Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7258
SECOND DIVISION Docket No. 7084
2-MP-CM-'77

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: (System Federation No. 2, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Missouri Pacific Railroad Company

Dispute: Claim of Employes:

1. That the Missouri Pacific Railroad Company violated Rule 10 of the controlling agreement and Decision SC-69 (Pages 79-80-81 of controlling agreement) when it improperly compensated Carman Apprentice Tom Jacobson at the straight time rate of pay for changing shifts, May 31, 1974, Kansas City, Missouri.

2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Carman Apprentice Jacobson four hours (4') at the straight time rate for said violation on May 31, 1974.

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.

Claimant, an upgraded Carman Apprentice, had been working as an unassigned Carman on the 7 a.m. to 3:30 p.m. shift since June 1973. On May 31, 1974 he was assigned to ride the bulletin on a Carman's position on the 11 p.m. to 7 a.m. shift, there being no Journeyman Carman available to fill the vacancy during the period the bulletin was posted pending assignment of the successful bidder.

Claimant was paid straight-time for this shift, but claims he should have received time and one-half pay as provided in Rule 10, which reads as follows:

"RULE 10. Employes changed from one shift to another will be paid overtime rates for the first shift of each change. This will not apply when returning to their regular shift nor when shifts are exchanged in the request of employes involved or in the exercise of their seniority rights."

Rule 10 is interpreted by Decision SC-69, which reads in part:

"(a) in the application of that part of the rule reading:

'Employes changed from one shift to another will be paid overtime rates for the first shift of change.' applies where employes are changed from one shift to another by the Management and will likewise apply when following rearrangement of force; in force reductions where employees are required to change shifts from day to night, or vice versa, by reason of having been disturbed on the regular assignment and possessing sufficient seniority to be not affected by being displaced from service ...

...

(e) In the application of that part of the rule reading:

'This will not apply *** in the exercise of their seniority rights' is applicable only when an employe working, for instance, the first shift bids in the second shift job, and after working his first shift on any given day he continues on through working the second shift on the same date, that although on the particular date he worked 16 hours, he does not receive pay at the rate of time and one-half for the second eight hours because of the fact that the second eight hours were worked as a result of the employe exercising his seniority rights on the second shift."

Carrier looks to Award No. 6119 (Quinn) as stare decisis in this matter. But there is substantive difference between the circumstances applicable to Award No. 6119 and the instant case. To quote from the Findings of Award No. 6119:

"In this case, an apprentice in the electrical craft had been following his scheduled training program when a journeyman electrician on the first shift retired. The apprentice was upgraded to ride the bulletin. The first shift position was bid in by a second shift electrician. When the position was awarded, the Claimant reverted to his apprentice status. He was promoted a second time to ride the bulletin on the second shift job. When that job was awarded, he reverted to his apprentice training schedule." /Emphasis added/

Thus in the case involved in Award No. 6119, the employe was, in effect, exercising some degree of seniority in that each move to ride the bulletin represented an upgrading (and more pay) from his then current status.

This is not the case in the present instance. Claimant had been an upgraded Carmen Apprentice for nearly a year. He was directed to move to another shift to ride a bulletin. Unlike the Electrician Apprentice in Award No. 6119, he achieved no higher rate of pay or change of status when transferred.

The Carrier's argument, that the Claimant "exercised his seniority", because he had a choice, does not hold water. The "choice" was to abandon his year-long status as an Upgraded Carman Apprentice and revert to the lower status and pay of an Apprentice. This is hardly the exercise of seniority. This is akin to saying an employe may avoid working a certain schedule properly assigned to him -- provided he wishes to give up his job altogether.

All of the many cases cited in reference to Rule 10 and Decision No. SC-69 can roughly, if not exactly, be found to show that involuntary shift moves are usually covered by the Rule, and voluntary moves are not. There is no showing that the Claimant had any reasonable alternative to following his Foreman's direction and riding the bulletin on a different shift. From the move, he gained nothing, other than preserving his status quo as an Upgraded Carman Apprentice. He is thus covered by Rule 10 and Decision No. SC-69.

A close reading of the applicable portions of Decision No. SC-69 is instructive. It says the overtime rate "applies where employes are changed from one shift to another by the Management and likewise apply when following rearrangement of force; ..." /Emphasis added/ The use of the word "likewise" clearly signifies that either of the two conditions may apply; in this case, it was the first condition (changed by Management).

As to the Carrier's position that the Claimant was exercising seniority rights, Decision No. SC-69 is again instructive. It reads:

> "(e) In the application of that part of the rule reading:
>
> 'This will not apply *** in the exercise of their seniority right' is applicable only when an employe working, for instance, the first shift bids in the second shift job, ..." /Emphasis added/

Claimant in this case did not "bid" and therefore cannot be construed in this instance to be exercising his seniority.

Nor is this a case in which there was a force reduction or job abolishment, as cited in so many of the Awards offered to the Board for consideration. Where such is the case, employes indeed must exercise seniority to attempt to retain employment, and thus fall outside the benefit of Rule 10. Again, this is not the case before the Board here.

Award No. 1949 (Donaldson), as interpreted and confirmed in Award No. 2621 (Donaldson), are of particular relevance.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 29th day of March, 1977.

LABOR MEMBERS' ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NOS. 7252 (DOCKET NO. 6962) AND 7258 (DOCKET NO. 7084)

In their Dissent to Award Nos. 7252 and 7258, the Carrier Members of this Division place special emphasis on Memorandums submitted to the Referees and attempt to incorporate those Memorandums into the record by reference.

Members of the Board are not Parties to disputes submitted for adjudication. Memorandums submitted by Members are notes of interest and words of persuasion and do not become a part of the record.

Procedures of the Board prohibit surrebuttal. If Memorandums or Briefs submitted by the Members of the Board were to be considered a part of the record, which they cannot, they would constitute surrebuttal. For that reason the Carrier Members' Dissents to Award Nos. 7252 and 7258 are improper.

M. J. Cullen

M. J. Cullen

G. R. DeHague

G. R. DeHague

J. G. Hayes

J. G. Hayes

R. S. Rodgers

R. S. Rodgers

C. E. Wheeler

C. E. Wheeler

CARRIER MEMBERS' DISSENT TO AWARD 7258, DOCKET 7084

(Referee Herbert L. Marx)

We dissent. The matters of record which clearly establish that this claim is completely invalid were discussed and presented to the Referee in the memorandum submitted by the Carrier Members. That memorandum is incorporated herein by reference.

J J Naylor

P C Carter

John W. Johnson

E J McGovern