

The Second Division consisted of the regular members and in addition Referee Tedford E. Schoonover when award was rendered.

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

Dispute: Claim of Employes:

1. That the Elgin, Joliet and Eastern Railway Company violated the current working Agreement, specifically Rule #91, when Carman Mitchell Stainback was forced to change shifts on January 14, 1982 and was not compensated at the time and one-half rate of pay as required by Rule #91.
2. That the Elgin, Joliet and Eastern Railway Company be ordered to compensate Carman Stainback an additional four (4) hours' pay at the pro rata rate of pay for said violation of Rule #91 on January 14, 1982.

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.

The claim filed on February 4, 1982 was based on alleged violation of Rule 91. It was not until July 2, 1982, that Rule 79 was cited by the Organization in support of the claim. Carrier rightly denied applicability of Rule 79 as being untimely since it was not referred to by the Organization until nearly 5 months after the claim was filed. This is in clear violation of Rule 101 which requires claims to be filed within 60 days after occurrence.

On January 12, 1982, the Joliet Steel Car Shops were shut down resulting in the furlough of 131 men. All but 25 of the Joliet carmen were furloughed. Claimant Stainback was the junior carman not furloughed. The 25 remaining employes without assignment due to the shut-down reported to the Joliet Repair Track for the 8:00 AM shift on January 13. Claimant was allowed to work at the Repair Track on that date so he would not lose the day.

The furloughs resulted in four vacancies in the Joliet Train Yard. During the day of January 13, while claimant was working on the Repair Track, it was determined his seniority would allow him to be assigned to one of those vacancies. Accordingly he was assigned to the 11:00 PM to 7:00 AM Coach Yard vacancy effective January 14. It was the only remaining job to which his seniority entitled him. It was either that job or be furloughed.

Rule 91 (b) is cited in support of the claim. However, in view of the fact the change of assignments resulted from the furloughs, Rule 84 must also be considered. That rule provides:

"Rule 84

Force Reduction

(a) When it becomes necessary to reduce forces, the craft affected at any point or in any department shall be reduced in reverse order of seniority; the employes affected to take the rate of the job to which they are assigned.

(c) When forces are reduced or jobs abolished, men affected shall, if they have sufficient ability, be given the privilege of placing themselves according to their seniority."

Review of the facts reveals that claimant's change of assignment was not at Carrier insistence but rather permitted him to take the only job to which his seniority entitled him. Rule 84 provides that in cases of force reduction employes may place themselves on other jobs in accordance with their seniority. That is exactly what claimant did in the situation covered by the claim.

There are many decisions of the Adjustment Board in support of the proposition that the Change of Shift Rule (Rule 91) does not apply when employes exercise their seniority in changing shifts for their own benefit. Second Division Award 9137 (Referee Dennis) on this same Carrier held:

"In the instant case Claimant exercised his seniority, albeit possibly involuntarily. Carrier did not direct Claimant to change shifts. He was displaced and he took the only job available to him. He exercised his seniority to remain at work."

In a similar case i.e., Award 3705, Referee Carey held:

It is noted that the penalty does not apply when shifts are exchanged in the exercise of seniority rights..."

Punitive payments are not provided under Rule 91 (b) each and every time an employe changes shifts. It is clearly set forth in the last sentence of the paragraph that overtime rates will not apply when shifts are exchanged at the request of the employe involved.

The principle enunciated in the rule was covered in a landmark decision by Referee Wenke in Award No. 1546 as follows:

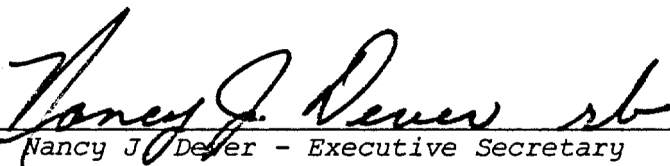
"Rule 8 expressly exempts the payment of overtime when the transfer from one shift to another is made by an employe 'in the exercise of seniority rights.' This specific exemption is in no way qualified as to the act being voluntary or involuntary ..." (emphasis added)

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 1st day of August 1984.