SPECIAL BOARD OF ADJUSTMENT NO. 506

AWARD NO. 4
DOCKET NO. 4
ORT CASE 3359

THE ORDER OF RAILROAD TELEGRAPHERS

vs.

MISSOURI PACIFIC RAILROAD COMPANY

Roy R. Ray, Referee

STATEMENT OF CLAIM:

Claim of the General Committee of The Order of Railroad Telegraphers on the Mo. Pacific (Texas & Louisiana), that:

1. Carrier violated Rule 10 of the Agreement when it failed to pay J.G.Berlinger 8 hours at pro rata rate of $2.435 per hour for Sept. 1, 1960, after it abolished his position as Agt.-Telgr., Reaves, La., on August 31, 1960.

2. Carrier shall pay J.C.Berlinger 8 hours at pro rata rate of $2.435 per hour as time lost in transferring from Agt.-Telegr., Reaves, La., to third shift Teleg. position, Anchorage, La.

OPINION OF BOARD:

Claimant held the position of Agent-Teleg. at Reaves, La., prior to Sept. 1, 1960, with work hours 8 AM to 5 PM. Carrier abolished this position effective with Claimant's tour of duty on Aug. 31, 1960, after giving Claimant the required 72 hours notice. Claimant, exercising his seniority, chose to displace the third trick teleg. at Anchorage, La., which position was assigned to begin work at 12:01 AM Sept. 1st. Since Claimant had worked the first shift at Reaves on Aug. 31st, he was forbidden by the Hours of Service Act (prohibiting an employe from working more than nine hours in a twenty-four hour period) from going to work at Anchorage at 12:01 AM on Sept. 1st. A claim was filed asking that Carrier pay Claimant for the 8 hour shift on Sept. 1st. The claim was denied by Carrier at all steps on the property.

Employes contend that this was a transfer by Claimant from one station to another in the exercise of seniority, and under Rule 10(a) entitled TRANSFERS says:

"Time lost in transferring from one station or position to another, except as provided for in Rule 20, Section (g), shall be paid for at the rate of the position from which transferred excepting such time as may be lost of the employe's own accord. The word 'transferring' includes transfer in the exercise of seniority, and also time lost in checking in and out of positions.'

Carrier takes the position that this was not a transfer at all and that Rule 10(a) is not applicable. It says that Rule 10 was intended to apply only to transfers to fill vacancies of short duration and where there was a transfer of accounts. Carrier says this was a displacement in accordance with the provisions of Rule 21(a) and that since Claimant chose to displace on this position, knowing that the Hours of Service Law prevented him from working the shift in question the Company is under no obligation to pay Claimant for the shift that he did not and could not work. It also argues that even if Rule 10(a) were applicable, under it Claimant cannot recover for time lost of his own accord; and that since Claimant could have displaced a number of other junior employes without losing time when he chose to displace at Anchorage the time lost was due to his own volition.

But at the outset Carrier says the Board is barred from considering the claim on the merits due to failure of Employes in appealing from the decision of the Asst. Gen. Mgr., to give him a notice that his decision declining the claim was rejected. Such a notice is required by Article V 1(b) of the 1954 National Agreement which reads:

"If a disallowed claim or grievance is to be appealed, such an appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision.. Failing to comply with this provision the matter shall be considered closed . . ."

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We must first consider the challenge to our jurisdiction. Employes argue that the letter of the Gen. Chairman to the Asst. Gen. Mgr., dated Nov. 25, 1960, contained a notice advising him that his declination of the claim was rejected. We cannot agree. In that letter the Gen. Chairman said, "This organization does not agree that Rule 20(f) covers a rule of this description. Inasmuch as Telegrapher Berlinger was forced into such a move, Rule 10 is the proper rule to apply in this case which entitled him to a day's pay." A conference was requested. After the conference the declination was reaffirmed on Dec. 21, 1960. Appeal to the Chief Pers. Officer was taken on Dec. 31,1960. We do not feel that the letter of Nov. 25th was a rejection notice as contemplated by Article V i(b).

The clear language of this Article is: "Failing to comply with this provision, the matter shall be considered closed." The Carrier did not expressly waive this requirement. Employes argue, however, that the failure of the Chief Pers. Officer to raise this point in denying the claim constituted an implied waiver of the Article V violation. We do not agree. The last sentence of the section provides that the parties may by Agreement, at any stage of the handling of a claim on the property, extend the 60 day period for decision or appeal, but nothing in the language contemplates implied waiver. As much as we dislike to dispose of a case on any ground other than the merits, in our judgment we have no alternative here but to dismiss the claim.

FINDINGS: That Employes failed to comply with Article V 1(b) of the 1954 Agreement and the Board has no jurisdiction over the dispute.

AWARD

Claim dismissed.

SPECIAL BOARD OF ADJUSTMENT NO. 506

s/ Roy R. Ray
Roy R. Ray - Chairman

s/ D. A. Bobo
D. A. Bobo - Employe Member

s/ G. W. Johnson
G. W. Johnson - Carrier Member

St. Louis, Missouri
July 29, 1963
File 52-60