Award No. 3853
Docket No. 3621
2-WT-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 106, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

THE WASHINGTON TERMINAL COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, Car Repairman Wm. Florimbio was improperly compensated for June 19, 1958 when changed from one shift to another.

2. That accordingly the Carrier be ordered to additionally compensate the aforesaid Car Repairman in the amount of four hours pay at applicable rate of pay for June 19, 1958.

EMPLOYES' STATEMENT OF FACTS: Car Repairman William Florimbio, hereinafter referred to as the claimant, is employed by the Washington Terminal Co. at Washington, D. C. hereinafter referred to as the carrier. Claimant was assigned to the 11:00 P. M. to 7:00 A. M. shift, Ivy City Car Shops (now furloughed).

One June 5, 1958 there was a one man force reduction of supervisors affecting Gang Foreman M. Farr who displaced Carman E. DiPietro on the 7:00 A. M. to 3:00 P. M. shift, car shop who displaced Carman C. W. Barker who displaced claimant William Florimbio on June 18, 1958. The claimant who did not have sufficient seniority to displace any other carman in his seniority district on the 7:00 to 3:00 shift was required to displace a junior carman on the 11:00 P. M. to 7:00 A. M. shift at the car shop effective June 19, 1958 in order to remain in the service.

POSITION OF EMPLOYES: The force was reduced at the direction of the carrier therefore, the claimant did not exchange shifts at his own request.

In accordance with rule #12 of the controlling agreement the claimant was entitled to overtime payment for the first shift of the change June 19, 1958.

Second Division Award 1713—Referee Adolph E. Wenke:

"When a contract is negotiated, and existing practices are not aborgated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself."

Second Division Award 1735—Referee Adolph E. Wenke:

"We think these several provisions of Rule 18 leave some doubt as to just what procedure the parties intended should be followed. In view of this ambiguity we must necessarily look to the practice which the parties either acquiesced in or accepted as indicating what they understood the Rule to mean."

Second Division Award 1764—Referee Edward F. Carter:

"* * * The Board has said many times that where uncertainty of meaning exists that the interpretation given to the questioned provision by the parties over the years affords a safe guide in determining what the parties had in mind when the agreement provision was made. The organization is in no position at this late date to have the provision construed more favorable to them. By their acquiescence in the application of the rule for more than thirty years they have fixed its meaning and removed any uncertainty growing out of the language used. * * * ."

Third Division Award 1397——Referee Royal A. Stone:

"The practice complained of is one of long standing. During its continuance there have been revisions of the contract, without correction, if correction be needed, of this practice. That is persuasive that, for eleven years or more, the employes themselves have not regarded it as a violation of their contract."

Third Division Award 1645—Referee Bruce Blake:

". . . Having stood by for nine years, with full knowledge of the facts, without protesting the arrangement the Organization should not be allowed to assert a claim for violation of the agreement."

Third Division Award 4493—Referee Edward F. Carter:

". . . The Board has repeatedly held that where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself. Awards 2436, 1397, 1257. We are obliged to say, therefore, that the Carrier could not properly modify or abrogate the practice except by negotiation."

The carrier submits therefore that the claim of the employes is without merit and should 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.

Parties to said dispute were given due notice of hearing thereon.

Claimant was displaced by a senior employe, and the basis of the claim is stated as follows:

> "The claimant who did not have sufficient seniority to displace any other Carman * * * on the 7 to 3 shift was required to displace a junior Carman on the 11:00 P. M. to 7:00 A. M. shift * * * in orded to remain in the service."

In other words the change was necessitated, not by the Carrier, but by the claimant's use of his seniority rights under the existing circumstances. The argument as stated on the property was that claimant "had no other choice but to change shifts on the above date, therefore the change was not at his request but was the result of the alleged one man force reduction."

More precisely analyzed, the contention is that his request for the change was in a sense not voluntary, since he had to make it in order to displace a junior employe; in other words, that his request for a change of shift under those circumstances constitutes an exception to the exception stated in the rules for changes of shift at an employe's request.

The rule uses the word "request" without any qualification, limitation or exception, but the Employes allege that the practice has been to allow overtime under such circumstances, and cite one instance, on July 11, 1950 in which three carmen were allowed such overtime pay. The Carrier replied that the curtailment and rearrangement in that instance was ordered by management for its own convenience in anticipation of a threatened strike by other employes, and that in any event one instance cannot establish a practice. Carrier's second point is valid whether or not its first one is. Carrier adds that Rule 12 and similar rules had existed on this property for 36 years during which in spite of numerous force reductions and adjustments causing such changes of shift under seniority rights, this claim and three companion cases have been the only such claims presented; that its practice has never been to pay overtime under such circumstances, that its first knowledge of such claimed interpretation was from an Organization bulletin posted three days before this claim arose, and that it is still not claimed by the other five crafts governed by these same Rules and involved in the same reduction and rearrangement of forces. Under these circumstances the record fails to show any established practice sustaining this claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of November, 1961.

DISSENT OF LABOR MEMBERS TO AWARDS 3853 and 3855

The majority is in error in stating that the claimant's request for a change of shift constitutes an exception to the exception stated in the rules for changes of shift at an employe's request. It will be noted that the majority did not quote the applicable rule, namely Rule 12, which states:

> "Employes changed from one shift to another will be paid overtime rates for the first shift of each change. Employes working two shifts or more on a new shift shall be considered transferred. This will not apply when shifts are exchanged at the request of the employes involved."

and therefore apparently overlooked the key word "exchanged" in the exception. The claimant did not exchange shifts with anyone but was forced to displace a junior employe on another shift and should have been compensated at the overtime rate for the first shift of the change.

Edward W. Wiesner

C. E. Bagwell

T. E. Losey

E. J. McDermott

James B. Zink