Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9732
SECOND DIVISION Docket No. 9459
2-MP-CM-'83

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

PARTIES TO DISPUTE: ( Brotherhood Railway Carmen of the United States
( and Canada
(
( Missouri Pacific Railroad Company

DISPUTE: CLAIM OF EMPLOYES:

1. That the Missouri Pacific Railroad Company violated Rule 18 of the scheduled Agreement January 1, 1980 when they forced Carman B. Hirsh to work outside in freezing weather against written orders from his physician.

2. That the Missouri Pacific Railroad Company violated the time limits of Rule 31 (a) of the scheduled Agreement when the designated officer for handling claims and grievances failed to answer, in writing, Local Chairman C. E. Johnson's claim of January 28, 1980 in behalf of Carman B. Hirsh.

3. That the Missouri Pacific Railroad Company be ordered to allow Carman B. Hirsh's claim as written, as per provisions of Rule 31(a). Also, that the Missouri Pacific Railroad Company be ordered to compensate Carman B. Hirsh for eight (8) hours per day at the pro rata rate starting January 1, 1980 and continuing until violation is corrected.

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.

Prior to January 1, 1980, Claimant was assigned to a general repair pool position inside the Carrier's Barton Street Shop. On December 31, 1979, all but four of the pool positions were abolished. The occupants of the four remaining positions were specifically assigned to body repair work on refrigerator cars on an adjacent repair track outside the Barton Street facility. Because Claimant was one of the most senior members of the carmen's craft at this point and because he held prior rights to refrigeration repair work, Claimant elected to remain in the pool assignment. He did not bid for or displace to a position on the rip track inside the shop.

Due to a longstanding medical problem, cold weather caused Claimant some discomfort. Since Claimant had many years of service with the Carrier, he asserted that under Rule 18 the Carrier should have assigned him to an inside carman's position. Therefore, Claimant seeks eight hours of pay for each day the Carrier allegedly compelled him to work outside in frigid, inclement weather. The record reflects that Claimant returned to a general repair pool assignment inside the shop on or about March 12, 1980.

The Local Chairman mailed this claim to the Master Mechanic on January 28, 1980. According to the Local Chairman, the Master Mechanic never responded. The Local Chairman then appealed the claim, not only on its merits but also on the Carrier's purported violation of the Rule 31(a) time limits, to the Mechanical Superintendent. The latter denied the entire claim and asserted that the Master Mechanic had issued a timely denial to the original claim by mailing his reply to the Local Chairman at the Barton Street Shop on March 21, 1980. The Carrier produced a copy of a letter dated March 21, 1980 (from the Master Mechanic) after the General Chairman had appealed this claim to the Director of Labor Relations.

The threshold issue to be resolved by this Board is whether the Carrier denied the initial claim within the sixty day limitation period set forth in Rule 31(a). The Organization contends that since the Local Chairman did not receive any reply from the Master Mechanic within sixty days after January 28, 1980, the claim should be summarily sustained. The Carrier acknowledges that the Master Mechanic received the January 28, 1980 claim but contends that the Master Mechanic timely denied the claim by mailing his response to the Local Chairman at Barton Street which was the accepted means of communication between the parties.

The parties have presented us with an issue of fact which is difficult or impossible for this Board to correctly determine. Either party can abuse the appeal process. The Local Chairman could contend that he never received a response when in fact such a reply did reach him. The Carrier could later manufacture a denial letter when in fact such a denial was not timely sent to the Local Chairman. In this case, we do not doubt the truthfulness of either the Local Chairman or the Master Mechanic. Thus, we conclude that the Master Mehcanic's timely denial of the initial claim was simply lost in the mail. For purposes of this case only, there was no violation of Rule 31(a). However, this Board is aware that this same problem has occurred before on this property. Second Division Award No. 9427 (Mikrut). If the parties are unable to agree upon a mutually recognized means for communicating claims, replies and appeals, we will place the burden squarely on the sender of the correspondence. Thus, in all future controversies of this type on this property, the party dispatching a letter should take whatever steps are necessary to insure that he can prove that the correspondence was received.

Turning to the merits, this Board must deny this claim because Claimant voluntarily failed to take advantage of numerous opportunities to be assigned to a job inside the shop. While Rule 18 may have given Claimant an entitlement to an inside position during the winter (due to his special health problem as well as his long time service), Claimant essentially created his own predicament. By not attempting to claim or bid on a position inside the shop, Claimant was barred from asserting that the Carrier forced him to work outside in cold weather.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 14th day of December, 1983