

Award No. 6243

Docket No. 6111

2-MP-EW-'72

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Irving R. Shapiro when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Electrical Workers)**

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Missouri Pacific Railroad Company violated the rules of the Controlling Agreement when they arbitrarily assigned Telephone Maintainer, S. C. Lingo to the second shift.
2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate S. C. Lingo in the amount of time and one half for each and every day he is held off his regular assignment.

EMPLOYEES' STATEMENT OF FACTS: The Missouri Pacific Railroad Company, hereinafter referred to as the carrier, maintains a regular crew of telephone maintainers in North Little Rock, Arkansas. Telephone maintainer, S. C. Lingo, hereinafter referred to as the claimant, is regularly assigned to the first shift, 7:00 A. M. to 3:00 P. M., in the radio shop at North Little Rock, Arkansas.

Telephone maintainer S. C. Lingo exercised his seniority, and was assigned to this job, working from 7:00 A. M. to 3:00 P. M., on July 5, 1967. He has worked these assigned hours until July 13, 1969, a period of over two (2) years, at which time he was ordered to report on the second shift, 3:00 P. M. to 11:00 P. M., without bulletin a new job or re-bulletin the job he had worked for over two (2) years on the first shift.

The carrier has never denied the fact that telephone maintainer Lingo, in exercising his seniority, bid the job working 7:00 A. M. to 3:00 P. M., and after working on the job for over two years was ordered to start working the second shift on a permanent basis. The carrier is of the opinion that because the telephone maintainers are monthly rated employees they are allowed to work them on any shift or any hours they wish, without the re-bulletin of their jobs as your Honorable Board can see by the Claimant's Exhibit F, and should this be the fact, then I am sure that your Honor-

authorized to add to or amend the present agreement. The claimant in this dispute was not abused. He had been working on the third shift for some years. When he had acquired sufficient seniority, he bid in a job which normally works from 3:00 P. M. to 11:00 P. M. He was well aware of the fact that the job had been originally established at the time the new hump yard was completed for the purpose of giving protection against communication failures during the second shift. He was also well aware of the fact that the previous two occupants of the position were being used on the first shift to assist in the installation of new equipment which required assembling a crew to assist the men who normally worked the first shift.

It came as no surprise to the claimant when he was instructed to work from 3:00 P. M. to 11:00 P. M., the normal working hours of the position at the time it had been established until the occupant was temporarily used for other work. We are confident that claimant will bid in a position with preferred working hours and rest day when his seniority is sufficient to bid in such position. The claimant was fortunate in being able to bid in the job while the occupant thereof was being temporarily used to assist with installation work performed during the daytime and was not abused when the work load required that the position again protect communication failures on the second shift.

As clearly stated in Rule 107 (c), telephone maintainers are paid a monthly rate for all services performed. Claimant has been paid his monthly rate each and every month. He is not entitled to any additional compensation. Instructing claimant to protect communication failures on the second shift did not create a new job, and there was no obligation to put out a bulletin advertising a position as contemplated in Rule 13 (a) cited by the employees. No new job was created. Claimant continued to occupy the same position to which he was assigned with the same rest day, the same salary and the same territory. He continued to be assigned normal working hours by his supervisor in the same manner as previously, the only change being that the work requirement necessitated the services of the occupant of the position on the second shift to assist in the repairs of radios and other communication equipment which failed during that shift. Claimant has been paid the monthly rate for telephone maintainers, which includes all services performed, including all services performed by claimant on and after July 16, 1969.

For the reasons stated, the claim is not supported by the agreement, 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 waived right of appearance at hearing thereon.

We have stated time and again that this Board is not authorized to add to, vary, alter, amend, or change the Agreement between the parties. See Awards

of this Division 3087 (Burke), 4027 (Johnson); Third Division 17950 (Dolnick), 18143 (Dorsey), 18377 (Dugan), 18379 (O'Brien).

However, Petitioner's claim herein is clearly distinguishable from those claims which were put forth in the cited cases. Although the Petitioner Organization in its submission indicated a factor which, if granted, might be construed as adding to the Agreement between the parties, this is not of the essence of the dispute before us.

For more than two years, Telephone Maintainer S. C. Lingo, employed at the North Little Rock Arkansas facility of the Respondent Carrier, was assigned to a schedule of "normal working hours" commencing at 7:00 A. M. and ending at 3:00 P. M., five days per week. The carrier unilaterally changed his normal working hours effective July 13, 1969 to 3:00 P. M. to 11:00 P. M. The basic issue of the dispute is whether this action by management was proper under the terms of the agreement.

The carrier cites as authority for its action the following provision of the Agreement:

"RULE 107.

(a) (Western and Southern Districts only). Telephone maintainers will be paid a monthly rate to cover all services rendered except as hereinafter provided. They will be assigned one regular rest day per week, Sunday if possible. Rules applicable to the classification of electrician shall apply to service for monthly rated telephone maintainers on their assigned rest day. Ordinary maintenance or construction work not heretofore required on Sunday will not be required on the sixth day of the work week. The straight time hourly rate for such employes shall be determined by dividing the monthly rate by 208 $\frac{3}{4}$ hours. Further wage adjustments, so long as monthly rates remain in effect, shall be made on the basis of 208 $\frac{3}{4}$ hours per month. Except as specifically provided in this paragraph (c), the rules applicable to monthly rated telephone maintainers prior to September 1, 1949, shall continue without change."

It claims that this Rule removes Telephone Maintainers from coverage under Rule 2, which deals with shift hours and operations. This classification is paid a monthly wage to cover all hours of work performed except those specifically otherwise provided. Therefore, according to the Carrier, Telephone Maintainers may be assigned to work any schedule of hours determined to be necessary by supervision. Thus, when a vacancy for this category is bulletined, the successful bidder accepts the job with knowledge that no specific hours are attached to it, and that assignments will be made in such manner as to "protect the work."

The Carrier then recounts the history of the Telephone Maintenance assignments at the North Little Rock installation between 1961 and 1969. This reveals substantial inconsistencies with the argument summarized above. Throughout the Carrier's submission we find the following statements:

"... telephone maintainers are not assigned hours of work but the supervisor does instruct the men as to their normal working hours." (Carrier's submission, page 3.)

"Recognizing the wishes of the men as to normal working hours on the basis of seniority . . ." (Ibid.)

"The normal working hours of each of the positions advertised are made known to the employees so that they will know what hours they will normally work, . . ." (Carrier's submission, page 8.)

The crux of the Carrier's position is that since the Controlling Agreement does not obligate it to "designate hours of assignment on the bulletin" for filling vacancies, it is not restricted from changing normal work hour assignments of any of the Telephone Maintainers. It then goes on to aver that when Telephone Maintainer Lingo successfully bid for the vacant position in July, 1967, he was advised by the supervisor that the normal working hours would be 3:00 P. M. to 11:00 P. M., although he was assigned "to the first shift to assist in the installation of new equipment. . . ." (Carrier's submission, page 9; emphasis ours). In addition, the Carrier's submission on page 5 reports, "It was necessary to defer installation work being performed during daylight hours in order that failures in communication equipment experienced during the second shift could be corrected more quickly." Therefore, ". . . the Supervisor at North Little Rock instructed claimant that the normal working hours of his position would **again** be 3:00 P. M. to 11:00 P. M. . . ." (Ibid.)

We do not question the right of the Carrier to determine what work it wishes to have done by its employees, so long as such work falls within the job description for the classification. Nor do we hold herein that the Carrier was required by the Controlling Agreement to set forth in its bulletin to fill a vacancy for Telephone Maintainer, the hours of assignment of the vacant positions.

We do find as follows:

First: Nothing in the Controlling Agreement exempts the Telephone Maintainers from the provisions of Rule 2 and Rule 10, which relate to shifts and shift changes. The quotations from Carrier's Submission establishes that this was fully recognized and adhered to, although it preferred to use the words "normal working hours" from time to time in an effort to differentiate the special status of the Maintainers, being on a monthly pay basis and being subject to be called upon to work other than and in addition to their "normal working hours to protect the work" without additional compensation.

Second: When a Telephone Maintainer successfully bids a bulletined position he may refuse to accept the job upon learning that the normal working hours of assignment are not to his liking. When Mr. Lingo took the job, the immediate assignment was the 7:00 A. M. to 3:00 P. M. shift. Carrier's allegations that the Supervisor advised the claimant that these hours were "temporary" and that the normal working hours for the job were 3:00 P. M. to 11:00 P. M. is not supported by any proof and is specifically denied by the Petitioner Organization. In any event, how long is "temporary"? Certainly two years cannot be construed as a temporary period. It would require a specific understanding between the Carrier and the Petitioner Organization to the effect that the working hours of Mr. Lingo's assignment when he successfully bid was to be considered temporary for such an extensive period of time.

Third: The Carrier recognized "the wishes of the men as to normal working hours on the basis of seniority." Despite this, it ignored Mr. Lingo's right to invoke his seniority rights in July, 1969, and unilaterally changed his shift.

Fourth: The Carrier, consistent with the above, and the Controlling Agreement, should have, upon deciding, as was its right, to defer installation work, to declare Mr. Lingo as surplus on the 7:00 A.M. to 3:00 P.M. shift. Simultaneously, it should have notified Mr. Lingo and the other Telephone Maintainers of its need to more extensively protect the work on the 3:00 P.M. to 11:00 P.M. shift. Mr. Lingo and others could have invoked their seniority rights in whatever manner was available to them under the Agreement, and the Carrier would have filled its needs as it did in 1963, when J. E. Brown bid off the job, and in 1967, when R. D. Swinney bid off the job, without disregarding claimant's rights. This does not mean that if a vacancy should occur as a result that the bulletin therefore must designate hours of assignment.

The Petitioner Organization requests that this Board award additional half-time pay to the claimant as compensation for damages suffered by him as a result of the failure of the Carrier to comply with the Agreement. At this juncture, we have no way of knowing whether Mr. Lingo actually sustained any damage. Had the procedure set forth above been followed by the Carrier, he might have elected to take the 3:00 P.M. to 11:00 P.M. shift, because his seniority status might not have afforded him any preferred alternative.

Nothing in the Controlling Agreement affords us the right to impose punitive damages against the Carrier in these circumstances, nor were any decisions of this Board cited to the effect that punitive damages is an appropriate remedy. The basic long established principle of contract law is that one may only recover that which he actually lost as a result of a violation of an agreement by a contracting party. Unless contractual provision is made for liquidated damages, the basic rule of law prevails.

AWARD

1. The Carrier is ordered to restore the situation to its status in July, 1969. The claimant shall be afforded the opportunity to invoke his seniority rights as though he had been declared surplus on the first shift, if he so desires, at this time.

2. Claim for time and one half for each and every day Claimant was off first shift denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 8th day of February, 1972.

Keenan Printing Co., Chicago, Ill.

Printed in U.S.A.