

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

Parties to Dispute: { System Federation No. 4, Railway Employees'
 { Department, A. F. of L. - C. I. O.
 { (Carmen)
 { Patapsco and Back Rivers Railroad Company

Dispute: Claim of Employees:

- No. 1. That under the current Agreement on the Patapsco and Back Rivers Railroad, Sparrows Point, Maryland, the Carrier improperly scheduled carmen, D. Killinger and D. Andrews to work a shift with hours commencing at 10:00 A.M. and ending at 6:00 P.M., such shift covering job referred to herein as Job A-1, formerly a regular 7:00 A.M. to 3 P.M. scheduled job.
- No. 2. That the Carrier changed the shift starting time contrary to the Controlling Agreement, and without the approval of the committee.
- No. 3. That accordingly, the Carrier be ordered to re-establish the former position and compensate carmen Killinger and Andrews for all hours worked on this irregular shift, specifically, five (5) hours per day for a total of ten (10) days or fifty (50) hours at twenty (20) cents per hour, constituting second shift premium rate of pay, for Carman D. Killinger, and five (5) hours per day at twenty (20) cents per hour for each day worked on Job A-1 by carman D. Andrews from the date of August 16, 1977, constituting second shift premium rate of pay.

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 waived right of appearance at hearing thereon.

The relevant Agreement language in this case is as follows:

"Rule 5 -- Shifts

- (a) When one shift is employed, the starting time shall not be earlier than 6 a.m. for employees of both

"Patapsco and Back Rivers Railroad Co. and South Buffalo Railway Co., however, when one shift is employed the starting time shall normally be not earlier than 7 a.m. nor later than 8 a.m., but the Company may start such shift between 3 p.m. and 4 p.m. or between 11 p.m. and 12 midnight.

- (b) When two shifts are employed, the starting time of the first shift shall be governed by paragraph (a) of this rule, and the second shift shall start not later than 11 p.m.
- (c) When three shifts are employed, the starting time of the first shift shall be governed by paragraph (a) of this rule, and the starting time for each following shift shall be regulated accordingly."

"Rule 6 -- Shift Premiums

Each Employee scheduled to work on the second shift shall be paid a premium of 20 cents per hour for all hours worked by him on that shift, and each Employee scheduled to work on the third shift shall be paid a premium of 30 cents an hour for all hours worked by him on that shift. Shift premiums payable under this Rule shall not be included as part of the Employee's rate of pay for the purposes of computing overtime compensation under these Rules."

In August of 1977, Carrier scheduled Carmen Claimants Killinger and Andrews to a newly established shift beginning at 10 a.m. and terminating at 6 p.m. The Organization claims that the above-cited Agreement language precludes the establishment of a shift with such hours. They argue that the only permissible starting times of a shift are clearly specified in the language of Rule 5(a). They claim further that the word "normally" in Rule 5(a), far from implying that permissible shift start times specified may be deviated from under "abnormal" circumstances, is simply the referent for the specific "but the Company may start ..." rights of the Carrier to schedule a single shift as a second or third shift, at the starting times specified, rather than as a first shift, if it desires.

Also, arguing, in effect, in the alternative, the Organization makes claim that all hours worked on any such as a 10 a.m. to 6 p.m. shift should be considered second shift hours, and should all be paid at the second shift premium rate.

Alternatively, the Carrier strenuously asserts that the use of the word "normally" in Rule 5(a) "is the best evidence that there may be occasions when the starting times of such shift will not always be 'no earlier than 7 a.m. nor later than 8 a.m.'". The Carrier argues that in the absence of "clear rule to the contrary, the Carrier has the exclusive right to schedule its work force".

Finally, the Carrier notes that the scheduling of this allegedly an molous shift was clearly necessitated by unavoidable and uncontrollable changes in time of interchange with the Western Maryland Railroad.

Viewed solely as a matter of abstract literal analysis on the relevant Agreement clauses, this Board confesses to having considerable respect for the basic, threshold Organization argument. However, the language involved is not without ambiguity, and the right asserted by management to schedule shifts as business necessity dictates is a vital one which this Board will not curb in the absence of a wholly clear, compelling and unambiguously expressed intent of the parties to do so. Indeed, the Organization has strongly implied in 1), a grievance filed previously with Carrier, (dropped, the Organization claims, inadvertantly, as a result of error) in a virtually identical fact situation and, 2), certain arguments made in their submission in this case, that they do not view Rule 5(a) as precluding, regardless of circumstances, the right of the Carrier to schedule shifts beginning at hours other than those mentioned in Rule 5. Accordingly, we rule that the Carrier is not precluded by Rule 5 from starting shifts at times other than those specified in Rule 5, when business conditions dictate the appropriateness of doing so.

Having thus, in part, at least, eschewed sterile literalism in deciding the first aspect of this case, we do not think it is beyond the intent and "spirit" of this contract language considered in its totality (Rules 5 and 6) to hold with the Organization that when a shift is established with a starting time later than the hours specified in Rule 5(a), all of the hours of that shift will be considered, for purposes of premium pay, to be hours worked on the next succeeding higher-premium shift.

There is, after all, at the very least, a strong presumption embodied in Rule 5 that, whenever possible, shifts will begin within the times specified in the Rule. This presumption is, of course, importantly related to legitimate employee convenience and expectations regarding a work life scheduled at relatively "normal" hours in relation to the way in which the rest of industry and the society as a whole work, rest and play. It does not seem to us unreasonable that when, under the language in this Agreement, the Carrier finds it necessary to disrupt the convenience and the normal expectations of employees by scheduling shifts to start at unanticipated times other than those specified in Rule 5(a), that it compensate affected employees at the shift premium rate for all hours worked on that shift. Specifically, then, we rule that any shift scheduled to begin after 8 a.m. but prior to 3 p.m. will pay second shift premium for all hours worked on that shift.

A W A R D

Claim sustained in part and denied in part as per the findings.

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Award No. 8372
Docket No. 8011
2-P&BR-CM-'80

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 11th day of June, 1980.