

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 9709
Docket No. 9058
2-EJ&E-CM-'83

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

(Brotherhood Railway Carmen of the United States
(and Canada
Parties to Dispute: (
(Elgin, Joliet and Eastern Railway Company

Dispute: Claim of Employees:

1. That the Elgin, Joliet and Eastern Railway Company violated the current working Agreement, specifically Rule 91, when it improperly compensated Temporary Carman L. J. Meyers at the straight time rate of pay when he was forced to change shifts on December 10, 1979.
2. That the Elgin, Joliet and Eastern Railway Company be ordered to compensate Temporary Carman L. J. Meyers an additional four (4) hours pay at the pro rata rate of pay for said violation of Rule 91 on December 10, 1979.

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 employes 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.

Prior to November 19, 1979, the Claimant, a temporary carman, was assigned to a position on the Gary Repair track from 8:00 a.m. - 4:00 p.m. On November 16 he received a notice indicating he was to report, effective November 19, to the 4:00 p.m. to 12:00 midnight "spur repair truck driver" position. This occurred because there were no bids received and because he was the junior qualified man. On November 16, 1979, the 12:00 midnight to 8:00 a.m. Gary Mill Car Inspector position went up for bid. On November 23, 1979, Local Chairman J. E. Randolph erroneously forced G. Klahn to fill subject job since it went "no bid". By letter dated November 25, 1979, Mr. Randolph advised Chief Clerk J. R. McMahon that J. Kasch should have been forced onto the job. Meanwhile, Kasch bumped Carman Hufstedler who in turn bumped Claimant Myers. Accordingly, Myers, the junior qualified employe, was assigned to the 12:00 midnight to 8:00 a.m. Gary Mill Yard Car Inspector position effective Monday, November 26, 1979.

On December 9, 1979, Carman M. Nagel bumped Claimant Myers effective Monday, December 10, 1979. He, in turn exercised his seniority to work on the Gary Repair Track from 8:00 a.m. to 4:30 p.m., the only job his seniority permitted him to hold.

The instant claim involves only the last change, i.e. from the 12:00 midnight to 8:00 a.m. millyard car inspector position to the 8:00 a.m. to 4:30 p.m. Gary Repair Track position.

The pertinent language reads:

"Rule 91

Changing positions or shifts

(a) An employe changing from one regular position to another regular position which involves a change in rest days, will be paid straight time for days (except holidays) he actually works on such positions between last rest day of former position and first rest day of new position. The application of this section will have no affect on the application of paragraph (b) of this rule.

(b) 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 employe involved.

If it becomes necessary to create a relief position in which the assigned relief employe is required to perform work on different shifts in order to have five (5) workdays included in his assignment, such employe will not be paid overtime rates for such shift changes to perform the work on the shifts included in his assignment. If such employe is required to change shifts for any other reason, this exception shall not apply to such other shift changes."

The Organization argues that Rule 91 (b) supports their claim. They contend the Claimant, because of his lack of seniority, was forced into a position of choosing between reporting back to and working the first shift Repair Track job or he could quit the Railroad. Claimant elected to remain an employe and reported to and worked on the first shift on the Repair Track on December 10, 1979, but was not compensated for this shift change as demanded by the pertinent part of paragraph (b) of Rule 91.

The Organization notes further that the Carrier contends that the Claimant "exercised his seniority" when he was forced from the third shift back to the first shift. The Carrier has explained that they have taken this position because the Claimant had two options; he could elect to work the only job open to him or he could elect to quit his employment with the Railroad. The Carrier's contention in this respect is erroneous and indefensible according to the Organization. They cite Second Division 7258 in response to this argument which they believe disposed of this issue.

The Carrier's argument focuses on the words "employees changing" as used in Rule 91 (b). They believe the phrase refers to employees changed at the insistence of the Carrier and employees so changed must be paid at the overtime rate. The last sentence of the first paragraph implies that employees who exchange shifts on their own account will not be paid at the overtime rate. Moreover, seniority carries with it an obligation as well as a right. Under the terms of the agreement, the junior employee who stands for work is obligated to take the vacancy to which entitled, regardless of his desires. In the instant case, a Carman position on the Gary Repair track was the only job which Claimant's seniority entitled him to hold. It follows that the Carrier's allowing Myers to place himself on this job is not the same as saying "... he was forced to change shifts ..." as the Organization has alleged. They cite a number of cases in support of their position in Second Division Awards 7251, 3705 and 5409 which involved the Carrier and the same System Federation and Rule. Award 5409 involved similar facts in that the employee was forced to change shifts to avoid furlough. It was stated in that award by Referee Coburn:

"The claim is based upon the premise that the Carrier's act of shutting down the powerhouse and abolishing Claimant's position amounted, in effect, to a change in Claimant's shift within the meaning and intent of Rule 13 which, inter alia, provides that when an employee is transferred from one shift to another, he will be paid at overtime rates for the first shift of each change.

In the opinion of the Board, the facts do not support the conclusion that this was a change of shifts as contemplated by Rule 13.

Accordingly, the claim will be denied."

A review of the record and in particular the numerous cases cited by both parties reveals a distinct divergence in the Board's thinking on issues involving change of shift rules.

In this case, greater weight must be given to the cases finding that a change of shift that occurs as the result of an exercise of seniority under circumstances similar to these is not covered by rules such as Rule 91. Under the individual facts and circumstances of this case, the greater weight must be given to this line of thought because a previous rule which is similar if not identical to Rule 91 was so interpreted.

Other awards that have held in a similar vein view such rules as protecting employees from the employer's indiscriminate changing of shifts rather than those caused by exercising seniority. Award 7251 citing 6344 adequately expresses this view:

"It is the view of the Board in this case that it was Claimant's exercise of his seniority that resulted in the change in his shift and not a change in shift that necessitated his exercising his seniority. The Board recognizes that divergent views have been expressed by numerous Awards of this Board and has carefully examined those opposing Awards cited by the parties. This examination leads us to support the Awards cited by the Carrier and refers the parties to Award No. 6344, Second Division, in particular, as it relates to a dispute involving the identical Rule at issue here and a claimant who was displaced through the exercise of seniority by a senior employee and thereby exercising his seniority on a position on a different shift. That Award sets forth, in simple terms, the principle that states:

"The purpose of this rule (Rule 13, which is Rule 11 in the subject case) as interpreted in prior awards is to penalize Carriers when they indiscriminately change shift assignments of employees. The overtime rate penalty, however, does not apply when employees are exercising seniority or changing shifts for their benefit."
(Also see Awards 6279, 6119, 5409, 5045, 4277, 4279 and many others.)

We do not find that the Claimant's change in shift assignment was the result of indiscriminate action by the Carrier or that the Agreement was violated."

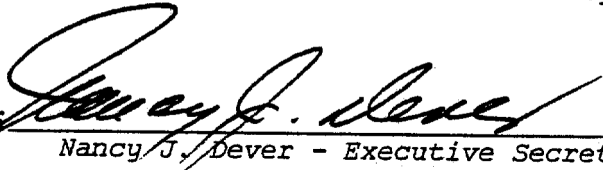
In view of the foregoing, this claim is denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 2nd day of November 1983.