Award No. 4265
Docket No. 3990
2-NYC&StL-CM-'63

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. 57, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1) That under the controlling agreement the Carrier improperly paid, Carmen, Leonard Miller and Herbert Hostetter for changing from one shift to another on July 10, 1960.

2) That accordingly the Carrier be ordered to additionally compensate the aforesaid Carmen four (4) hours each at the straight time rate of pay.

EMPLOYES' STATEMENT OF FACTS: Carmen Leonard Miller and Herbert Hostetter, hereinafter referred to as the claimants are employed by the New York, Chicago and St. Louis Railroad Company, hereinafter referred to as the carrier, at Fostoria, Ohio.

Claimant Herbert Hostetter held a regular assignment in the train yard working on the second shift, from 3 P. M. to 11 P. M., up to and including July 9, 1960. On this date carrier elected to abolish three positions. Carman, R. P. Miller, the incumbent of one of these positions elected to displace Claimant Hostetter, causing said claimant to move to the third trick on July 10, 1960, as there were no carmen's positions on the second trick held by employes junior to him.

Claimant Leonard Miller held a regular assignment on the third trick 11 P. M. to 7 A. M., up to and including July 9, 1960. On this date carrier elected to abolish three positions. R. P. Miller who held one of these positions on first trick 7 A. M. to 3 P. M., displaced Herbert Hostetter, causing him to displace Claimant Leonard Miller in turn causing him to take a position on the repair track working 7 A. M. to 11 A. M., 11:30 A. M. to 3:30 P. M., there being no position on the 11 P. M. to 7 A. M. shift held by employes junior to him.

This dispute has been handled with all carrier officers designated to handle

It is also true that if there were any ambiguity in the rules (although the carrier believes the rules are clear) the issue must be decided in favor of the carrier on the basis of past practice and mutual interpretation thereof during the life of the present agreement and predecessor rules of the same import for more than 25 years (since June 1, 1935).

The employes have in conference referred to awards of the Second Division as a reason for changing the interpretation of the present rules as adhered to for the past 25 years. However the controlling rules may read on other properties, Rules 13, 16, 24, and the sample bulletin on Page 97, are peculiar to this carrier, and the issue must be decided on the facts, circumstances, and the interpretation of those rules on this property. Awards 1816, 2356, 2615, and 3103, among others, sustain the position of the carrier that the claim is without merit under the controlling rules.

The proper and agreed interpretation of the controlling rules on this property requires the denial of the claim.

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 Claimants H. Hostetter and L. Miller have been employed as carmen at the Carrier's Fostoria (Ohio) Car Shop. Prior to July 10, 1960, Hostetter was assigned to the second shift (3:00 P. M. to 11:00 P. M.) and Miller was assigned to the third shift (11:00 P. M. to 7:00 A. M.). On that day, the Carrier abolished three positions at said shop due to lack of work. As a result, Hostetter was displaced by an incumbent of one of such positions who was senior to him. Since there was no carman on the second shift junior to Hostetter, he exercised his seniority rights and displaced Miller. There was no carman on the third shift junior to the latter and he, in turn, exercised his seniority rights and displaced a carman on the first shift (7:00 A. M. to 11:00 A. M. and 11:30 A. M. to 3:30 P. M.).

The Claimants filed the instant grievance in which they contended that they were entitled to time and one-half for the first shift worked on their respective new assignments. They requested compensation in the amount of four hours each at the pro rata rate. The Carrier denied the grievance on the ground that the changes in shifts were made at the request of the Claimants.

In support of their claim, the Claimants rely on Rule 13 of the applicable labor agreement which reads, as far as pertinent, as follows:

> "Employes changed from one shift to another will be paid overtime rates for the first shift of each change, except that this rule shall not apply when the change is made at the request of the employe . . ."

1. A basic rule to be observed in the interpretation of a labor agreement is to ascertain the intent and aim of the parties. In an effort to make such a determination, the agreement, as a safeguard of industrial and social peace, must be given a fair and liberal interpretation consonant with its spirit and purpose so as to accomplish its evident aim—disregarding, as far as reasonably feasible, any inaccuracy of expression or any inadequacy of the words used. See: Award 3954 of the Second Division and cases cited therein; Frank Elkouri and Edna A. Elkouri, **How Arbitration Works**, Rev. Ed., Washington, D. C., BNA Incorporated, 1960, pp. 203-204 and references cited therein.

Applying the above principles to this case, we have reached the following conclusions:

The first clause of Rule 13 generally prescribes payment of the overtime rate in instances where an employe is changed from one shift to another. The second clause contains an exception from this general rule and relieves the Carrier from paying the premium rate if the change is made at the request of the employe. A careful analysis of the entire Rule has convinced us that the evident intent of the first clause is to provide additional compensation for an employe because of the inconvenience resulting from a change in shift if such change is caused by reasons beyond his control. On the other hand, an employe is not entitled to additional compensation under the second clause if a change in shift is made for reasons within his control, such as shift preference, personal convenience, and the like. Any other construction would place an unduly narrow and purely literal meaning upon the words "at the request of the employe" appearing in Rule 13. Yet the law is well settled that literalness may strangle meaning. See: Award 4130 of the Second Division and cases cited therein.

The record discloses that the Claimants' changes in shifts were caused by the Carrier's decision to reduce the working force. They did not change shifts of their own free will but were forced to do so by the circumstances. The only other alternative available to them was to waive their seniority rights in accordance with Rule 24 of the labor agreement and to become unemployed. Under these conditions, we hold that the changes in shifts were necessitated by reasons beyond their control. As a result, they are entitled to overtime pay as provided in the first clause of Rule 13. See: Awards 1329, 2488, 3006, and 3128 of the Second Division.

2. In support of its position, the Carrier also relies on Rule 16 of the labor agreement. This Rule provides, in essence, that in filling new jobs or vacancies seniority and ability shall prevail and that an employe who exercises his seniority rights in such instances is not entitled to additional pay. The flaw in the Carrier's argument is that no new job or a vacancy was here involved. Hence, Rule 16 has no application to the facts underlying this case.

Moreover, the Carrier has referred us to the sample of a bulletin to be used when positions are discontinued. The bulletin states, as far as relevant, that the employes affected will be given the privilege of exercising their seniority rights as per Rule 16 (old Rule 14). The sample of the bulletin is appended to the printed agreement (p. 97 of the agreement booklet). Apart from the Carrier's self-serving statement (Carrier's Submission Brief, p. 3), the record is devoid of any evidence that the bulletin was mutually agreed upon by the parties to the labor agreement as were other appendices to the agreement (Agreement booklet, pp. 74, 76, 77, 80, 84, 87, 93, 95, 100, and 101). It is self-evident that the Carrier cannot nullify Rule 13 by including a reference to Rule 16 in a bulletin unilaterally issued by it.

3. In further defense of its denial of the instant claim, the Carrier relies on past practice. Our attention has not been called by the Carrier to a representative number of specific instances from which we could reasonably conclude the existence of a long-continued and consistent practice well-known to and generally accepted by all interested parties. To demonstrate the existence of a binding rule to govern the rights of the parties, past practice must more adequately exhibit mutual understanding than the record here reveals. See: Awards 4016, 4097, 4100 and 4129 and 4193 of the Second Division.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 11th day of July, 1963.