# Award No. 2356
# Docket No. 2060
# 2-SP(PL)-CM-'56

## NATIONAL RAILROAD ADJUSTMENT BOARD

## SECOND DIVISION

**The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when the award was rendered.**

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## PARTIES TO DISPUTE:

## SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

## SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement Carmen F. M. Delgadillo and T. Quintana were improperly compensated for service performed on the 11:00 P. M. to 7:00 A. M. shift on April 15, 1954.

2. That accordingly the Carrier be ordered to additionally compensate the aforementioned Carmen each in the amount of four (4) hours pay for the aforesaid date.

EMPLOYES' STATEMENT OF FACTS: At Tracy, California, the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the carrier) elected to reduce the force at this point which resulted in the rearrangement of forces in the abolishment of the positions of Carmen F. M. Delgadillo and T. Quintana (hereinafter referred to as the claimants) on the 3:00 P. M. to 11:00 P. M. shift. The Claimants' seniority did not permit them to remain on the 3:00 P. M. to 11:00 P. M. shift, and in order to remain in the service, were forced on the 11:00 P. M. to 7:00 A. M. shift on April 15, 1954.

A claim was progressed for the payment of overtime rate for April 15, 1954, in behalf of the claimants, which was declined by the officers designated by the carrier to handle such affairs.

The agreement effective April 16, 1942, as subsequently amended, is controlling.

POSITION OF EMPLOYES: It is submitted that when the carrier elected to reduce the force which resulted in a rearrangement of the force, they forced the claimants from their desired positions on the 3:00 P. M. to 11:00 P. M. shift to the 11:00 P. M. to 7:00 A. M. shift and accordingly are entitled to the overtime rate for such change under the provisions of Rule 12, which reads as follows:

"Employes changed from one shift to another will be paid overtime rates for the first shift of each change. Employes working two

It has been the recognized practice on this property throughout the life of the current and prior agreements to allow employes the straight-time rate of the job in all cases where they personally exercise their seniority under circumstances here involved, as provided by Rule 12, without protest by the petitioner, which is clear evidence that the petitioner has considered such to be the proper application of the rule.

Inasmuch as the petitioner's position cannot be sustained by any rule of the agreement, the carrier respectfully submits that within the meaning of the Railway Labor Act, the instant claim involves request for change in the agreement which is obviously beyond the purview of this Board. It is a well-established principle that it is not the function of this Board to modify an existing rule or supply a new rule when none exists.

## CONCLUSION

The carrier asserts that it has conclusively established that the claim in this docket is entirely lacking in either merit or agreement support and requests that said claim be denied.

**FINDINGS:** The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The organization contends carrier improperly compensated Carman F. M. Delgadillo and T. Quintana for the services they performed for carrier on Thursday, April 15, 1954, during the hours from 11:00 P. M. to 7:00 A. M. In view thereof it asks that we order carrier to compensate each claimant for four additional hours at the applicable straight time rate, basing the right thereto on Rule 12 of the parties' controlling agreement.

Rule 12, insofar as here material, provides:

> "Employes changed from one shift to another, will be paid overtime rates for the first shift of each change. * * * This will not apply when shifts are changed in the exercise of seniority * * *."

On Thursday, April 8, 1954, carrier notified claimant Delgadillo and Carman G. N. Breeland that the positions they were occupying at Tracy, California, were being abolished effective at the close of their respective shifts on Wednesday, April 14, 1954. Delgadillo was then occupying a position of car inspector with a shift from 3:00 to 11:00 P. M. On Thursday, April 15, 1954, Delgadillo, by written application filed with carrier, exercised his seniority and displaced a junior carman on a car inspector's position with hours of duty from 11:00 P. M. to 7:00 A. M. and was paid 8 hours straight time for filling the first shift thereof on that day.

On Thursday, April 15, 1954, after his position had been abolished effective on the preceding day, Breeland displaced Claimant Quintana from a position of car inspector he then held, which had a shift from 3:00 to 11:00 P. M. Thereupon Quintana, by written application filed with the carrier, exercised his seniority and displaced a junior carman holding a car inspector's position with a shift from 11:00 P. M. to 7:00 A. M. For the services he rendered in filling this position on Thursday, April 15, 1954, Quintana was paid for 8 hours at the straight time rate applicable thereto.

It is the contention that what was here done came within the quoted provision of Rule 12 and that each claimant should have been paid at the overtime rate for the first shift of the position he filled on Thursday, April 15, 1954. Carrier, on the other hand, contends the facts bring it within the exception, that is, that the shifts were changed by each claimant in the exercise of his seniority.

We think the factual situations surrounding claimants, which resulted in each claimant changing his shift, are controlled under the rule here applicable by what we held in Awards 1546 and 1816. In Award 1546 we said:

> "This specific exemption is in no way qualified as to the act being voluntary or involuntary."

And in Award 1816 we said:

> "The positions of these claimants * * * were abolished. There were no shifts on the abolished positions remaining to (here from) which a change could be made."

That the parties' controlling agreement contemplates carrier may do what it here did is evidenced by the following quote from Rule 29 (e) of that agreement:

> "When assignments are changed through the operation of this rule, or through the abolition of jobs, employes affected will be allowed to place themselves in such jobs as their seniority and qualifications entitle them to, but only such employes who are actually disturbed by re-arrangement of jobs caused through reduction in forces or abolition of jobs, will be permitted to exercise seniority in this manner."

But it is contended carrier elected to reduce its forces at Tracy, California, and, in doing so, did not comply with the requirements of Rule 29 (a). Rule 29 (a), which relates to "Reduction and Restoration of Forces", provides, insofar as material here, that:

> "Employes will be laid off in accordance with their seniority, * * *."

Assuming this provision has application to what carrier did, a question not before us and one we therefore do not decide, we think it would not help claimants for the claims before us are not claims for being improperly "laid off."

Award 1856 of this Division is cited as here controlling. The factual situation disclosed by Docket 1730, on which the award is based, is different and consequently that provision in Rule 19 (a), upon which the award is premised, has no application here. We cannot agree that the holding in Award 1856 is controlling of the situation now before us.

In view of what we have herein held we come to the conclusion that the claim is without merit.

## AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December, 1956.

## DISSENT OF LABOR MEMBERS TO AWARD NO. 2356

The majority holding that the claimants elected to displace employes on another shift is not in accord with the evidence.

The exercise of seniority implies the use of the seniority principle to gain preference in some aspect of the employment relationship. The claimants were required to change shifts as the result of unilateral action of the carrier.

We dissent from the findings of the majority for the reason that the evidence shows that the claimants were "changed from one shift to another" within the meaning of Rule 12 of the agreement and should have been compensated as claimed.

**R. W. Blake**
**Charles E. Goodlin**
**T. E. Losey**
**Edward W. Wiesner**
**George Wright**