

The Third Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Duluth, Missabe & Iron Range Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier refused to allow B&B Lakehead Mechanic D. H. Peterson to work his regularly assigned 3:00 P.M. to 11:00 P.M. shift on November 28, 29, 30, December 1, 2 and 3, 1984 and instead required him to work the 11:00 P.M. to 7:00 A.M. shift (System Claim No. 25-85).

(2) As a consequence of the aforesaid violation, B&B Mechanic D. H. Peterson shall be allowed forty (40) hours of pay at his straight time rate."

FINDINGS:

The Third 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 employees 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 was a B&B Mechanic regularly assigned to the 3 P.M.-11 P.M. (Monday-Friday) shift at the Lakehead Storage Facility. No Mechanics were assigned on the 11 P.M.-7 A.M. shift at that location.

Due to changes in the arrival times of ore boats at Lakehead, it was determined (in late November 1984) that one Mechanic would be needed on the 11 P.M.-7 A.M. shift for about one week. On Tuesday, November 27, 1984, Claimant worked his regular shift and doubled onto the succeeding shift. At the Carrier's instructions, he reported to work from 11 P.M.-7 A.M. from Wednesday, November 28 through Monday, December 3, 1984, in lieu of his regular shift. At the end of this temporary assignment, Claimant returned to his regular 3 P.M.-11 P.M. shift.

The Organization maintains that Rules 17(f) and 19 of the Agreement were violated, since the Carrier changed the Claimant's regular hours and

suspended his regular work period in order to avoid overtime. The Organization seeks forty (40) hours of pay at the straight-time rate as compensation for Carrier's action.

The Carrier asserts that it has the right to rearrange the work force as necessary, and nothing in the Agreement prohibits the rearrangement involved in this case. The Carrier additionally contends that it is not obligated to assign overtime when the work can be accomplished at straight-time rates.

Rule 4(b) provides that when the starting time of a bulletined position is changed by at least one hour for more than five consecutive days, the position shall be considered a new position. The incumbent has the option of keeping the assignment or vacating it.

The Organization argues that since the Claimant was not given the option of vacating his position, the Carrier's action cannot be considered a simple change in starting times. Furthermore, since Claimant was not given the five days' notice of the abolishment of his regular position, as required by Rule 5(b), the Organization maintains that Claimant's regular position continued in effect.

The Organization emphasizes Rules 17(f) and 19. Those Rules state, respectively:

"Employees' regular assigned hours will not be changed temporarily to avoid application of overtime rates."

"Employees will not be required to suspend work during any regular assigned work period for the purpose of absorbing overtime."

Rule 4(b) clearly gives the Carrier the right to change the starting time or rest days of a regularly-assigned position, and grants the incumbent employee limited rights as a result. However, Rule 17(f) prohibits a temporary change in the working hours if the purpose of the change is to avoid paying overtime.

The Organization maintains that Rules 17(f) and 19 restrict the Carrier's right to rearrange the work force, and it insists that the Carrier exceeded its authority. The Carrier clearly suspended the Claimant's regular shift for the sole purpose of requiring him to work the 11 P.M.-7 A.M. shift at straight-time rates, the Organization states.

The Carrier cites Rule 4(c), which provides:

"Positions or vacancies of thirty (30) calendar days or less will be filled in the following order:

- 1) Bulletined relief position if established.
- 2) Senior qualified employee from the headquarter point where the temporary position or vacancy occurs.
- 3) Senior qualified employee holding seniority in the classification. [This would include furloughed employees.]"

The Mechanic position on the 11 P.M.- 7 A.M. shift was a temporary position covered by Rule 4(c), the Carrier states. No relief position was applicable, and thus Claimant was assigned in accordance with Step 2 of this Rule. If Claimant had not been assigned, the Carrier asserts it would have recalled a qualified furloughed employee at straight-time rates, but it preferred not to increase its work force. Therefore, the Carrier maintains, neither Rule 17(f) nor Rule 19 was violated, since it was not acting to avoid overtime.

The Carrier's argument is vulnerable due to some important facts in this case.

Claimant was not the senior Mechanic at the headquarter point. According to the Carrier, Claimant was the junior Mechanic. All of the senior qualified employees declined the assignment, however, so Claimant was "force-assigned" as the junior qualified employee at the headquarter point.

The Carrier now concedes that under the terms of Rule 4(c), it should have required the senior Mechanic to take the temporary 11 P.M.-7 A.M. shift. If anyone has a Claim, it is the senior Mechanic, the Carrier observes, not the Claimant here.

We are not entirely convinced that the Carrier is correct in its latest interpretation. It is at least arguable that the Carrier should have offered the position to Mechanics outside the headquarter point before forcing the senior Mechanic there to take the position. In any case, it is clear that Rule 4(c) did not authorize the Carrier to "force-assign" the Claimant.

Perhaps even more critical is the fact that Claimant was assigned to this shift on an overtime basis the first night, November 27, 1984. This certainly raises a suspicion concerning the Carrier's assertion that it was not attempting to avoid overtime.

The Carrier has offered no plausible explanation for its assertion that it never considered overtime as an option; it has simply stated it as fact. Given that overtime was utilized the first night of this temporary position, we cannot accept the Carrier's assertion without some evidence to support it. We cannot escape the conclusion that the Carrier's action violated Rules 17(f) and 19, and we will award the compensation claimed.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 4th day of May 1989.