that vacancy. If he had refused, his employment position would not have been improved; it would have been susceptible to psychological deterioration.

Carrier relies on Award No. 71 of Special Board of Adjustment No. 169, wherein the same parties were involved, and which held that "while Rule 11-1(c) authorized moving Claimant off his own assignment and gave him a preferential right to the promotion, nothing in the rule required him to accept the promotion as the rule did in Award 7227." We are rather inclined, for the most part, to agree with Carrier's dissent to that award wherein they say:

> "One of the most important features of the rule is the fact that the Carrier has the right to place the regular employe on another position regardless of his wishes in the matter. The rule would be of little use without this basic feature. No rule would be needed to permit a regularly assigned empoye to accept an offer to fill a vacancy on another position for which no qualified extra or furloughed employe is available and which no senior employe desires. But that, in effect, is the meaning the majority places on 11-1(c) in this award."

Vacant positions, necessary in the operation of Carrier's business, need be filed. If "no qualified furloughed or extra employe is available, regularly assigned employes" may be assigned. If all available qualified regular employes refused an assignment the position would remain unfilled and the operation of Carrier's business would be adversely affected. That is not the purpose, meaning, or intent of Rule 11-1(c). At least the most junior available, qualified regular employe should be obliged to accept the assignment to the temporary vacancy.

Claimant here did not move from his regular assignment to another because of a bid for a job that was bulletined, nor did he move because he displaced another employe. When the Carrier directed him to fill the temporary vacancy, he did not give up his regular rest days — Friday and Saturday, September 8 and 9, 1967.

Rule 110-(a) provides that "When a furloughed or extra employe takes an assignment of a regular employe, he assumes the conditions of such assignment, **including the work week and rest days thereof.**" (Emphasis ours.) No such provision is found in paragraph (c) of that rule which applies to regularly assigned employes filling temporary vacancies. While uniformity and consistency is necessary and desirable in the administration of an agreement between the same parties, and interpretations of the agreement should be followed, it is not compelling where an interpretation is on its face erroneous. Such an erroneous interpretation is Award No. 10983. We believe that there is a distinct difference in meaning and intent between paragraphs (a) and (b) of Rule 11-1. If the parties had intended that regular employes assigned to temporary vacancies take the "work week and rest days" of the temporary vacancy

filled. If "no qualified furloughed or extra employe is available, regularly they would have so provided in paragraph (c). This Board has no right to read into paragraph (c) language which by the very omission gives meaning and intent contrary to that of paragraph (a).

Claimant's regular assignment on September 5, 1967 was that of Relief Clerk No. 10 and rest days were Friday and Saturday. He did not give up those rest days when he was assigned to fill the temporary vacancy. Since he worked on Friday and Saturday, September 8 and 9, 1967, he was entitled to be compensated at the time and one-half rate for the hours he worked on those dates. His claim is valid.

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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of June, 1970.

CARRIER MEMBERS' DISSENT TO AWARD 18001, DOCKET CL-18221 (Referee Dolnick)

The first paragraph of the Opinion of Board states that:

> "The issue is whether the Claimant regularly held Yard Clerk Position No. 1 or Relief Clerk No. 10 from September 5 through September 11, 1967."

That was not the issue involved. The issue was whether an employe who leaves a regular assignment to work a temporary assignment carries with him the rest days of the regular assignment that fall after his commencement of service on the temporary assignment, or whether he takes the conditions of the assignment to which advanced.

In the fourth paragraph it is stated that Friday and Saturday, September 1 and 2, were Claimant's rest days on Yard Clerk Position No. 1. Such statement is incorrect. The rest days of Yard Clerk Position No. 1 were Tuesday and Wednesday as correctly stated in the second paragraph of the Opinion of Board.

In the fifth paragraph reference is made to Carrier's statement that Claimant reverted to the Yard Clerk Position No. 1 on Sunday, September 10, and worked such position that date and September 11, and observed the rest days of such position on Tuesday and Wednesday, September 12 and 13. Tuesday and Wednesday were assigned work days of Relief Clerk No. 10 position, but no contention or claim was made that Claimant was withheld from service on such position on those dates. It is obvious that Claimant was occupying the Yard Clerk assignment and not the Relief Clerk assignment because he worked the Yard Clerk position September 10 and 11 and observed the rest days of such assignment. If he had been assigned as Relief Clerk he would have worked the Relief Clerk assignment September 10 and 11 and the two days, September 12 and 13, that he was observing the rest days of the Yard Clerk assignment.

The twelfth paragraph contains a statement that Rule 11-(c) contains no provision providing that regularly assigned employes filling temporary vacancies would assume the conditions of such assignment, including the work week and rest days thereof, as does Rule 11-1(a), and that if the parties had so intended they would have made provision therefor. Neither does Rule 11-1(b) but obviously such rule would not be workable if a Group 2 employe were advanced to a Group 1 position and retained the rest days and conditions of the Group 2 position from which advanced. Rules 11-1(b) and 11-1(c) were written prior to Rule 11-1(a), as modified by the Forty Hour Week Agreement. Prior to the Forty Hour Week Agreement [11-1(a) as presently written] an extra employe had no assigned work week and no assigned rest days, and even as the rule is written an extra employe has no assigned rest days. The Referee thus disregarded the history of the rules and the logical intention of the parties — matters which were given proper consideration in our entirely correct Award 10983.

The Referee finds that Award 10983, which denied a claim almost identical to that involved in this award, placed an erroneous interpretation on the rule. In addition to Award 10983, Awards 23 and 71 of Special Board No. 169 on the property also held that regularly assigned employes advanced to temporary positions were not entitled to time and one-half rate for hours worked outside their regular assignment or for the rest days of their regular assignment, but no mention is made that such awards placed an "erroneous interpretation" on the rule. No attempt was made by the Employes to distinguish the facts and rules involved in such awards.

We respectfully submit that the award is erroneous in that it is manifestly based on misunderstanding and a failure to properly evaluate the significant facts. Our prior Award 10983 as well as Awards 23 and 71 of Special Board of Adjustment No. 169 reflect the proper interpretation of the applicable rules and should be followed in future cases. In the light of these repeated and consistent sound rulings, this award can only be regarded as an unfortunate exercise in confusion.

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Keenan Printing Co., Chicago, Ill.

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