

The Second Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

PARTIES TO DISPUTE: ( (Brotherhood Railway Carmen/Division of TCU  
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM:

1. That the Elgin, Joliet and Eastern Railway Company violated the current working Agreement, specifically Rule 91, when it improperly compensated Carman D. Schmidt at the straight time rate of pay when he was forced to change shifts on Monday, November 16, 1987.

2. That the Elgin, Joliet and Eastern Railway Company be ordered to compensate Carman D. Schmidt an additional four (4) hours' pay at the pro rata rate of pay for said violation of Rule 91 on November 16, 1987.

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 employes 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 basic facts in this case are set forth as follows. Effective November 4, 1987, Claimant was assigned to the Gary, Indiana, Repair Track. Prior to that date, he had worked in the Joliet, Illinois, seniority district. From November 4 through November 13, 1987, he worked at the Gary situs on the first shift, though he worked on the Repair Track, Kirk Yard Train Yard and in Gary Mill Yard. On November 13, 1987, Carrier notified the Local Committee that it needed to fill a vacancy caused by a Carman who exercised seniority rights to fill a vacation absence. Several Carmen were asked to fill the position, but without apparent success. Since Claimant was the junior Carman in seniority, he was force assigned to fill the position on November 16, 1987. Further, since this required a change in shift, namely from the first shift to the third shift, Claimant filed a Claim for an additional four (4) hours pay at the pro rata rate of pay. This was for time worked on November 16, 1987.

It was the Organization's position that since Claimant did not volunteer for the change in shift position or exercise displacement seniority pursuant to a position abolishment, Carrier violated Rule 91, Paragraph (b) of the controlling Agreement. This Rule reads:

"Employee 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."

The Organization cited several Second Division Awards, including Awards 9350 and 10479. Award 9350 involved the parties to this dispute.

In response, Carrier contends that since the third shift vacancy required a replacement employee, it was necessary to observe the seniority provisions of the controlling Agreement. In other words, since Claimant was the junior Carman at the Gary situs, it was compelled to assign him to the third shift position in accordance with seniority. Admittedly, Carrier recognizes that said assignment was an exercise of involuntary seniority, but it premised and defended its action on the basis of Second Division Awards 10008, 10097, 9709, 9137, and 5409 involving Rule 91 disputes on the property. See also Second Division Awards 7675, 7366, 7291, 7251 and 1546. Simply put, it argues that Rule 91 does not apply when employees, albeit involuntarily, exercise seniority or change shifts for their own benefit.

In considering this case, the Board concurs with Carrier's position. Firstly, there is no clear indisputable evidence that Claimant originally occupied a regular position. Rather, the evidence indicates that he was a furloughed Joliet Carman, who was given an opportunity to work in Gary to fill temporary vacancies. Secondly, there are no persuasive indications that similar actions on the property were considered violations of Rule 91. Thirdly, since the weight of Second Division authority permits shift movement predicated upon the exercise of involuntary seniority, there was no triggering liability when Claimant was assigned the third shift position. To be sure, Rule 91 is not an open license for Carrier to change an employee's shift without incurring a penalty, but this contingent liability does not attach to actions where the employee initiates the shift change or voluntarily or involuntarily exercises seniority.

A W A R D


Claim denied.

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Award No. 11944  
Docket No. 11700  
90-2-88-2-232

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of November 1990.