Award No. 17994
Docket No. TE-18463

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis X. Quinn, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Norfolk & Western Railway Company (Radford Division), that:

Carrier violated the Agreement when it required Leverman E. D. Carter to suspend work on the first shift assignment, 8:00 A. M. to 4:00 P. M., on Tuesday, May 14, 1968.

Carrier violated the provisions of the Telegraphers' Agreement effective February 16, 1958, particularly Rules 16(c), among others.

Carrier shall now be required to compensate Leverman E. D. Carter for eight (8) hours' pay at the prevailing rate of pay for first shift position, Randolph Street Tower, Roanoke, Virginia, for date of May 14, 1968, as a result of the aforementioned violation.

EMPLOYES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

The dispute involved herein is based on provisions of the collective bargaining agreement, effective February 16, 1958, as amended and supplemented, and by this reference is made a part hereof.

The dispute was handled in the usual manner on the property, including conference, December 27, 1968, up to and including the highest officer of the Carrier designated to handle claims and grievances, and remains unsettled.

The controversy arose because Carrier did not properly notify claimant he was displaced.

Carrier contends claimant suffered no suspension of work, and that Rule 16 (c) places obligation upon the employes, rather than on the Carrier.

Employes contend that claimant should have been notified on or before his tour of duty ended (first shift 8:00 A. M. to 4:00 P. M.), Monday, May 13, 1968, as Rule 16 (c) states.

Carrier violated the provisions of the Telegraphers' Agreement effective February 16, 1958, particularly Rules 16 (c) and 7 (c), among others.

Carrier shall now be required to compensate Leverman E. C. Carter for eight (8) hours' pay at the prevailing rate of pay for first shift position, Randolph Street Tower, Roanoke, Virginia, for date of May 14, 1968, as a result of the aforementioned violation."

The Carrier declined the claim.

OPINION OF BOARD: Claimant is regularly assigned to a rest day relief position at Randolph Street Tower, Roanoke, Virginia, scheduled as follows:

Friday — 12:00 A. M. to 8:00 A. M.
Saturday — 8:00 A. M. to 4:00 P. M.
Sunday — 8:00 A. M. to 4:00 P. M.
Monday — 4:00 P. M. to 12:00 Midnight
Tuesday — 4:00 P. M. to 12:00 Midnight
Wednesday — Rest Day
Thursday — Rest Day

On Sunday, May 12, 1968, Claimant was notified by the Carrier that, due to illness of the regular first trick (8:00 A. M. to 4:00 P. M.) telegrapher at Randolph Street Tower, he would be required to work that shift commencing on Monday, May 13, rather than his own assignment. He worked as instructed on May 13. Then, about 8:00 P. M. that day, the regular first trick employe reported that he would resume duty on his job the next day, May 14. Claimant, in turn, was notified at 8:15 P. M. on May 13 that the regular incumbent of the first trick would resume duty on the 14th. Claimant worked his regular assigned hours on the 14th.

He then filed a time slip claiming eight hours' additional payment, contending that since he was not notified in accordance with Rule 16 (c) of the regular incumbent's resumption of duty, he was suspended from work on the first shift, contrary to the provisions of Rule 7 (c).

The pertinent rules read as follows:

"RULE 7 (c).

Employes will not be required to suspend work during regular hours or to absorb overtime."

"RULE 16 (c).

An assigned employe when returning after absence for any reason, regardless of the number of days so absent, will be required to give the proper company officer sufficient advance notice of his return in order that the employe filling his assignment can be notified before going off duty that the regular incumbent will protect the assignment the next work day. It is understood that when an employe gets permission to be relieved for a specified number of days, he has given the required notice as to when he will return to duty."

Carrier declined the claim on the grounds that there was no violation of Rule 7 (c), and that observation of Rule 16 (c) is an employe responsibility. The record shows that a separate claim, under Rule 7 (c), for a day's pay for being suspended from work on his own assignment on May 13 was allowed the claimant.

In considering the present claim both rules must be considered at the same time. Carrier's opinion that it has no responsibility with respect to Rule 16 (c) cannot be sustained. The rule clearly implies that Carrier is not free to accept and act on a notice not in conformity with this rule's provisions. If Carrier does accept and act on such an improper notice, it does so at its peril because the rule is part of the contract to which it agreed. The record before us leaves no doubt that Rule 16 (c) was violated. The consequences of this violation will be discussed below.

Rule 7 (c) is clearly an employe protective rule restricting Carrier's actions to the extent it plainly provides. On the date in question, May 14, 1968, and under all the circumstances of this particular case, Claimant had a right to work either the first trick at Randolph Street Tower or the second trick, but not both. He did work the second trick, his regular assigned hours for that day. Therefore, there was no violation of Rule 7 (c).

The consequences of the violation of Rule 16 (c), however, present a more difficult problem. The rule is what — for lack of a better term — might be called a "convenience rule." It was designed to protect relief employes from the inconvenience, and perhaps additional expense, of short notice that the employe being relieved will resume duty. It does not contain any provision for compensation in case of violation.

The Employes, however, contend that a penalty is required in order to maintain the sanctity of the agreement, citing Award 4601 as support for this contention. The Board has followed this line of reasoning in numerous instances. There is, however, an equally respectable line of awards decided on the basis that in the absence of provision for damages the burden is upon the claimant to prove that he was injured, and, in the absence of such proof, no reparation is to be awarded. Awards 12937, 12962, 13150, 13200, 14319, 17664, among others.

We are of the opinion that Rule 16 (c) should be applied in accordance with this latter principle. Claimant apparently suffered no loss of earnings, nor was he put to any additional expense because of the violation, so far as shown by the record. Accordingly, the claim for compensation will be denied.

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