

The Second Division consisted of the regular members and in addition Referee Carlton R. Sickles when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Elgin, Joliet & 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 R. C. Gilkerson at the straight time rate of pay when he was forced to change shifts on June 11, 1979.
2. That the Elgin, Joliet and Eastern Railway Company be ordered to compensate Temporary Carman R. C. Gilkerson an additional four (4) hours pay at the pro rata rate of pay for said violation of Rule 91 on June 11, 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 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.

The Claimant was the most junior-qualified man on the extra list and was assigned to fill a vacancy. When the vacancy was filled, the Claimant returned to his previous assignment.

Claimant, in the process of changing these assignments, was required to make a shift change. Claimant seeks to be paid time and one-half for the shift change necessary upon returning to his previous assignment based upon Rule 91 as follows:

"Rule 91
Changing Positions or Shifts

- a) An employee changing from one regular position to another regular position which involved a change of rest days, will be paid straight time for days (except holidays) he actually works on such positions between last rest day of former position and first rest day of new position. The application of this section will have no effect on the application

of paragraph (b) of this rule.

- b) Employees changed from one shift to another will be paid overtime rates for the first shift of each change This will not apply when shifts are exchanged at the request of the employee involved ..."

The reason for the first shift in assignment was for the Claimant to replace an incumbent who was assigned to another position. Claimant was assigned this position until a new incumbent could be selected for the position. In no way, can the Claimant be said to have volunteered for the assignment. In conformity with the procedures established between the parties, he was selected by the Organization to fill the assignment because no one volunteered for the assignment.

In returning to his previous assignment, the Carrier alleges that the Claimant had to assert his seniority and, therefore, it was a voluntary act on his part relying on that portion of Rule 91 which provides:

"This will apply when shifts are exchanged at the request of the employee involved."

Carrier further resists on the basis that Claimant did not hold a regular position during the pendency of the bid period.

With respect to this latter assertion by the Carrier, it relies heavily on Award 4630 (Second Division) wherein the claim was denied because the Claimant therein was held not the holder of a regular position. In that matter, the Claimant was filling a series of vacancies, until an incumbent was selected for each one. The Board held that in holding a job under these circumstances, the Claimant was not holding a regular job, awaiting determination of the successful bidder.

In the instant matter, however, the Board notes that the Claimant did have a regular job at the time he was reassigned, however briefly, to the new assignment pending the establishment of an incumbent. Under the particular circumstances of this matter, the Board will not be guided by the rationale of the Carrier.

The Board has reviewed the many Awards provided by both parties and has noted that Awards cited by both of them take note of "divergence of views contained in former awards of this division" Award 4277 (Second Division) and "precedent is of little value Claims involving a change in shifts must be judged on a case by case basis recognizing the peculiar facts of each case." (Award 8414 (Second Division)).

The Board must, therefore, decide whether the exercise of seniority rights under the particular facts of this case is "at the request of the employee". In doing so, it will consider the circumstances surrounding the initial assignment change in evaluating the second reassignment.

The Board has determined that since the first reassignment was not "at the request of the employee" and for an obviously short period of time, that the exercise of seniority rights to return to his original assignment cannot be considered under the circumstances "at the request of the employee", and the claim will be sustained.

A W A R D

Claim sustained.

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 26th day of January, 1983.