Award No. 4630

Docket No. 4501

2-ACL-MA-'65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Jacob Seidenberg when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 42, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Machinists)

ATLANTIC COAST LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the applicable agreement the Carrier improperly paid Machinist T. A. Terrell for changing from one Shift to another Shift on October 31, 1961.

2. That accordingly, the Carrier be ordered to additionally compensate the aforesaid Machinist for (4) four hours at the Straight time rate of pay.

EMPLOYES' STATEMENT OF FACTS: Machinist T. A. Terrell, hereinafter referred to as the claimant, is employed by the Atlantic Coast Line Railroad Company, hereinafter referred to as the carrier, in their Mechanical Facilities at their Shops at Waycross, Georgia.

Prior to October 3, 1961, Machinist T. A. Terrell was performing relief work for the carrier under Provisions of Rule 16-A governing the use of furloughed employes, on October 3, 1961, Bulletin #335 was posted advertising a vacancy created by Machinist H. L. Sports being promoted to a supervisor. The claimant was restored to service in keeping with the provisions of Rule No. 16-D covering the restoration of forces and placed on the vacancy created due to H. L. Sports promotion, pending the expiration of the bid period.

Senior Machinist W. Moody was successful bidder and assigned to job advertised in Bulletin No. 335, the claimant was then instructed by carrier to fill W. Moodys old vacancy that was advertised in Bulletin No. 366 dated October 16, 1961, pending the expiration of bid period. Senior Machinist J. Fullard was successful bidder and assigned to vacancy advertised in Bulletin No. 366, carrier then instructed claimant to fill J. Fullard old vacancy pending bid period advertised by Bulletin No. 379 dated October 23, 1961, Senior Machinist J. N. Ingalls was successful bidder and assigned, carrier then instructed claimants to fill J. N. Ingalls old vacancy pending bid period, that was advertised by Bulletin No. 393 dated October 31, 1961, claimant worked first shift October 30, 1961 and reported as instructed to second shift on October 31, 1961, but was denied the rate of pay as provided for in Rule No. 9, Paragraph (A) of the current agreement for service rendered on October 31, 1961. The claimant continued to work vacancies of positions bulletined until Bulletin No. 397

vided for by the agreement. It has never been the practice on this carrier to make payment at the time and one-half rate when employes change shifts while working in an unassigned status or in the exercise of seniority. Although the claimant in this case changed shifts on October 5 and October 9, as well as on October 31, while working temporary vacancies pending his regular assignment on December 1, the organization made no claim for the penalty rate for changing shifts on any of these dates except on October 31. In accordance with past practice, claimant was paid straight time rate on each of the above dates. Clearly, there was no difference in the cause for this man changing shifts on October 31 and the two other dates mentioned; yet, the organization has singled out October 31 in order to prevail upon your board to grant them overtime payment not provided by past practice nor by agreement.

Carrier points out that each change of shift incurred by claimant, including the change on October 31, was, in effect, the direct result of a senior employe exercising his seniority and displacing claimant. Had no senior employe bid on the position left vacant when a machinist was promoted to a supervisory position, then Machinist Terrell could have been permanently assigned at that time and, therefore, would not have changed shifts on October 31. There can be no doubt that the sole cause for this employe changing shifts was due directly to the exercise of seniority.

Your Board in Award 1546, stated:

> "However, Rule 8 expressly exempts the payment of overtime when the transfer from one shift to another is made by an employe 'in the exercise of seniority rights.' This specific exemption is in no way qualified as to the act being voluntary or involuntary. In view thereof we find it expressly covers the situation of the claimants. Therefore we find this claim to be without merit."

Machinist Terrell's seniority entitled him to fill these temporary vacancies during the bulletining period, and, inasmuch as he had signified his desire to perform such work, it was Carrier's obligation, by agreement and past practice, to permit Terrell to protect this work.

This carrier simply recognized the seniority and request of claimant to perform this work in accordance with the provisions of the agreement, and it is a strange procedure for the organization to now ask your board to compel carrier to make a penalty payment for complying with the agreement. There is no provision in the agreement requiring the payment of overtime to an employe who changes shifts while working in a temporary unassigned status; neither is there any provision for paying overtime to employes who change shifts in the exercise of seniority. Additionally, past practice and the fact that the organization seeks payment for only one change of shift out of several involved in claimant's return to a regular assignment, clearly show that there is no basis whatsoever for this unwarranted claim. It should be denied in its entirety.

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 basic issues before the Division for determination are:: (1) what is the character and nature of the job held by the Claimant during the pendency of the bid period or periods of bulletined jobs, and; (2) is Rule 9(a) of the Agreement applicable to such jobs?

Concerning the first issue the Division is constrained to state that it cannot completely accept or agree with the positions taken by either party. It does not believe well founded the Organization's contention that the Claimant was assigned to and held a regular job during the bid period, while he was working thereon, awaiting determination of the successful bidder. For example, if it were to be held that the Claimant had been in fact assigned to a regular job during this period of time, then the Carrier would have been in violation of the existing seniority provisions because the record indicates that there were at least three other machinists who outranked the Claimant in seniority.

It is equally untenable to accept the Carrier's position that the Claimant, as a furloughed worker, was performing relief work during the pendency of the bid periods, in accordance with the provisions of Rule 16(a). If the Claimant were performing relief work as claimed, then it is proper to ask, whom was he relieving. The Claimant was not acting during this time as the alter ego of a regular employe temporarily absent because of illness, vacation, leave of absence, etc. These are the time honored and accepted reasons and purpose for having relief work. The truth is that the only reason why there was a need for the Claimant's services during the bid period is that there was no incumbent for the job. Thus to describe the Claimant's job as relief work under the existing circumstances is to distort the well established meaning of the term "relief work".

The Division does not think it is necessary to categorize the Claimant's work by any particular term or caption. It should merely be described as to what it actually was—filling a series of vacancies in regular bulletined jobs which had no existing incumbents, under such circumstances as the parties knowing full well that the Claimant was only to occupy the post for an interim period until the successful bidder could be designated. The Division must concude in light of this analysis that the Claimant held no regular job during the pendency of the bid period. It was not until December 1, 1961 when he was awarded a regular job by Bulletin 404 that it could be said that he came within the job classification contended for by the Organization.

The Division must now turn to the second issue to determine whether Rule 9(a) which states in part:

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

is applicable to the Claimant when his shifts were changed in the course of holding jobs during the pendency of the bid period. The Division, after due consideration of the record, is unable to accept the Organization's contention that, because the language of the Rule is all-embracing and contains no words of limitation or exclusion, it must apply to the circumstances in which the Claimant found himself. The reason why the Division cannot accept the sweeping and literal interpretation contended for by the Organization, is that the Rule in question has wide currency in railroad contracts, and over the years has been the subject of many interpretations. The vast majority of awards

rendered both by this Division, and other Divisions of the National Railroad Adjustment Board, have held clearly and unequivocally that the rationale and purpose of the Rule was to cover those situations where the Carrier moved a regularly assigned employe to another shift for its convenience, and thus had to pay the employe the premium rate for the inconvenience it caused him. This rationale was recognized and stated in the Dissent of the Labor Members in Awards 4277 and 4278. There are also comparable statements in many awards of this Division, too numerous to cite.

Because this Division has already found that the Claimant was not the holder of a regular position, and because it finds that the majority of the decided cases have held that the language of Rule 9(a) was not intended to be applied to situations where the employe was not the holder of a regular position, the Division must conclude that a denial award is in order.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: William B. Jones
Chairman

E. J. McDermott
Vice Chairman

Dated at Chicago, Illinois, this 12th day of February, 1965.