Award No. 36
Docket No. 36

MOP File 380-1055-152
ORT File 1162-54

SPECIAL BOARD OF ADJUSTMENT NO. 117

ORDER OF RAILROAD TELEGRAPHERS
and
MISSOURI PACIFIC RAILROAD COMPANY

Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Railroad that:

1. Carrier violated the provisions of the Agreement between the parties when it failed and refused to compensate H. L. Simpson at the rate of time and one-half for the work performed on third shift Telegrapher-Clerk on Thursday, May 13, 1954, on Montrose, Arkansas, swing assignment, the 6th day in his work week.

2. Carrier shall now pay H. L. Simpson the difference between the straight time rate which he was paid and the time and one-half rate which he should have been paid for the work performed on May 13, 1954, on the third shift Telegrapher-Clerk's position at Montrose, Arkansas.

OPINION OF BOARD: The claimant here was regularly assigned to a relief position which carried assignments at two different locations, with a work week commencing on Saturday, with Thursdays and Fridays as rest days.

On May 2, 1954, claimant here was given notice of a change in rest days and designating new relief assignment covering only one point, with Sunday through Thursday as work days, with Friday and Saturday as scheduled days of rest.

The record indicates that the claimant performed service on Sunday and Monday, May 9 and 10, as well as Tuesday and Wednesday, May 11 and 12. The Organization alleges that the claimant was improperly compensated at the pro rata rate on Thursday, May 13, which, it contends, was the sixth day in the claimant's work week which, in truth and in fact, began on Saturday, May 8. The Organization cites Rule 8, Section 2(e-4); Rule 8, Section 2(i); and Rule 10(h), which will be quoted herein below.

The Organization asserts that in the work week beginning Saturday, May 8, the claimant worked the work days of his old relief assignment and on the first rest day thereof, that is, May 13, was required to work, which was, in truth and in fact, the sixth consecutive day of work for the claimant who had not exercised his displacement rights as he might have under the rules of the effective agreement and, in so doing, he worked both in excess of five days and 40 hours in a work week, contrary to the provisions of Rule 10(h), without the compensation provided therein.

Rules cited by the Organization mentioned above, are here quoted:

"8-2(e-4) Changes in the assignment of regular relief positions from those advertised will constitute a new position, but the employe holding the regular relief position at time of change will have the option of retaining it or exercising displacement privileges. In the latter event, the relief position so vacated will be rebulletined. A change in the starting time of a position on which they relieve does not grant regular relief employes displacement privileges."

"8-2(i) BEGINNING OF WORK WEEK: The term 'work week' for regularly assigned employes shall mean a week beginning on the first day on which the assignment is bulletined to work, and for unassigned employes shall mean a period of seven consecutive days starting with Monday."

"10(h) Work in excess of 40 straight time hours in any work week shall be paid for at one and one-half times the basic straight time rate except where such work is performed by an employe due to moving from one assignment to another or to or from an extra or furloughed list, or where days off are being accumulated under paragraph (g) of Section 2 of Rule 8.

"Employes worked more than five days in a work week shall be paid one and one-half times the basic straight time rate for work on the sixth and seventh days of their work weeks, except where such work is performed by an employe due to moving from one assignment to another or to or from an extra or furloughed list, or where days off are being accumulated under paragraph (g) of Section 2 of Rule 8.

"There shall be no overtime on overtime; neither shall overtime hours paid for, other than hours not in excess of eight paid for at overtime rates on holidays or for changing shifts, be utilized in computing the 40 hours per week, nor shall time paid for in the nature of arbitraries or special allowances such as attending court, deadheading, travel time, etc., be utilized for this purpose, except when such payments apply during assigned working hours in lieu of pay for such hours, or where such time is now included under existing rules in computations leading to overtime."

The respondent asserts that there is no question as to its right to make the change in the work week and resultant rest days of a relief assignment as authorized within the meaning of Rule 8-2(k), which reads as follows:

"(k) The rest days of each regular assignment (including relief assignments) shall be designated and shall be the same days each week, but may be changed to meet service requirements by giving not less than seventy-two (72) hours written notice to employes affected."

The respondent asserted that the changing of the relief assignment in question from Saturday through Wednesday with Thursday and Friday as rest days, to an assignment of Sunday through Thursday with Friday and Saturday as rest days, had the effect of giving the claimant a new work week by virtue of the fact the work week of the old assignment had been cancelled as of May 9 by the notice of May 2, 1954,

which precludes any finding here, that the claimant by virtue of the changed work week, worked in excess of five days or 40 hours, which would entitle him to punitive pay within the meaning of Rule 10(h).

The respondent further asserts that the work week and resultant rest days of the claimant were changed only after notice was given within the meaning of Rule 8-2(k) and that the changing of assignments of regular relief positions was not, as the Organization alleges, handled contrary to Rule 8-2(e-4).

An examination of the record in this dispute and the rules involved indicates that a similar factual situation and an identical rule as is here controlling, namely, Section 8-2(e-4), was interpreted in Third Division Award 5586, in which it was held as follows:

NOTE: Rule 32, Section 1(e) in the below quoted Award is identical with the present Rule 8, Section 2(e-4), and Rule 29(b) mentioned therein is identical with the existant Rule 10(h).

"The determination of the issue presented in this docket devolves upon the effect to be given to the quoted paragraph of Rule 32, Sec. 1(e). Obviously when an employe moves from one assignment to another in the exercise of seniority and works on the new assignment after having performed forty hours of work in the work-week on the old assignment or works a day which would have been a rest day on the old assignment, he would not be entitled to penalty pay for such work under the exception provided for in Rule 29(b) (c). However, electing to remain on a relief position when it is changed from the bulletined assignment in accordance with the right given the incumbent in Paragraph 5 of Rule 32 is not the exercise of seniority. That right of election is given because of incumbency in a given position and not because of seniority. Although Paragraph 5 of Rule 32, Sec. 1(e), initially provides that a change in the assignment of regular relief positions will constitute a new position, the nature of that change is qualified with respect to the incumbent. The effect of the qualifying language is to permit the incumbent to elect to treat the position as a new one or as the old one as changed by the Carrier. That is evident from the language of the rule. The rule does not give the incumbent preference in bidding for the 'new' position but provides that she shall retain it. Thus, some vestige of the old position must remain when the incumbent elects to remain, otherwise there would have been nothing to retain. One cannot retain that which is no longer in existence nor retain something which is newly created. We conclude, therefore, that with respect to Claimant when she elected to remain on the old position, as changed, she has not moved to a 'new' assignment and hence the exception in Rule 29(b) and (c) does not apply."

We do not see that there exists a valid reason why the findings and holdings enunciated in this award should not be controlling here.

This claim is meritorious.

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FINDINGS: The Special Board of Adjustment No. 117, upon the whole record and all the evidence, finds and holds:

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 Special Board of Adjustment has jurisdiction over the dispute involved herein; and,

That the Carrier violated the effective agreement.

AWARD

Claim sustained.

SPECIAL BOARD OF ADJUSTMENT NO. 117

Livingston Smith - Chairman

C. O. Griffith - Employe Member

G. W. Johnson - Carrier Member

St. Louis, Missouri
July 26, 1956