

Award No. 16012

Docket No. TE-15082

NATIONAL RAILROAD ADJUSTMENT BOARD**THIRD DIVISION**

John J. McGovern, Referee

PARTIES TO DISPUTE:**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION**
(Formerly The Order of Railroad Telegraphers)**MISSOURI PACIFIC RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Railroad (Gulf District), that:

1. Carrier violated Rule 25 (d) of the Agreement when, on the 12th day of April, 1963, it arbitrarily permitted Junior Extra Telegrapher J. R. Cowan to displace Senior Extra Telegrapher M. K. Johnson from the 10:30 P. M.-6:30 A. M. assignment in MS Office, San Antonio, Texas, and thereby forcing Telegrapher Johnson to leave his home station and protect extra work in H Office, Palestine, Texas.

2. Carrier shall compensate Telegrapher M. K. Johnson eight (8) hours at the pro rata rate of \$2.7305 account loss in pay on April 12, 1963, also, compensate Telegrapher Johnson at the punitive rate of pay for all time worked outside the 10:30 P. M.-6:30 A. M. position in MS Office, San Antonio, Texas, and for all expenses incurred while away from his home station beginning April 13, 1963, and continuing thereafter as long as this violative act continued.

EMPLOYEES' STATEMENT OF FACTS: Claimant M. K. Johnson was an extra Telegrapher assigned to third shift Telegrapher's position in MS Office, San Antonio, on April 8, 1963, with assigned hours of 10:30 P. M. to 6:30 A. M. The employe holding the position in H Office, Palestine, was assigned a vacation beginning April 13, 1963. Extra Telegrapher J. R. Cowan was junior to the claimant, M. K. Johnson. Telegrapher Cowan has been an extra employe on and off since the day he began working on the railroad on November 10, 1954, and has worked at Austin and other points where CTC theory is in operation. Telegrapher Cowan notified the Carrier that due to sickness in his family he could not work outside the San Antonio area. Without the concurrence of the Organization, the Carrier removed the senior extra employe, Claimant Johnson, from his position at MS Office, San Antonio, and required him to perform the vacation relief service, effective 7:00 A. M., April 13, 1963, in H Office, Palestine, and thereafter assigned junior extra employe J. R. Cowan to the position in MS Office.

Claim was made in behalf of Telegrapher M. K. Johnson who lost a day's pay on April 12, 1963, in making this transfer at the order of the Carrier. Claim

Antonio pending completion of bulletin and assignment. A vacancy occurred in H office at Palestine for which the only other extra telegrapher available, Mr. J. R. Cowan, could not protect because of the fact that he was not qualified to handle the CTC board.

The Carrier instructed Mr. M. K. Johnson to report to Palestine to protect the vacancy in H office and instructed Mr. J. R. Cowan to protect the position at San Antonio formerly protected by M. K. Johnson.

There is no rule in the Telegraphers' Agreement which prohibits the Carrier from utilizing extra employes in order to protect the needs of the service as was done in this case.

In view of the foregoing, claim is respectfully declined.

Yours truly,

/s/ B. W. Smith"

9. Conference discussion of this dispute was held October 15, 1963; however, the parties were unable to resolve the dispute and the claim is properly before your Board.

OPINION OF BOARD: Claimant was an extra telegrapher assigned to third shift Telegraphers' position in MS Office, San Antonio, on April 8, 1963, with assigned hours of 10:30 P. M. to 6:30 A. M. The employe holding the position in H Office, Palestine, was assigned a vacation beginning April 13, 1963. Extra Telegrapher Cowan was junior to Claimant. Cowan notified the Carrier that because of illness in his family he could not work outside the San Antonio area. Claimant was thereupon removed from the position at MS Office, San Antonio, and assigned as vacation relief in H Office, Palestine. Junior Telegrapher Cowan was then assigned to the position in MS Office. Petitioner contends that Carrier, by assigning the junior man to the MS Office stands in violation of Rule 25 (d); that rule reads as follows:

"RULE 25. EXTRA EMPLOYES

(d) Senior extra employes when available and competent will be used in preference to junior extra employes but cannot claim extra work in excess of forty hours in his work week if a junior extra employe who has had less than forty hours' work in his work week is available. Senior extra employes will be allowed to displace junior extra employes. An extra employe who displaced another extra employe on position where a transfer is involved will be required to effect transfer of accounts during the last two hours of tour of duty on the day previous, unless other arrangements agreeable to all concerned are made. Transfer of accounts will be made by the employes involved without expense to the Railway Company. Under this Rule extra employes must accept the work to which entitled."

Carrier comes forth with the argument that Cowan, the junior man, was not qualified to work on the CTC Board at Palestine, whereas Claimant had just recently worked in H Office, Palestine and is qualified on the CTC.

Petitioner answers by stating that Cowan was qualified, since he has performed duties at Austin and many other interlocking plants in the vicinity of San Antonio, and understands the function of centralized control operations. They further aver that in accordance with Rule 25 (d), preference must be extended to the senior man and not the reverse as they allege Carrier has done in this case. They rely principally on Award 508, which sustained the principle that a senior extra telegrapher must be given preference over junior extra telegraphers.

In reviewing the pertinent portion of Rule 25 (d), we note that it states clearly and without equivocation, that senior extra employees will be used in preference to junior extra employees. There are however two qualifications that must be considered before the senior man is given the assignment. First, he must be available. Second, he must be competent. If he meets these two qualifications, he must be given preference under the Rule. In discussing this rule, we wish to state categorically that Carrier is empowered by the provisions of this rule to appoint a junior man when the senior man is unavailable or incompetent. When Carrier pursues that course of action however, it must come forward with substantial evidence to show that it was justified in assigning the junior man. In other words, in the instance just described, Petitioner first alleges a violation of the rule, then Carrier comes forth with an affirmative defense of non-availability or incompetence, which it must prove by a preponderance of evidence to support a denial award.

In the case before us, we do not have the senior man being held incompetent in the eyes of the Carrier, we have the Carrier justifying its action by stating that the junior man was not competent to perform the CTC duties at Palestine. Hence, in the execution of its managerial prerogative, it assigned the senior man. Viewing Rule 25 (d) literally, Petitioner has presented at least a prima facie case that the rule has been violated, and indeed the assignment of the senior man to Palestine has itself been confirmed by the Carrier. It has not denied this essential fact. It has justified its action by asserting that the junior man was not competent. It appears to us that once Petitioner has basically established a violation of a rule, which it has in this case, the burden of proof then shifts to the Carrier to present evidence of an affirmative defense. We have examined the record before us and we find it singularly lacking in any evidence to show that Cowan was not qualified. They merely assert that he was not qualified. It is true that Carrier in this area has broad powers of discretion in the exercise of its managerial prerogatives, but when so exercised it must be supported strongly by probative evidence. Carrier does not speak "ex Cathedra" in a situation such as the one confronting us. It must present evidence. Because it has failed to prove its affirmative defense, we hold that it has violated Rule 25 (d). We will sustain part 1 of the Claim.

Part 2 of the Claim, the method of compensating Claimant for the violation, although not referring specifically to a rule in the contract, we are unable to sustain as presented. In the handling on the property, Petitioner based its claim for compensation on Rule 13 — Relief Work — Regular Employees. This rule reads as follows:

"Regularly assigned hourly rated employees used for relief work shall receive the higher rate of the two positions, and pro rata rate for time worked within the hours of his assigned position, and time and one-half for time worked outside the hours of his assigned position, with necessary actual expenses while away from home station.

If used in another office at the same station will be allowed additional transportation expenses incurred. Employees used for relief will have no claim for guarantee of regular assignment in addition to compensation allowed on relief assignment. Employees relieving monthly rated positions will receive the higher rate of the two positions, and necessary expenses while away from home station."

Clearly this rule is inapplicable in this case. Claimant is not a "regularly assigned hourly rated employee."

Under the "make whole" concept, a principle established through a long series of awards, we award the Claimant the difference in pay and expenses incurred as a result of him having been assigned to Palestine. This would also include the loss of a day's pay resulting from this transfer. The intent of this award is to make Claimant "whole" for any losses incurred as a result of Carrier's action.

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 Employees involved in this dispute are respectively Carrier and Employees 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

Part 1 - Claim sustained.

Part 2 - Claim sustained in accordance with the expressed Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of December 1967.