



Award No. 6154
Docket No. 5950
2-SOO-CM-'71

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Jesse Simons when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 66, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

SOO LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the terms of the current agreement and already accepted practice of Amended Rule 23, paragraph 8, Carrier wilfully and deliberately forced carman J. Koniar to work a lesser paying position of 4 cents per hour and work a week of Wednesday through Sunday, rest days Monday and Tuesday, instead of Monday through Friday with rest days of Saturday and Sunday, also, inside work as opposed to outside work.

2. That, accordingly, the Carrier be ordered to additionally compensate carman J. Koniar three (3) additional days pay each week, plus the 4 cents per hour commencing December 23, 1967 and continuing up to December 9, 1968, when he was able to bid a new vacancy in the air brake shop.

EMPLOYEES' STATEMENT OF FACTS: Carman J. Koniar, hereinafter referred to as the claimant, is employed by the Soo Line Railroad Company, hereinafter referred to as the Carrier, as a carman at Carrier's Shoreham Shops, Minneapolis, Minnesota.

On October 23, 1967, claimant was displaced from his position in the air brake department, working Monday through Friday with Saturday and Sunday as rest days and forced to accept a Wednesday through Sunday work week with Monday and Tuesday as rest days and at a reduction of four (4) cents per hour in rate of pay.

This was a result of carrier abolishing carman S. Biernat's position who, under the provisions of amended Rule 23, paragraph 8, displaced claimant.

On December 13, 1967 carrier recalled a furloughed employe back to work and assigned him to the air brake department.

claim on the basis that it had been Mr. Ginther, not Mr. Koniar, who had been aggrieved.

To compound matters, when Mr. Biernat recovered from his illness, forces were increased in the air brake shop, and on January 22, 1968, Mr. Biernat was permitted to return to the air brake shop. This, carrier concedes, was improper. Mr. Koniar, who had a 1-21-66 dating in the air brake shop, should have been recalled, rather than Mr. Biernat, who had only an improperly acquired dating of 10-23-67.

In recognition of its error, carrier offered to make an adjustment of 4 cents per hour for all hours worked by Mr. Koniar at the lower scale between January 22, 1968 and December 9, 1968, when he returned to the air brake shop. Carrier refused to consider the claim for an additional three days per week during this period on the basis that he had suffered only a pecuniary loss and the rules and working conditions agreement did not prescribe an arbitrary or penalty in instances such as this.

To summarize, it is carrier's position that the note to Rule 27-3 was specifically designed to shelter roster No. 4 and roster No. 6 carmen from displacement while employed in the air brake shop. While someone erred in permitting Mr. Biernat to displace Mr. Ginther originally, this was rectified. To have permitted Mr. Koniar to displace Mr. Ginther would have only compounded Mr. Ginther's injury. Two wrongs do not make a right. This claim is without merit, except for the 4 cents differential between January 22, 1968 and December 8, 1968 — is supported neither by the rules nor past practice, and should be denied accordingly.

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.

Carrier acknowledges that it erroneously failed to assign Carman J. Koniar to the air brake shop at the time it mistakenly recalled furloughed Carman L. Ginther and assigned him to the air brake shop. Carrier's offer to rectify said error and settle grievance, as described in the record, consisted of making claimant whole by paying him 4 cents for each hour worked for the period January 22, 1968 to December 9, 1968, has been rejected by the Organization which is seeking in behalf of claimant Koniar the following:

1. Four cents per hour compensation for all hours worked between December 23, 1967 and December 9, 1968.
2. Four hours' pay at the Air Brakeman's rate for each Saturday and for each Sunday that claimant worked during the period December 23, 1967 to December 9, 1968, because Saturdays and Sundays would have been the claimant's regular days off, had the Carrier not made the erroneous assignment.

3. Two additional days' pay per week at the Air Brakeman's rate, to compensate claimant during the period from December 23, 1967 to December 9, 1968, for not permitting claimant to work on Mondays and Tuesdays, which days he would have worked had Carrier not made the erroneous assignment.

As the Carrier has conceded that it erred, only two issues are before the Board for decision, namely, whether the claimant is entitled to be made whole for any loss he may have suffered as a result of carrier misapplication of a rule, and if the claimant is so entitled, what constitutes the proper compensation to the claimant to make claimant whole.

Too numerous to cite are the Awards of the Board in which monetary compensation has been awarded to claimants when, for whatever reason, Carrier failed to discharge its obligation under the Agreements.

In 1971, after almost four decades of impartial third party adjudication of disputes arising under terms of collective bargaining agreements, the Board finds little merit or persuasiveness in the thesis advanced by Carrier that a valuable contract right can be denied an employe causing said employe a loss, which is monetarily measurable, but for which loss compensation need not be tendered for the reason that the particular provision violated does not contain a specified penalty.

The Board finds the above reasoning untenable, and in addition not in accord with the whole sweep of the well-established procedures of grievance arbitration. The Board, therefore, finds that claimant is entitled to be made whole for the loss he suffered as a consequence of Carrier's error.

In considering the issue of what degree of compensation the employe is entitled to because his contractually protected seniority rights were violated, the Board finds:

1. That claimant is entitled to recover the 4 cents per hour difference between what he was paid, and what he would have been paid had he been properly assigned in the Air Brake Department, this amount to be computed by multiplying the hours worked by the claimant, times 4 cents for the period December 23, 1967 up to and including December 9, 1968.
2. That claimant lost the valued opportunity to be off on Saturday and Sunday but instead was required to work those days at straight time rates, and that he is therefore entitled to be paid a sum equal to four hours' pay at the Air Brakeman's rate for each Saturday and for each Sunday he worked during the period December 23, 1967 up to and including December 9, 1968.

The organization has advanced a third claim; namely, that claimant should be compensated for his "rest days", i.e., Mondays and Tuesdays when he did not work, but when he would have worked had he not been erroneously assigned during the period in question. The Board is not persuaded that claimant should be compensated for time not worked, i.e., his rest days, Monday and Tuesday. This, in the Board's view, would go beyond making the employe whole for an actual loss, and would constitute a punitive measure, something

which the Board is not, under the facts and circumstances cited in the record, prepared to do, for it sees no just grounds for such a penalty measure.

AWARD

Claim sustained to the extent provided for in the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **SECOND DIVISION**

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 14th day of July, 1971.