

The Second Division consisted of the regular members and in addition Referee Nicholas H. Zumas when award was rendered.

Parties to Dispute: { International Association of Machinists and  
{ Aerospace Workers  
{ Clinchfield Railroad Company

Dispute: Claim of Employes:

1. That under the terms of the Controlling Agreement, the Clinchfield Railroad Company failed to compensate Machinist L. W. Briggs for changing shifts February 18, 1975, as provided in Rule 8 of the Agreement.
2. That accordingly the Clinchfield Railroad Company be ordered to additionally compensate Machinist L. W. Briggs in the amount of four (4) hours pay at the straight time rate of pay for this change of shifts occurring on February 18, 1975.

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.

This is a claim for compensation under the provisions of Rule 8 of the Agreement between the parties which state:

"Employes changed from one shift to another will be paid overtime rates for the first shift of each change. Employes working two shifts or more on a new shift shall be considered transferred. This will not apply when shifts are exchanged at the request of the employes involved.

If it becomes necessary to create a relief job in which the assigned relief man is compelled to perform work on different shifts in order to have five (5) work days included in his assignments such employe will not be paid overtime rates for changing shifts to perform the work on the shifts included in his assignment. If such employe is required to change shifts for any other reason, this exception shall not apply to such other shift changes."

The essential facts are not in dispute. Prior to February 18, 1975, the claim date, Claimant was assigned to the first shift position at Carrier's shop facilities at Erwin, Tennessee. As a result of force adjustments by Carrier, Claimant was "bumped" from his first shift assignment by a senior employe whose position had been abolished. Claimant was the junior machinist in service, and a relief position working the second and third shifts was the only remaining unassigned position. The unassigned position was advertised but no bids had been received. Claimant was assigned to the position by reason of his seniority. He now makes claim for the payment of time and one-half for the first shift worked on the new position.

The precise question to be determined in this dispute is this:

When Claimant is displaced from his first trick position because of force reduction, and refuses to bid on a second-third trick relief assignment, can Carrier assign Claimant to the relief assignment without penalty under Rule 8?

The Organization takes the position that the claim should be allowed because Claimant was displaced through no fault of his own and was subsequently forced to accept the relief position by Carrier when he did not bid the assignment. Under Rule 8, the Organization argues, there are only two exceptions for the non-payment of the penalty: 1) a shift change at the request of the employe, and 2) making up relief assignments. The Organization further argues that the awards relied on by Carrier involve rules that are broader in their scope and include a third exception, viz. no penalty where the employe changes shifts in the exercise of his seniority. The Organization also cites a number of awards supporting its position.

Carrier asserts that the awards relied upon by the Organization were early awards, and that the more recent awards support its position. Carrier further asserts that when Claimant was displaced he was not an employe assigned to the first trick shift any longer; and when he refused to bid on the relief assignment position, Carrier had no alternative but to assign him the relief position because of seniority.

The Board is of the opinion that even though, as the Organization contends, there are no specific exceptions enumerated in the rule, the purpose of the rule was to penalize the Carrier when it made a shift change for its own convenience. Moreover, Claimant, as the senior employe, had an obligation to bid on the assignment. He had no right, under the rule, to lay back, refuse to bid the job, and then claim that he was entitled to penalty pay as a shift change when he accepted the assignment.

In Second Division Award No. 4630, the Board said:

"The Division must now turn to the second issue to determine whether Rule 9(a) which states in part:

'Employes changed from one shift to another will be paid overtime rates for the first shift of each change...'

"is applicable to the Claimant when his shifts were changed in the course of holding jobs during the pendency of the bid period. The Division, after due consideration of the record, is unable to accept the Organization's contention that, because the language of the Rule is all-embracing and contains no words of limitation or exclusion, it must apply to the circumstances in which the Claimant found himself. The reason why the Division cannot accept the sweeping and literal interpretation contended for by the Organization, is that the Rule in question has wide currency in railroad contracts, and over the years has been the subject of many interpretations. The vast majority of awards rendered both by this Division, and other Divisions of the National Railroad Adjustment Board, have held clearly and unequivocally that the rationale and purpose of the Rule was to cover those situations where the Carrier moved a regularly assigned employe to another shift for its convenience, and thus had to pay the employe the premium rate for the inconvenience it caused him. This rationale was recognized and stated in the Dissent of the Labor Members in Awards 4277 and 4278. There are also comparable statements in many awards of this Division, too numerous to cite."

And in Second Division Award No. 1816, the Board denied the claim, finding:

"Prior to January 9, 1953, carrier had 82 Carmen and Carmen Helpers working in the Erecting Shops at Marshall, Texas. These men had been assigned by bulletin to a work program of building 250 new gondola cars. On January 9, 1953, these jobs were abolished and the employes directed to place themselves in line with seniority. On January 5, 1953, the carrier bulletined 80 new positions at Marshall. Some of the employes whose positions had been abolished bid on and were assigned to new positions. Claimants are 24 Carmen and 8 Carmen Helpers who did not bid on these new positions or exercise their seniority thereto, but were subsequently assigned by the carrier. The organization contends that claimants are entitled to overtime rates for the first shift of their new positions under Rule 2 (m), current agreement, which provides in part:

'An employe changed from one shift to another will be paid overtime rates for the first shift of each change. An employe working two shifts or more on a new shift shall be considered transferred. This will not apply when shifts are exchanged at the request of the employe involved, or in the exercise of his seniority.'

"We point out that the change in shift rule does not apply in this case. There was no change of shifts within the meaning of the rule. The positions of these claimants in the erecting shops were abolished. There were no shifts on the abolished positions remaining to which a change could be made. New positions were bulletined upon which claimants could bid. If they had a choice of positions, they should have bid. Upon failure to bid, carrier could assign them to unfilled positions in accordance with their seniority which the carrier did. They assumed the shift to which they voluntarily permitted themselves to be assigned--they did not change from one shift to another within the meaning of the first sentence of Rule 2(m). They were changed to a new shift on a new position to which they were entitled by seniority. Claimants cannot profit in such a situation as we have here by the expedient of failing to bid on new positions and accepting that to which their seniority entitles them. Award 1546."

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By

  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 5th day of April, 1977.