# Award No. 2336
# Docket No. 2054
# 2-DM&IR-CM-'56

## NATIONAL RAILROAD ADJUSTMENT BOARD

## SECOND DIVISION

**The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when the award was rendered.**

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## PARTIES TO DISPUTE:

## SYSTEM FEDERATION NO. 71, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

## DULUTH, MISSABE & IRON RANGE RAILWAY CO.

**DISPUTE: CLAIM OF EMPLOYES:** 1. That under the current agreement Carman Helper Clarence Nelson was improperly compensated for service performed on the 11:00 P. M. to 7:00 A. M. shift on April 29, 1950.

2. That accordingly the Carrier be ordered to additionally compensate the aforesaid Carman Helper in the amount of four (4) hours pay at the straight time rate for April 29, 1950.

**EMPLOYES' STATEMENT OF FACTS:** Carman Helper Clarence Nelson, hereinafter referred to as the claimant, was employed as such by the Duluth, Missabe and Iron Range Railway Company, hereinafter referred to as the carrier. The claimant holds seniority on the Iron Range Division which includes the points of Two Harbors and Biwabik.

Prior to April 29, 1950, the claimant was assigned as a carman helper at Two Harbors on the 7:00 A. M. to 3:30 P. M. shift. A bulletin was posted at Biwabik for a carman helper's position with hours of service 11:00 P. M. to 7:00 A. M. No bids were received and the carrier assigned the claimant to the position which changed him from working on the 7:00 A. M. to 3:30 P. M. shift to the 11:00 P. M. to 7:00 A. M. shift.

A claim was made for 8 hours at the time and one-half rate for service performed by the claimant on the 11:00 P. M. to 7:00 A. M. shift for April 29, 1950, which claim was denied by carrier officials designated to handle such claim.

The agreement effective January 1, 1948, as subsequently amended, is controlling.

**POSITION OF EMPLOYES:** It is submitted that the claimant was assigned to the 11:00 P. M. to 7:00 A. M. shift under the terms of Rule 15, reading in pertinent part as follows:

> ". . . If the Company does not receive sufficient bids to fill the vacancies bulletined under this rule within five (5) days after posting

as a result of changing from one position to another (and did not work more than eight hours in a twenty-four hour period) he would only be entitled to straight time rate for such change. Mr. Henning's understanding of the proper application of the rules as they apply to the instant case is exactly the same as that of the carrier, and proves beyond any reasonable doubt that the claim of the employes in this docket is totally without merit.

In Award No. 1816, rendered the 23rd day of July 1954, your Board dealt with a case similar to the one in this docket. In that award your Board said, in part,

> "We point out that the change in shift rule does not apply in this case. There was no change of shifts within the meaning of the rule. The positions of these claimants in the erecting shops were abolished. There were no shifts on the abolished positions remaining to which a change could be made. New positions were bulletined upon which claimants could bid. If they had a choice of positions, they should have bid. Upon failure to bid carrier could assign them to unfilled positions in accordance with their seniority which the carrier did. They assumed the shift to which they voluntarily permitted themselves to be assigned—they did not change from one shift to another within the meaning of the first sentence of Rule 2 (m). They were changed to a new shift on a new position to which they were entitled by seniority. Claimants cannot profit in such a situation as we have here by the expedient of failing to bid on new positions and accepting that to which their seniority entitles them. Award 1546."

What your Board said in Award 1816 is particularly applicable in this case. It has been recognized and admitted, particularly since carmen persistently progressed such claims, that many employes, almost exclusively carmen, have deliberately refrained from applying for bulletined positions simply for the purpose of placing themselves in a position to claim time and one-half pay when they were assigned to the bulletined positions as the junior employes. In so doing they defeat the purpose of the rule, and ignore the clear understanding between the parties when the rules were written.

On the basis of the sound and sensible conclusions reached by the Board in Award 1816, as well as on the basis of the clear understanding between the parties when the agreement was made, the carrier requests the Board sustain the position of the carrier and deny the claim of the employes in this docket.

**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.

The parties to said dispute were given due notice of hearing thereon.

Carmen Helper Clarence Nelson claims he was improperly compensated for the services performed for the carrier on April 29, 1950 when he was assigned to and filled the position of a carman helper at Biwabik on the 11:00 P. M. to 7:00 A. M. shift. He was paid for these services at the straight time rate but claims, under the provisions of Rule 10 (a) of the parties' then effective agreement, he should have been paid at time and one-half. He therefore asks that we order the carrier to pay him for four (4) hours' additional pay.

Rule 10 (a) provides:

> "Employes changed from one shift to another at the direction of the management will be paid overtime rates for the first shift of each change. An employe worked two (2) shifts or more on a new shift shall be considered transferred."

There is no doubt of the fact that such was the agreement of the parties as specifically set forth in section (b) of Rule 10 as found in their agreement effective July 1, 1939 and as specifically set forth in paragraph 6 of Rule 14 in a Supplemental Agreement of November 1, 1944 when section (b) of Rule 10 was dropped therefrom. But neither of these provisions, nor any comparable language, is found in the agreement effective January 1, 1948. If the parties, during their negotiations leading up to an agreement, expressly agree to what shall be contained therein they should be very careful and make sure that the language used fully expresses that intent for we must accept the language used as expressing their agreed to understanding. It is only when the language used is not clear, and creates an ambiguous situation, that practice thereunder by the parties is admissible for the purpose of determining just what it was they intended thereby. It should, however, be understood that in determining just what any provision of an agreement is intended to accomplish that often it can only be determined by considering several different provisions thereof or even the agreement as a whole.

Rule 10 (a) does not relate to a change of positions as such. In fact, it refers to "Employes changed from one shift to another". In order to have application it contemplates an employe must be holding an assignment from the shift of which he is being temporarily changed or transferred. Rule 15 (c) of the parties' agreement, effective when this claim arose, provided, insofar as here material that:

> "Any employe * * * assigned to a bulletined job will lose his right to the job he left."

It is apparent, because of the character of the carrier's business, that by their agreement, when considered as a whole, it was the apparent endeavor of both sides, insofar as it was possible, to maintain steady employment for all employes without creating additional expense for the carrier. When their agreement is considered in this light, particularly in view of the quoted language from Rule 15 (c), the provisions of Rule 10 (b) relating to when transfers are made due to increases or decreases in business, and the fact that the rule relating to the reduction and restoration of forces does not include the readjustment of forces when made necessary by seasonal operation, we do not think it was intended to bring changes in shifts caused thereby within the penalty rate imposed by Rule 10 (a). Further, under the situation herein disclosed, we do not think claimant can, nor do we think he should be allowed to profit by the expediency of failing to bid on positions created by the readjustments in forces made necessary by the seasonal changes in operations and, by doing so, force carrier to assign him thereto. See Award 1816 of this Division for a comparable holding.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of November, 1956.