Award No. 3967

Docket No. 3694

2-D&RGW-CM-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 10, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Carmen)

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That rules of the current agreement, particularly Rule 2, paragraph (b), were violated when Carmen named in part 2 hereof, were unilaterally assigned to an 11:00 P. M. to 7:30 A. M. shift from December 9, 1958 to January 6, 1959.

2. That accordingly the Carrier to be ordered to compensate the following named Carmen at the time and one-half rate for the aforesaid period of violation as follows:

D. H. Quick from 4:30 A. M. to 7:30 A. M.—Monday through Friday

Rob't. Luster from 4:30 A. M. to 7:30 A. M.—Monday through Friday

J. A. Madril from 4:30 A. M. to 7:30 A. M.—Saturday

Matt Kostelec from 4:30 A. M. to 7:30 A. M.—Saturday

EMPLOYES' STATEMENT OF FACTS: On December 9, 1958, The Denver and Rio Grande Western Railroad Co. hereinafter referred to as the carrier unilaterally established a second shift in its Alamosa, Colorado train yard with hours of 11:00 P. M. to 7:30 A. M.

Rule 2(b) of the controlling agreement provides:

"(b) Where two shifts are employed, the starting time of the first shift will be governed by the provisions of Paragraph (a) of this rule, and the second shift will start not later than 8:00 P. M., unless otherwise agreed to by the Master Mechanic and Local Committee according to service requirements."

the desired result of future enforcement of the agreement had been obtained.

Under these circumstances and in view of the fact that the handling was identically the same when the master mechanic conferred with the local committee as provided by Rule 2(b), which is supported by the prima facie evidence of the result of the meeting held January 6, 1959, there was no actual loss sustained by the employes and the carrier submits that no penalty as claimed by the employes is due.

The Second Division has maintained under similar circumstances that such claims are not proper. In Second Division Award 2722 on the M.K.T., Referee D. Emmett Ferguson, where change in starting times were made unilaterally under similar rule, the employes are upheld in the necessity for holding such a conference as result of the rule having been bargained in good faith, which conference was held in the instant case on this property belatedly; however, if the employes had not reached an agreement with the carrier's officers, then the management would have been within their rights to exercise their prerogative and change the starting time unilaterally, which the employes could then challenge. A conference was held on this property and it was agreed that the change was necessary. It will be noted in this case that the award was specific, "There is no rule cited nor are there any facts contained in the record which would support any claims for compensation, which the Board finds are without merit."

In Second Division Award 2798, Referee Livingston Smith, on the Boston and Maine, with a rule requiring a mutual understanding with the organization to change starting times, involved a case where the employes did not agree to the necessity of making a change. It was held that the organization was consulted and presented with ample opportunity to present evidence of lack of need for the proposed change and no such evidence was forthcoming. This same thing occurred in the conference held on this property January 6, 1959 when the employes' representatives agreed that the change was necessary. It will be noted in Award 2798 where it was necessary for the B&M to make a change arbitrarily, that the failure to reach an agreement does not carry with it the power of the organization to veto any such changes.

These two awards point up the fact that the carrier has a duty to meet the requirements of the service along with its duty to discuss such matters with the employes. The carrier complied with the requirement of the rule which ended in agreement as to the service requirements. The rule was temporarily overlooked but when the matter was called to the attention of the carrier, its provisions were strictly adhered to; therefore, the agreement has not been violated. Without prejudice to this position, the Second Division has held that claims for compensation under similar cases are not justified.

Claims must 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 waived right of appearance at hearing thereon.

The Carrier admittedly violated Rule 2(b) in starting the second shift three hours later than 8:00 P. M. on December 9, 1958, without first attempting to reach an agreement with the Local Committee. When the Claim was filed the Carrier called the Local Committee on January 6, 1959, and conceded the violation, and at a conference on that day an agreement was reached for the new starting time.

This claim is on behalf of the four employes affected, for time and one-half pay for the three hours worked after the regular assigned shift of 8:00 P. M. to 4:30 A. M., from December 9 to January 6, when the change was agreed to.

No pecuniary loss or damage to Claimants is shown, and the Agreement does not provide for any arbitrary or penalty for this violation.

It is a well settled rule of statutory construction that a penalty is not to be readily implied, and that a person or corporation is not to be subjected to a penalty unless the words of a statute plainly impose it. Tiffany v. National Bank of Missouri, 85 U.S. 409; Keppel v. Tiffin Savings Bank, 197 U.S. 356.

The rule is equally applicable to the construction of contracts; for the parties can readily agree upon penalty provisions if they so intend, and the absence of such provisions negatives that intent.

The Supreme Court of the United States said in L. P. Steuart & Bro. v. Bowles, 322 U.S. 398, that to construe a statute as imposing a penalty where none is expressed would be to amend the Act and create a penalty by judicial action; that it would further necessitate judicial legislation to prescribe the nature and size of the penalty to be imposed.

Similarly, for this Board to construe an agreement as imposing a penalty where none is expsessed, would be to amend the contract, first, by authorizing a penalty, and second, by deciding how severe it shall be. Not only are the parties in better position than the Board to decide those matters; they are the only ones entitled to decide them. Consequently there have been many awards refusing to impose penalties not provided in the agreements. Among them are: Awards 1638, 2722 and 3672 of this Division; Awards 6758, 8251 and 15865 of the First Division; and 7212 and 8527 of the Third Division.

AWARD

Claim 1 sustained.

Claim 2 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 18th day of April, 1962.

OPINION OF LABOR MEMBERS CONCURRING IN PART AND DISSENTING IN PART TO AWARD No. 3967

We concur in the finding of the majority that "The carrier admittedly

violated Rule 2(b) but we dissent from the finding that "No pecuniary loss or damage to claimants is shown." It is impossible to reconcile the holding of the majority that the agreement was violated with the holding that the agreement does not provide for compensation for the violation since Rule 6(c) of the Agreement prescribes that

> "For continuous service after regular working hours, employes will be paid time and one-half, on actual minute basis, with a minimum of one hour for any such service performed."

and the claimants were performing continuous service after their regular working hours during the period of the violation.

The Court decisions cited by the majority have reference to statutes, not collective bargaining agreements, and are inapposite. The landmark Supreme Court decisions upholding the integrity of a collective bargaining agreement are J. I. Case v. National Labor Relations Board; 64 Sup. Court Rep. 576 and Order of Railroad Telegraphers v. Railway Express Agency, 64 Sup. Court Rep. 582.

Edward W. Wiesner

C. E. Bagwell

T. E. Losey

E. J. McDermott

James B. Zink