

Award No. 4739

Docket No. 4579

2-C&O-CM-'65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L.-C. I. O. (Carmen)**

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Southern Region)**

DISPUTE: CLAIM OF EMPLOYES: 1. That the Chesapeake & Ohio Railway Company violated the current agreement, particularly Rule 13, when they denied Carman Painter E. E. Wilcox time and one-half rate for change of shifts, Sept. 24, 1962, Huntington Shop, Huntington, West Virginia.

2. That accordingly the Chesapeake & Ohio Railway Company be ordered to additionally compensate Passenger Carman Painter E. E. Wilcox four (4) hours September 24, 1962, at the Passenger Carman Painter applicable straight time rate of pay.

EMPLOYES' STATEMENT OF FACTS: The Chesapeake & Ohio Railway Company, hereinafter referred to as the carrier, employs a number of carmen painters at Huntington Shops, Huntington, W. Va., which includes E. E. Wilcox, hereinafter referred to as the claimant, who holds carman painter seniority at Huntington Shop under the provisions of Rule 31 of the controlling shop crafts agreement. Claimant Wilcox was furloughed from Huntington Shop, Huntington, W. Va., some time prior to September 11, 1962. On September 12, 1962, a bulletin was issued recalling claimant for service effective at starting time 7:00 A. M., Tuesday, September 11, 1962. Claimant reported for work and was assigned to the first shift 7:00 A. M. to 3:30 P. M., with duties of painting station wagons; working said position to September 24, 1962. On September 14, 1962, the first shift assignment to which claimant was assigned, was bulletined. On September 24, 1962, addendum to the bulletin of September 14, 1962, was issued, awarding the first shift assignment being worked by claimant, to K. P. Lester, senior painter to Claimant Wilcox.

On September 21, 1962, claimant was instructed by Supervisor Mr. Seivers, paint foreman, to report at the operating headquarters building starting September 24, 1962, with hours of assignment 5:30 P. M. to 2:00 A. M. shift. Claimant was denied the time and one-half rate for changing shifts September 24, 1962.

(Johnson), 4061 (Daugherty) and 4188 (McDonald). Of particular note is recent Award 4277, wherein Referee McDonald held as follows:

"We have had many occasions to consider similar situations under similar rules on other properties.

We are well aware of the divergence of views contained in former awards of this division. (Compare for example, Awards 1329, 2488, 3006 and 3128 with Awards 2067, 3853, 4061 and 4188).

We find that the reason for the Rule 13 here involved, and the similar rules construed in our other awards was to deter Carriers from indiscriminately moving employees from one shift to another without sanction.

We hold that the first part of the section of Rule 13 with which we are here involved does not apply to the instant situation."

Conclusions

The carrier has shown:

(1) That Rule 13 does not require punitive payment to a furloughed employee used on two consecutive vacancies on different shifts under the operation of seniority rules.

(2) That claimant did not change shifts at the instance of the company.

(3) That claimant was properly paid under the clear provisions of Rule 18.

(4) That prior awards of this division support the carrier's position.

(5) As the claim is without merit in all respects, a denial award should be rendered.

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.

Parties to said dispute were given due notice of hearing thereon.

A new first shift position was established and bulletined. Claimant, being the senior furloughed carman painter, was recalled to service on September 11, 1962 and worked the position temporarily until its permanent assignment to Lester, a second shift carman painter. Claimant then on September 24 started to occupy Lester's former second shift position temporarily, pending its permanent assignment pursuant to bulletin. The question is whether he is entitled to the overtime rate for his first shift on the second temporary assignment, under Rule 13 (a), which provides in pertinent part as follows:

“ * * * employees changed from one shift to another will be paid overtime rates for the first shift of each change. * * * .

Understanding—Negotiated Feb. 9-22, 1922:

(1) The words ‘employees changed’, used in the first sentence of this rule, mean employees changed at the instance of the company, and employees so changed must be paid at overtime rate.”

Thus by specific agreement the only employees entitled to the punitive rate are “employees changed at the instance of the company”. In other words, the punitive rate is applicable only when the company has unilaterally changed the employee to another shift.

Here the change was not unilateral, but was strictly pursuant to, and required by the Rules. Claimant's first temporary assignment pending bulletin was terminated by permanent assignment of the position pursuant to bid. Under the Rules the second temporary vacancy pending bid was mandatorily assigned by the Carrier to Claimant as the junior active employee, and mandatorily accepted by him to protect his seniority. That action being strictly required by the Rules, the Carrier cannot be punished for taking it.

Since the facts do not bring this claim within Rule 13 it is unnecessary to examine the various arguments advanced and awards cited by the parties interpreting and applying that rule.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 30th day of July, 1965.

DISSENT OF LABOR MEMBERS TO AWARD No. 4739

There is no disagreement between the parties to this dispute that claimant was assigned to the first shift 7 A. M. to 3:30 P. M., September 11, 1962, and worked thereon until assigned to another shift September 24, 1962, 5:30 P. M. to 2 A. M. The employee was in continuous service and this change in shifts was ordered by the supervisor in charge and was not by exercise of claimant's seniority. Thus, since the Understanding negotiated Feb. 9-22, 1922 states that employees changed at the instance of the company must be paid at overtime rate, the present claim should have been sustained.

E. J. McDermott

C. E. Bagwell

T. E. Losey

R. E. Stenzinger

James B. Zink