

Award No. 4097

Docket No. 3846

2-TM-CM-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. — C. I. O.
(CARMEN)**

THE TEXAS-MEXICAN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement Carman E. R. Saenz was unjustly deprived of the opportunity to earn wages in the amount of eight (8) hours on October 31, 1959.

2. That accordingly, the Texas-Mexican Railway Company be ordered to compensate Carman E. R. Saenz for eight (8) hours at his regular pro rata rate for October 31, 1959.

EMPLOYEES' STATEMENT OF FACTS: On October 26, 1959, Bulletin No. 19-255 was posted by the Texas-Mexican Railway Company, hereinafter referred to as the carrier, at Laredo, Texas. The job referred to in Bulletin No. 19-255 has a work week of Monday through Friday, one (1) hour for lunch period, hours 7:00 A. M. to 4:00 P. M., rest days Saturday and Sunday.

On October 29, 1959, Carman Andres Cantu placed his bid in for this position and on the same date (October 29th), Carman E. R. Saenz, hereinafter referred to as the claimant, also placed his bid for this position. Bids expired at 4:00 P. M., October 30th, and on this date (October 30th) Notice No. 19-255 was issued, naming the claimant, Mr. E. R. Saenz, the successful bidder to Position 19, as outlined in the bulletin.

At the time the claimant bid in this new assignment, he was working a position of Thursday through Monday, rest days Tuesday and Wednesday. Instead of being permitted to remain on this position, the claimant was directed by supervision not to report for his regular assignment on October 31, 1959.

This matter has been handled up to and including the highest designated officer of the carrier, who has declined to adjust the matter.

such manner, i.e., when a bulletin expires the employe is assigned immediately and from that time becomes the owner of the new position.

POSITION OF CARRIER: There is no assignment rule on this property which provides any time for assignment over and above the expiration time and date of a bulletined position. The employes claim that assignment should have been held up until the first work day of the new position, which is indicative that they contend an employe should be permitted to work on his old position until the first work day of the new position. There is no rule to support such claim. Your Board will note that employes are not consistent in the matter of making assignments; in one instance they claim that an employe should be immediately assigned to a bulletined position while in the instant claim they make a claim because the employe was assigned immediately.

Your Honorable Board is requested to examine this matter with your usual thoroughness and give consideration to interpretation of General Chairman Roe, relied upon by the carrier in making the assignment of Mr. Saenz immediately on expiration of bulletin.

Carrier requests that this claim be dismissed or denied for two reasons: the first that there is no rule to support employes' contention, and, second, that the carrier was acting in good faith when it made Carman E. R. Saenz's assignment immediately, which was in conformance with letter of interpretation from General Chairman Roe.

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 waived right of appearance at hearing thereon.

The Claimant E. R. Saenz has been employed by the Carrier as a Carman at Laredo, Texas. Formerly, his regular working hours were from 8:00 A. M. to 5:00 P. M., Thursday through Monday with Tuesday and Wednesday as rest days. On October 29, 1959, he bid on a bulletined position. The regular working hours thereof were from 7:00 A. M. to 4:00 P. M., Monday through Friday with Saturday and Sunday as rest days. Upon expiration of the bidding period at 4:00 P. M., Friday, October 30, 1959, he was awarded and assigned to said position. The Carrier did not permit him to work at all on Saturday, October 31, 1959, on the ground that this was a rest day for the new position.

The Claimant filed the instant grievance in which he requested eight hours' pay at the straight time rate as compensation for the loss in earnings suffered by him on October 31, 1959. The Carrier denied the grievance.

The basic question posed by this case is whether the Claimant should have been transferred to the new position on the day he was awarded and assigned to it (Friday, October 30, 1959) as contended by the Carrier or whether he should have been transferred to said position on the first regular working day thereof (Monday, November 2, 1959) as asserted by him. For the reasons hereinafter stated, we are of the opinion that the Claimant's assertion is justified.

1. In support of its position, the Carrier primarily relies on an opinion expressed by J. O. Roe, a former Vice-General Chairman of the Organization, in a letter, dated August 5, 1957, to R. E. Johnson, Vice-President and General Manager of the Carrier. However, the factual situation described in said letter is distinguishable from the one before us. Roe contended that a successful bidder should have been assigned immediately to a new position but was assigned thereto only after seven days had elapsed. In the case at hand, it is undisputed that the Claimant was immediately assigned. The instant dispute centers around the question as to when he should actually have been transferred to the new position. Thus, Roe's letter is of no assistance in the disposition of the grievance under consideration.

2. The Carrier argues, further, that it has been the practice during the last several years to assign and transfer the successful bidder to a bulletined position immediately upon the expiration of the bidding period. Our attention has not been called by the Carrier to any specific instances from which we could reasonably conclude the existence of such a long-continued, consistent, and mutually accepted practice. Past practice to take on the authority of demonstrating the existence of a binding rule to govern the rights of the parties to a labor agreement must more adequately exhibit mutual understanding than the record here reveals.

3. Rule 1, Section 2(a) of the applicable labor agreement establishes a forty-hour work week consisting of five days of eight hours each. Moreover, Rule 1, Section 2(h) provides that "the term 'work week' for regularly assigned employees shall mean a week beginning on the first day on which the assignment is bulletined to work." As applied to the facts underlying the instant grievance, we construe Section 2 (a) to mean that the Claimant was entitled to work on Saturday, October 31, 1959, to satisfy the requirement of the five-day week. We are also of the opinion that, in conformity with Section 2(h), he should have been transferred to the new position on the first day on which it was bulletined to work, i.e., Monday, November 2, 1959. Any other construction would place an unwarranted burden upon the Claimant by penalizing him with one day's wages for the sole reason that he was the successful bidder. Yet the law is well settled that, when one interpretation of an ambiguous provision in a labor agreement would lead to harsh or inequitable results, while an alternative interpretation, equally consistent, would lead to just and reasonable results, the latter interpretation will be applied. See: Frank Elkouri and Edna A. Elkouri, *How Arbitration Works*, Rev. Ed., Washington, D.C., BNA Incorporated, 1960, p. 209.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 5th day of December, 1962.