Award Number 17567

Docket Number TE-16423

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Murray M. Rohman, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Missouri Pacific Railroad (Gulf District), that:

1. Carrier violated the Agreement when on the 6th day of May 1965, it permitted the regular assignee of second trick position at Corpus Christi, Texas to return from leave and assume second trick position without properly notifying Telegrapher R. V. Nolte thereby depriving Mr. Nolte of work on this date.

2. Carrier shall compensate Telegrapher R. V. Nolte eight (8) hours pro rata pay applicable to the position he was entitled to work on May 6, 1965.

EMPLOYES' STATEMENT OF FACTS: Claimant R. V. Nolte was filling a relief position at Corpus Christi, Texas, which worked 6:15 A.M. to 2:15 P.M. on Saturday and Sunday, 4:00 P.M. to 12:00 Midnight on Tuesday and Wednesday, and the agent-telegrapher position at Mathis, Texas on Monday. On Monday, May 3, Mr. Nolte was notified that Telegrapher J. T. Eady was displacing him and it was requested that he inform the Carrier where he desired to exercise his seniority. Claimant Nolte informed the Chief Dispatcher R. L. Caldwell in Palestine, Texas that he would assert his right on the 4:00 P.M. to 12:00 Midnight position on Thursday, May 6, 1965, displacing Telegrapher R. Guajardo who was relieving the regular occupant of the position J. T. Harrison. J. T. Harrison was off on leave of absence.

At 5:13 P.M., May 3, 1965, Wednesday, Telegrapher J. T. Harrison filed a message that he was returning to work at 4:00 P.M. on Thursday, May 6, 1965. This was less than twenty-four hours before the beginning of the assigned hours of the position on May 6. Telegrapher Nolte was unaware of the circumstances since he was observing his rest day. Carrier acknowledged that it was unable to notify Claimant Nolte and permitted Harrison to assume the position with less than the twenty-four hours notice as contemplated in Rule 22(f) of the Agreement. Telegrapher Nolte reported for work at 4:00 P.M., May 6, 1965, only to find that J. T. Harrison was occupying the position. Claimant Nolte lost pay for Thursday, May 6, 1965.

Claim was made and appealed to the highest officer and declined by him. Claim is now properly before your Board for final adjudication.

(Exhibits Not Reproduced)

quently appealed to the General Manager and Director of Labor Relations, who could find no merit to the claim and accordingly denied the claim. The claim was subsequently progressed to your Board.

OPINION OF BOARD: Both parties are in agreement as to the facts. As a result of being displaced, the Claimant exercised his right to bump a junior extra who was working at Corpus Christi relieving Harrison, the regularly assigned employee. The Carrier authorized the Claimant to start his assignment at Corpus Christi, effective 4:00 P.M. on May 6, 1965.

In the interim, a combination of circumstances developed which precipitated the instant dispute. Harrison, the regular incumbent of the position at Corpus Christi had been off sick since April 30, 1965. On May 5, 1965, at 5:30 P.M., Harrison notified the Division Trainmaster that he would report for duty at 4:00 P.M. on May 6. This notification was not received by the Trainmaster until 9:50 A.M. on May 6, nevertheless, he authorized Harrison to report on his assignment.

The Agent at Corpus Christi being advised of Harrison's availability for May 6, attempted to contact the Claimant who was on his rest day and not scheduled to report until 4:00 P.M. that day. Hence, unable to be contacted and uninformed of Harrison's return, the Claimant reported for duty at 4:00 P.M. on May 6. With this turn of events, the Claimant was not allowed to work the position, inasmuch as a vacancy no longer existed with Harrison's return.

The Organization, thereupon, filed the instant claim, alleging a violation of Rule 22 (f), hereinafter quoted:

"(f) At least twenty-four (24) hours notice shall be given to the Supervising Officer before an employe who is laying off or on leave of absence will be permitted to return to duty."

The Carrier defends its declination on a number of grounds. Primarily, Rule 22 (f) has never been applied to regularly assigned employees who are off sick on account of illness, as well as a good faith effort to contact the Claimant and, furthermore, Claimant was not displaced.

Both parties vigorously argue that the practice supports their contentions. Specifically, the Organization asserts that Rule 22 (f) requires at least 24 hours notice before an employee who is laying off or on leave of absence will be permitted to return to duty. The Carrier, on the other hand, counters that this rule is inapplicable to regular assigned employees who are off on account of illness.

Despite the fact that both parties argue their positions in this vein, neither party has substantiated its alleged practice. Hence, it becomes incumbent upon us to inspect the rule carefully.

Rule 22 (f) of the effective Agreement sets forth two instances when an employee is required to give at least 24 hours notice before he will be permitted to return to duty. These two situations are when he is laying off or on leave of absence. An analysis of the effective Agreement does not reveal a provision for sick leave. Therefore, we pose the query, what is the status of an employee who is ill? If he has not taken a leave of absence

and should he fail to report, we are confident that such employee would be disciplined for failure to protect his assignment. His only recourse, therefore, would be to lay off. Whether the layoff is for illness or personal reasons, it still is a layoff. Under these circumstances, it is our view that Harrison was obligated to comply with the 24 hour rule in order to deprive the Claimant of his protection.

We would further note that had the Claimant not reported at 4:00 P.M. on May 6, he could have been held accountable for such failure. In passing, we would remark that the Carrier has merely alleged a practice. Hence, were we even to assume for hypothetical purposes that Rule 22 (f) is ambiguous, it is imperative that a practice which negates a rule be supported by clear and convincing proof. Our careful analysis of the Record fails to reveal such affirmation.

It is, therefore, our considered judgment that the Claim is meritorious.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of October 1969.

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