

Award No. 2621
Docket No. 2496
2-WAB-EW-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Glenn Donaldson when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 13, RAILWAY EMPLOYEES'
DEPARTMENT, AFL (Electrical Workers)**

WABASH RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement Electrician L. O. Granger was improperly compensated for changing from one shift to another on October 18, 1955.
2. That accordingly the Carrier be ordered to additionally compensate the aforesaid Electrician in the amount of four (4) hours' pay at the straight time rate of pay.

EMPLOYEES' STATEMENT OF FACTS: Electrician L. O. Granger, (hereinafter referred to as the claimant) was employed on October 10, 1955 by the carrier in the locomotive department, Decatur, Illinois. The claimant was used to fill a new position in the locomotive shop with hours of 6:00 A.M. to 11:00 A.M.—11:30 A.M. to 2:30 P.M. This new position was bulletined on October 10, 1955. On October 21, 1955 a bulletin was posted assigning Electrician K. L. Radcliff to the position bulletined October 10, 1955. Electrician Radcliff's former assignment was on the 3:00 P.M. to 11:00 P.M. shift in the Decatur Diesel Shop, which was vacant, and the claimant was directed by the management to fill this vacancy.

The carrier compensated the claimant at the straight time rate for the hours 3:00 P.M. to 11:00 P.M. on October 18, 1955.

The dispute was handled with carrier officials designated to handle such affairs, who all declined to adjust the matter.

The agreement effective June 1, 1939, as subsequently amended, is controlling.

statement of claim is tantamount to saying that the carrier shall be penalized for doing that which it was compelled to do by provisions of the agreement. The change in shifts on the part of the claimant came about as a result of a senior employee bidding in the new position occupied by claimant when that position was bulletined in accordance with the rules.

During their handling of this case on the property the committee sought to support their contention by referring to Second Division Award No. 1949, Docket No. 1804. An examination of the employees' submission and rebuttal in that case will reveal that the committee placed great reliance upon a letter written by the shop superintendent which they alleged was evidence that the claimant in that case "was transferred by the direction of the Management." That letter was referred to no less than four times in the employees' submission and rebuttal in Award No. 1949. Such would indicate that they based their case in that award largely upon that letter. If so, their contention in the instant case falls far short because no such letter exists here. As a matter of fact, it was stated by General Chairman Mehrholz during conference on March 30, 1956 that there was a difference in the circumstances of this case as compared with those in Award No. 1949, in that, the claimant here did not receive written notification.

The foregoing is mentioned because of the extreme dependence which the employees placed upon written notification in support of their position in Award No. 1949, and because of the possibility that the findings in that award may have turned on that circumstance. It is the opinion of the carrier that merit alone, as indicated by facts and circumstances, should have resulted in a denying award in that case, and, most certainly, should do so in this case.

Rule 10 and its interpretation expressly exempt the payment of overtime when the change from one shift to another is made by an employee "due to exercising his seniority rights." This specific exemption is not qualified as to the act being voluntary or involuntary. (See Award No. 1546, Second Division).

Attention is directed to Award No. 1816, Second Division. In that case there were positions abolished on one shift and new positions were bulletined on another shift. The claimants in that case failed to bid on the new positions and contended that they were changed from one shift to another "solely to suit the convenience of the Carrier." The referee said in his findings in that case:

"Upon failure to bid, carrier could assign them to unfilled positions in accordance with their seniority which the carrier did."

Since the carrier had to right to assign the claimants in that case to unfilled positions, the claimant in this case, a new employee and not assigned by bulletin to any position, was not entitled to receive punitive pay when he changed shifts to secure the only position open to him.

The contentions of the committee should be dismissed and the claim 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 employee or employees involved in this dispute are respectively carrier and employee 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.

Award 1949, decided by the Division on June 6, 1955, with the present Referee assisting, construed the identical rule on the lines of this carrier as is now before us. Rule 10 provides as follows:

"Employees changing from one shift to another will be paid over-time rates for the first shift of each change. Employees 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 employees involved."

Claimant, an electrician, was employed on October 10, 1955, and used to fill a new position on the first shift in the Locomotive Department at Decatur, Illinois. On the same day this new position occupied by claimant was bulletined. Eleven days thereafter, a senior employee, Radcliff, was assigned to the position. However, Radcliff commenced work on that position as of October 18, 1955. This left Radcliff's former position on the second shift vacant. The second shift vacancy was bulletined on October 18, 1955. On the same day, claimant commenced work in the vacated position, whether through exercise of seniority or through carrier's direction is in dispute. He was compensated at straight time rate on said date and claims time and one-half due him under Rule 10.

Carrier points to the following portion of an Interpretation of Rule 10, reading:

"Rule 10 contemplates that an employee changing shifts due to exercising his seniority rights, or at the request of the employee, will be paid at his regular rate when changing shifts, instead of being allowed time and one-half for the first shift of such change."

Carrier contends that his shift to fill Radcliff's vacant, second shift position on October 18 constituted an exercise of seniority rights on his part within the Interpretation to Rule 10, hence his claim to time and one-half compensation is precluded.

The Organization contends that claimant was directed by management to change shifts for the purpose of filling the vacancy created by Radcliff's assignment to the first shift, obviously relying on the second paragraph of the before-mentioned Interpretation, reading, in part:

"An employee transferred from one shift to another by direction of management will be paid time and one-half rate for time worked on the new shift the first day of the change."

We are not inclined to reverse an Award previously handed down on the same property involving the same rule unless that former ruling be clearly erroneous. Unless we strive for some degree of consistency under such circumstances, the parties are left in utter confusion and an open invitation is extended to deadlock each dispute hoping for reversal upon appeal where a different referee may be sitting.

Carrier, as is its right, is highly critical in its submission of our findings in Award 1949, in which this Referee participated. We find merit in its criticism of the sentence therein reading:

"The case would be different if he had bid upon the bulletin position to which he was later instructed to fill."

This sentence, while misconceiving practice, had no bearing upon the issue there before us or upon the reasoning reflected in the balance of the findings. We also stated in Award 1949 that

"Awards 1243 and 1317 of this Division, decided without a referee, are persuasive."

That, perhaps, was an understatement. We now say that we should accord greater weight to an award rendered by the Division sitting without a referee based upon similar set of facts and rules than one in which an outside neutral participates and molds the result.

We have re-examined Award 1243. In its essential aspects it is identical to the case before us. Rule 7 there before us, while employing different terminology, expressly states that it

"will not apply to cases of employees exercising their seniority rights."

In the submission subject of Award 1243, we have the following factual picture. A senior employe returning from a leave of absence advised his foreman that he desired to displace a junior employe working on the night shift. The carrier first believed that they could dispense with the services of the junior employe, but later decided that they could use him and he was advised that he could report for work on the first shift. This Division determined this to be

"a transfer by supervisor in charge and not by exercise of his seniority."

The Award was cited simply to show that the Division, without referee, rejected the argument made there and here, namely: that the rule was intended to apply to the consequences resulting from the exercise of seniority by others. While Award 1317 involved written rather than oral instructions to transfer to another shift, we deem the method of instruction immaterial.

It should be noted that in denial Award 2067 emphasis was given in the findings to the wording of the rule there involved. The transfer rule in that submission provided for overtime rate

"for the first shift worked after returning to his regular assignment"

and the Division concluded that the rule was intended therefore to apply only to temporary transfers. Not so in the submission before us where the interpretation to Rule 10 provides in part as follows:

"If returned to his old shift or any other shift, he will then be entitled to time and one-half rate for the first day of such change."

Upon the facts present here we find no cause to reverse our ruling in Award 1949.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 12th day of September, 1957.