

The Second Division consisted of the regular members and in addition Referee Rodney E. Dennis when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Elgin, Joliet and Eastern Railway Company

Dispute: Claim of Employees:

1. That the Elgin, Joliet and Eastern Railway Company violated the current working Agreement, specifically Rule 91, when it improperly compensated Temporary Carman James Luna at the straight time rate of pay when he was forced to change shifts on December 9, 1979.
2. That the Elgin, Joliet and Eastern Railway Company be ordered to compensate Temporary Carman James Luna an additional four (4) hours pay at the pro rata rate of pay for said violation of Rule 91 on December 9, 1979.

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.

Claimant, Carman J. Tuma, was employed by Carrier on the repair track in Gary, Indiana. He worked the 8:00 a.m. to 4:30 p.m. shift. On November 17, 1979, he was assigned to fill a trainyard car inspector's position on the 12:00 midnight to 8:00 a.m. (3rd) shift. Claimant was compensated under Rule 91 for this shift change. Rule 91 reads in pertinent part as follows:

"Employees changed from one shift to another will be paid overtime rates for the first shift of each change. Employees 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 employee involved."

On December 9, 1979, at 8:00 a.m., Claimant finished his last tour of duty on the car inspector's job. He immediately reported to his former assignment on the first shift and worked eight hours. He was not paid for that first shift change in accordance with Rule 91, but was rather compensated on a straight-time basis.

The Union argues that Claimant was forced into the job by Carrier. He should therefore be paid time and one-half for the first time that he worked the new shift. The Organization is requesting that Claimant be awarded four hours at the pro rata rate. Carrier argues that Claimant exercised his seniority and, by choice, returned to his old job. Therefore, he was not moved at the direction of Carrier and does not qualify for pay under Rule 91.

This Board is once again confronted with a shift change case in which Carrier argues that Claimant exercised his seniority to change shifts and the Organization argues that Claimant, by virtue of Carrier's action, was forced to change shifts. The parties have presented the Board with a number of awards on both sides of the issue.

We have carefully reviewed the facts of the instant case and past awards on the subject. It is the Board's consensus that these facts (that is, that Claimant was displaced when the incumbent on the car inspector's job returned and claimed his job) closely parallel those we considered in Award 7251 (Roadley). Our reasoning in that case applies equally as well to the present one.

Claimant was displaced because the man who owned the job came back to work. He was forced to claim the only job available to him. He utilized his seniority to keep a job. In Second Division Award No. 1546, Referee A. Wenke outlined the principle that applies here when deciding whether seniority has been exercised. He said:

"Rule 8 expressly exempts the payment of overtime when the transfer from one shift to another is made by an employee 'in the exercise of seniority rights.' This specific exemption is in no way qualified as to the act being voluntary or involuntary..." (emphasis added)

In the instant case Claimant exercised his seniority, albeit possibly involuntarily. Carrier did not direct Claimant to change shifts. He was displaced and he took the only job available to him. He exercised his seniority to remain at work.

This Board has stated on numerous occasions that it believes that rules such as Rule 91 are intended to penalize Carriers when they indiscriminately change shift assignments of employees. The overtime rate penalty does not apply when employees exercise seniority or change shifts for their own benefit. We continue to subscribe to that interpretation. (See Second Division Awards 7251 and 6344 and awards cited therein.) We see no basis in this record for concluding that Carrier indiscriminately forced the changes that took place. Carrier has not violated the agreement.

A W A R D

Claim denied.

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Award No. 9137
Docket No. 9034
2-EJ&E-CM-'82

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 16th day of June, 1982.