Award No. 3855

Docket No. 3623

2-WT-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 106, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

THE WASHINGTON TERMINAL COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, Coach Cleaner James P. Wood was improperly compensated for August 13, 1958 when changed from one shift to another.

2. That accordingly the Carrier be ordered to additionally compensate the aforesaid Coach Cleaner in the amount of four hours pay at applicable rate of pay for August 13, 1958.

EMPLOYES STATEMENT OF FACTS: Coach Cleaner, James P. Wood, hereinafter referred to as the claimant is employed by the Washington Terminal Co. at Washington, D. C. hereinafter referred to as the carrier. Claimant was assigned to the 3:00 P. M. to 11:00 P. M. shift, coach yard, "now furloughed."

On June 7, 16, and July 2, 1958 notice was posted of force reduction and rearrangement which resulted in job displacements down the seniority line resulting in the claimant being displaced from his position on the 7:00 A. M. to 3:00 P. M. shift at the coach yard. The claimant was displaced by a senior coach cleaner on August 13, 1958 and due to his not having enough seniority to displace anyone else on his same shift, he was required to displace a junior coach cleaner on the 3:00 P. M. to 11:00 P. M. shift in order to remain in service.

POSITION OF EMPLOYES: The force was reduced and rearranged at the direction of the carrier therefore, the claimant did not exchange shifts at his own request. In accordance with rule No. 12 of the controlling agreement the claimant was entitled to overtime payment for the first shift of the change August 13, 1958.

Rule No. 12 reading:

"Employes changed from one shift to another will be paid over-

abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself."

Second Division Award 1735—Referee Adolph E. Wenke:

"We think these several provisions of Rule 18 leave some doubt as to just what procedure the parties intended should be followed. In view of this ambiguity we must necessarily look to the practice which the parties either acquiesced in or accepted as indicating what they understood the Rule to mean."

Second Division Award 1764—Referee Edward F. Carter:

" * * * The Board has said many times that where uncertainty of meaning exists that the interpretation given to the questioned provision by the parties over the years affords a safe guide in determining what the parties had in mind when the agreement provision was made. The organization is in no position at this late date to have the provision construed more favorable to them. By their acquiescense in the application of the rule for more than thirty years they have fixed its meaning and removed any uncertainty growing out of the language used. * * * ."

Third Division Award 1397—Referee Royal A. Stone:

"The practice complained of is one of long standing. During its continuance there have been revisions of the contract, without correction, if correction be needed, of this practice. That is persuasive that, for eleven years or more, the employes themselves have not regarded it as a violation of their contract."

Third Division Award 1645—Referee Bruce Blake:

". . . Having stood by for nine years, with full knowledge of the facts, without protesting the arrangement the Organization should not now be allowed to assert a claim for violation of the agreement."

Third Division Award 4493—Referee Edward F. Carter:

". . . The Board has repeatedly held that where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself. Awards 2436, 1397, 1257. We are obliged to say, therefore, that the Carrier could not properly modify or abrogate the practice except by negotiation."

The carrier submits therefore that the claim of the employes is without merit 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 were given due notice of hearing thereon.

This claim is identical with that involved in Award 3853 and necessitates the same conclusion.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of November, 1961.

DISSENT OF LABOR MEMBERS TO AWARDS 3853 and 3855

The majority is in error in stating that the claimant's request for a change of shift constitutes an exception to the exception stated in the rules for changes of shift at an employe's request. It will be noted that the majority did not quote the applicable rule, namely Rule 12, which states:

> "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 employes involved."

and therefore apparently overlooked the key word "exchanged" in the exception. The claimant did not exchange shifts with anyone but was forced to displace a junior employe on another shift and should have been compensated at the overtime rate for the first shift of the change.

Edward W. Wiesner

C. E. Bagwell

T. E. Losey

E. J. McDermott

James B. Zink