Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13406
Docket No. 13183
99-2-96-2-93

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (System Council No. 6
(International Brotherhood of Firemen and Oilers
(
(CSX Transportation, Inc. (former Baltimore and
(Ohio Railroad)

STATEMENT OF CLAIM:

"1. The B&O Railroad Company violated Article I of September 25, 1964 Agreement when F&O R. P. Hamilton was receiving a dismissal allowance pursuant to protective benefits of the September 25, 1964 Agreement, was offered a position at another point, namely, Cincinnati, Ohio, and forfeit said dismissal allowance that he was receiving.

2. That accordingly, CSXT be ordered to reinstate Firemen and Oiler R. P. Hamilton's guarantee with any and all benefits attached thereto as provided by the September 25, 1964 Agreement beginning on December 1, 1994."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was furloughed in September 1991 as a result of the last Laborer position in Cowen, West Virginia, being abolished, and was afforded protective benefits under Article I, Section 6 of the September 25, 1964 Shop Crafts Protective Agreement. In December 1994 the Claimant was advised that there was a Laborer position in Cincinnati, Ohio, available to him under Rule 27 of the working Agreement, and that if he accepted the position he would be afforded relocation benefits. The Claimant was also advised that if he chose not to accept the position, his protective benefits would cease. Cincinnati was over 250 miles from the Claimant's home.

Although the Claimant initially set out to medically qualify for such position, prior to the completion of his return to work physical, he notified the Carrier that he had decided not to accept the transfer due to his wife's serious illness. The Carrier's termination of the Claimant's protective benefits effective December 1, 1994 was the basis of the instant claim, which was filed by the Organization on March 13, 1995.

The Organization argues that because the Claimant's working Agreement gave him seniority only at the point where he was employed, and there were no available positions at that location when he was furloughed or subsequently, the Claimant satisfied all contractual obligations for entitlement to protective benefits. It contends that Rule 27 was amended by a Memorandum of Agreement in 1991, and, in any case, does not force the Claimant to accept a transfer requiring him to move. Rather, the Organization asserts that Rule 27 makes transfers voluntary, thereby preventing the Carrier from requiring the Claimant to transfer to a location outside his seniority point in order to retain his entitlement to protective benefits. The Organization notes that the Claimant would have been forced into a worse position because he would have had no seniority in Cincinnati and would have had to leave his newly built home and move his family.

The Organization argues that the only methods by which a dismissal allowance can cease prior to its term are listed in Section 6(j) of the September 25, 1964 Agreement, which provides, in pertinent part:

> "1. Failure without good cause to return to service in accordance with working agreement after being notified of position for which he is eligible and as provided in paragraphs (g) and (h)."

Section 6(g) referred to above states:

> "An employee receiving a coordination allowance shall be subject to call to return to service after being notified in accordance with the working agreement, and such employee may be required to return to the service of the employing carrier for other reasonable comparable employment for which he is physically and mentally qualified and which does not require a change in his place of residence, if his return does not infringe upon the employment rights of other employees under the working agreement."

The Organization contends that the above Rules clearly show that the Claimant is not required to return to work in order to protect his benefits if the position requires a change in his place of residence, as it did in this case. It relies upon the following Awards in support of its position that the Claimant was entitled to decline the transfer and retain his protective benefits: STB Docket No. 28905 (1997); Special Board of Adjustment No. 570, Awards 114, 159, 414; TCU and CSXT, Arbitration under Art I, Section 11 of the New York Dock Conditions (Fredenberger, 1996); BRC and B&O/L&N, Arbitration under Art. I, Section 4 of the New York Dock Conditions (Fredenberger, 1983); TCU and CSXT, Arbitration under Art I, Section 11 of the New York Dock Conditions (Dennis, 1993), review refused in ICC Finance Docket No. 28905 (Sub-No. 25); SMWIA and BN, Arbitration under Section 9 of the 12/29/67 Merger Protection Agreement (Twomey, 1989); Second Division Awards 6045, 13009, 13010; Third Division Awards 6935, 13623.

The Carrier argues that a dismissed employee is obligated under the September 25, 1964 Agreement to accept employment at another location in the exercise of seniority in order to retain his protected status even if it requires a change of residence. The Carrier contends that this issue has long been decided by the entity created by the parties to hear these type of disputes, and relies upon the following Awards in support of its position that the Claimant's failure to accept a transfer to the same position results in the forfeiture of his right to protective benefits: Special Board of Adjustment No. 570, Awards 90, 180, 240, 251, 308, 313, 360, 397, 578, 712, 753, 782, 822; BMWE and CNWT, Arbitration under Art I, Section 11 of the New York Dock Conditions (Kasher, 1982); IAMAW and CSXT, Arbitration under Art I, Section 11 of the New York Dock Conditions (Richter, 1995); BRC and CSXT, Arbitration under Art I, Section 11 of the New York Dock Conditions (Scheinman, 1993).

The Carrier relies upon the following language of Article I, Section 3 of the September 25, 1964 Agreement:

> "An employee shall not be regarded as deprived of employment or placed in a worse position with respect to his compensation and rules governing working condition in case of his . . . failure to obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements, ..."

In addition to the provisions of Article I, Section 6 of the September 25, 1964 Agreement noted by the Organization, the Carrier also notes the relevance of the following language:

> "Any employee who is deprived of employment as a result of a change in operations for any of the reasons set forth in Sec. 2 hereof shall be accorded a monthly dismissal allowance in accordance with the terms and conditions set forth in Section 7(a) through (j) of the Washington Job Protection Agreement of May, 1936 reading as follows:
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> * * *
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> (c) An employee shall be regarded as deprived of employment and entitled to a coordination allowance in the following cases:
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> 1. When the position which he holds on his home road is abolished as a result of coordination and he is unable to obtain by the exercise of his seniority rights another position on his home road or a position in the coordinated operation, ..."

Finally, the Carrier relies upon the language of Rule 27 of the working Agreement which provides:

> "While employees are furloughed, if men are needed at any other point, they will be given preference to transfer, with privilege of returning to home station when force is increased, such transfer to be made without expense to the Company. Qualifications and seniority to govern all cases."

The Carrier contends that Rule 27 gives employees preferential right to jobs at another location, and thus must be considered a seniority right under the Agreement, which an employee is obligated to exercise in order to retain his protected status. The Carrier asserts that the Claimant had seniority rights under Rule 27 to the position offered in Cincinnati, Ohio, and, despite the fact that he was not obligated to submit an application for such position under the working Agreement, he was required to return to service under Section 6(j) of the September 25, 1964 Agreement when notified of this position in his craft while receiving protective benefits. The Carrier relies upon the difference between an offer of work within an employee's craft, as exists in this case, which requires an employee to transfer, and an offer of "comparable employment" in another craft that does not require an employee to change his place of residence. See IAMAW and CSXT, (Richter), supra.

The parties are correct in asserting that the issue of an employee's entitlement to receive and/or retain protective benefits under Agreements incorporating the New York Dock Conditions, and such employee's concomitant responsibilities and obligations to accept offered employment has been the subject of numerous prior Awards issued by Special Board of Adjustment No. 570, Arbitration Committees under Article I, Section 11 of the New York Dock Conditions, the ICC and Surface Transportation Board (STB), and various Divisions of this Board. A thorough review of this extensive cited precedent reveals support for each of the parties' positions under the Agreements in issue between the Carriers and Organizations there involved.

While it is difficult to determine which line of cases is more compelling under the circumstances of this case, the Board will focus on those Awards which are on the property and involve the instant Carrier. Of all cited cases, only Second Division Awards 13009 and 13010 involve the same parties as the instant dispute, and the record reflects that the parties herein agreed to hold the instant claim in abeyance until the issuance of those Awards, without giving up their right to continue to process this case after receipt of the result. These Awards were issued on July 10, 1996 and deal with the applicability of the same Agreement language here in dispute.

In those cases Referee Herbert L. Marx, Jr. was faced with Claimants who were furloughed in one location, were drawing dismissal allowances in accordance with Article I, Section 6 of the September 25, 1964 Agreement, and were offered positions in other locations requiring a change of residence under threat of loss of benefits if they refused the jobs. In Award 13009, the Carrier offered the employees positions in

Waycross, Georgia, some 275 miles from their homes and both Claimants accepted the positions under protest. In Award 13010, the Claimants refused the transfer to Augusta, Georgia.

In Second Division Award 13009, the Board rejected the Organization's contention that Rule 23(f), which is almost identical in language to Rule 27 relied upon by the Carrier herein, had been superseded by a 1991 Memorandum Agreement, finding such Agreement applicable to promotions and the performance of extra and relief work only. We make the same finding herein. The Board went on to hold that this Rule provides an opportunity for a furloughed employee to accept a position elsewhere, but does not require him to do so, and that the implications of such Rule cannot be changed by offering to provide moving expenses for such a move. The Board there concluded that return to work from furlough is not mandatory under the language of Sections 6(g) and (j) of the September 25, 1964 Agreement if it requires a change in the place of residence. Second Division Award 13010 adopted the same rationale and provided a monetary remedy for the Claimants who did not accept the transfers.

On July 11, 1996 Neutral William Fredenberger issued an Award in TCU and CSXT, Arbitration under Art I, Section 11 of the New York Dock Conditions, dealing with the issue of whether a furloughed employee receiving protective benefits has the obligation to bid a vacant position on a seniority district where he does not hold seniority or forfeit his protection. Fredenberger relied upon an ICC Decision in Finance Docket No. 28905 (Sub-No. 25) declining to review TCU and CSXT, Arbitration under Art I, Section 11 of the New York Dock Conditions (Dennis, 1993), in holding that "the nature of the agreement upon which the Carrier relies to force employees to accept positions on seniority districts where they do not hold seniority is determinative . . . if the agreement is mandatory the carrier possesses such right. If the agreement is voluntary it does not." Finding that the applicable clerical Rule was voluntary and provided furloughed employees the opportunity to secure positions on other seniority districts but did not require them to do so, Fredenberger held that the Carrier could not terminate the protective benefits of employees who decline to bid on vacant positions in other seniority districts. Carrier Member Warren Comiskey filed a Dissent, relying upon many of the cases cited by the Carrier herein.

The Fredenberger Award was appealed by the Carrier and reviewed by the Surface Transportation Board in Finance Docket No. 28905 (Sub-No. 28). In its Decision dated August 21, 1997, the STB affirmed Fredenberger's findings and held

that, absent a provision in their Collective Bargaining Agreement that would permit involuntary transfer, dismissed employees do not forfeit their dismissal allowances if they refuse to accept a recall to work that would require them to change their residence. Because the arguments and provisions relied upon by the Carrier and the Organization in the instant case are similar to those asserted to the STB, we find that the following conclusions have direct bearing on the claim before us.

> "The requirements for initially granting dismissal allowances are not at issue here . . . Rather, the controversy is over the circumstances under which previously granted dismissal allowances may be withdrawn. The withdrawal of dismissal allowances after they are initially granted is governed by section 6(d) of *New York Dock*, 360 I.C.C. at 87. . . .
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> Most of the precedents cited by the parties involve the initial receipt of a dismissal allowance. Such precedents are not helpful because they have no bearing on the interpretation of section 6(d), which involves the termination of an existing dismissal allowance. . . .
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> As noted by CSXT, section 6(d) has a proviso that allows termination of a dismissal allowance for 'failure to return to service after having been notified *in accordance with the working agreement.*' (Emphasis added) This proviso, however, must be considered in light of the next proviso of section 6(d), hereafter called the 'change of residence proviso.' The change of residence proviso provides that a dismissed employee's dismissal allowance ceases for 'failure without good cause to accept a comparable position *which does not require a change in his place of residence.*' (Emphasis added).
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> 'Working agreement', as used in this section, plainly refers to existing CBAs. Here . . . it is undisputed that the existing CBA would not permit management to require the employee to accept the proposed transfer. Hence an employee recalled in accordance with the agreement cannot be required to accept such a transfer or forfeit his or her dismissal allowance. The aforementioned change of residence proviso establishes the circumstances under which an employee can be recalled and required to accept a transfer to a comparable position under the labor conditions (i.e., other than as provided for in existing CBAs.) That proviso clearly limits

> the right of transfer of recalled employees, other than as provided by existing CBAs, to locations that do not require a change of residence. . . .
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> Here, the CBA does not permit management to require Ebrens to relocate and the change of residence proviso of section 6(d) restricts carrier's ability to terminate Ebrens' dismissal allowance for failure to relocate to a position that would require a change of residence after he attained the status of a dismissed employee."

The STB went on to hold that, "where notice of available comparable positions is given to dismissed employees in accordance with a CBA that does not permit management to require employees to change seniority districts, management may not force employees to do so or lose entitlement to a dismissal allowance. . . ."

The Carrier argues that these decision are wrong, and ignore the weight of settled precedent on this issue. We reviewed such precedent and find that neither Second Division Awards 13009, 13010 nor STB Finance Docket No. 28905 (Sub-No. 28) are palpably erroneous. In doing so the Board carefully considered the points raised by the Carrier Members' Dissent to Awards 13009 and 13010. We initially note that these cases were issued prior to the STB Award, which deals specifically with a situation where employees would not hold seniority in the new location to which they were being requested to transfer, although being given preferential rights under the working Agreement to transfer to such location, as is the case herein. The Carrier Members based their Dissent on the difference between comparable employment and employment within the craft to which the Claimant has seniority rights. While the Dissent argues that Rule 27 gives the Claimant seniority rights to jobs in other locations, it is clear that the Claimant had point seniority only under this Agreement, and was unable to exercise seniority to any available position within his home location. The STB and the Board in Awards 13009 and 13010 rely upon the finding that the provision giving the employee the opportunity to transfer to a location outside his home seniority point is not mandatory. They reason that because the Carrier cannot require a change of location transfer under such provision, it cannot base a forfeiture of protective rights upon it. Special Board of Adjustment No. 570, Award 251, relied upon by the Carrier Members in their Dissent deals with different parties and the initial entitlement to protective benefits under a different Agreement, where the Board found that the Claimant did not lose his position as a result of an operational change. We also find the IAMAW and

CSXT (Richter, 1995) Award noted in the Carrier Members' Dissent to be distinguishable from the facts herein.

Because the factual circumstances in this case are similar to those dealt with in the STB Award and Second Division Awards 13009 and 13010, and the earlier cases relied upon by the Carrier were distinguished therein, we find the reasoning of those Awards applicable, and adopt their rationale in holding that the Carrier impermissibly terminated the Claimant's dismissal allowance when he failed to accept a transfer to Cincinnati, Ohio, after December 1994. To find otherwise would be to ignore the most recent pronouncement of this issue on the property, a result that would do nothing to foster stability in labor relations.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 16th day of June 1999.