Award No. 719
Docket No. MW-694

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wm. H. Spencer, Referee

PARTIES TO DISPUTE:

THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE FLORIDA EAST COAST RAILWAY COMPANY

STATEMENT OF CLAIM: "(a) Was the management within its rights in denying Mr. Carpenter the right to do extra or relief section foreman's work sufficiently to protect his seniority status because after a physical examination by Railway Company doctors they had recommended treatment for a blood condition?

"(b) Should Mr. Carpenter's name be restored to the seniority roster with full and complete seniority?"

EMPLOYES' STATEMENT OF FACTS: "An agreement exists between the Florida East Coast Railway, W. R. Kenan, Jr., and S. M. Loftin, Receivers, and employes represented by the Brotherhood of Maintenance of Way Employes, the effective date of the current agreement being April 12, 1932. Rule 15 (f) of this agreement reads:

> 'Employes failing to return to work, or to give satisfactory reason for not so doing, within seven (7) days from date of mail or telegraphic notification sent to the address last given, shall forfeit all seniority rights. Seniority rights of employes cut off through force reduction and not reinstated for one (1) year from the effective date of the reduction, will automatically cease, and re-employment thereafter will be only as a new employe.'

The last sentence of this rule is the only part of the rule applicable to the questions at issue.

"Rule 15 (b) of this agreement as amended effective May 28, 1934, reads:

> 'An employe affected by force reduction may displace only an employe junior to himself in the same rank, in the classification in which the reduction of forces occur, with the least seniority on the seniority district. If there is no position to which he is entitled in that classification, he must, if qualified, displace the employe junior to himself in the same rank with the least seniority on the seniority district. In the event there is no position to which he is entitled, or for which he is qualified, in the same rank, he may exercise seniority, if qualified, in the sequence outlined above, in any lower rank in which he elects to exercise displacement rights.'

"Section Foreman W. G. Carpenter was thrown out of employment as a section foreman by virtue of his not having sufficient seniority to hold a regular position after a force reduction occasioned by the abolishment of certain sections.

"On July 22, 1937, before he would have been out of the service one year on the following September 12, Mr. Carpenter, using a Florida East

had paid such fees, he would not have been eligible for free treatment of the disease which he had. The East Coast Hospital Association is a corporation existing under the laws of Florida, and there is an agreement between that Association and the Railway, under which the Association renders certain hospital and medical services to employes who pay the $1.50 per month membership fees. The Railway has no control over the rules and regulations of the East Coast Hospital Association. The physical examination rules of the Railway, which are prescribed by the Chief Surgeon, require certain standards of excellence as to health, vision and hearing, and where corrective treatment is necessary such treatment, with certain exceptions, is furnished employes by the East Coast Hospital Association under its contract with the Railway, under which the Railway makes certain donations toward the expenses of the Association, in addition to the monthly membership fees paid by employes. Where such services are of a nature beyond the scope of the treatments contemplated by the membership fees, the Railway, upon the presentation of a deduction order signed by the employe receiving such treatment, makes monthly deductions from the wages of the employe and pays the same to the East Coast Hospital Association. The treatment for the infection which Mr. Carpenter had was of a nature that did not entitle him to free treatment by the Hospital Association, even if he had been in active service and had been eligible for free transportation to and from the hospital for such treatments. Therefore, the Railway could not furnish him with passes to visit the hospital for these treatments and was not in position to protect the Hospital Association for the cost thereof, through wage deductions. The pass rules of the Railway do not permit the furnishing of free transportation to cut-off employes engaged in outside employment. All of these matters are not within the scope of the Agreement between the Railway and the Brotherhood of Maintenance of Way Employes, and are not, therefore, subject to review by the National Railroad Adjustment Board."

OPINION OF BOARD: The facts essential to the disposition of this controversy may be summarized briefly. On July 16, 1933, the claimant, W. G. Carpenter, with a seniority date as a section foreman as of May 3, 1926, was laid off in a force reduction. Following his lay-off, the claimant continued for a time to work as a section laborer. He continued in this capacity until October 15, 1935, occasionally working as a relief foreman. On the last mentioned date, the claimant left the service of the Carrier as a laborer and took permanent employment with the Florida Linen Supply Company.

After discontinuing active service with the carrier, the claimant continued down to the date of this dispute to keep his name on the seniority roster of the carrier by complying with Rule 15 (e) of the agreement between the parties. This provides:

> "Employes laid off by force reduction desiring to retain their seniority rights, must file with sub-department officer, their address and renew same each thirty (30) days."

Rule 15 (f), however, provides in part:

> "Seniority rights of employes cut off through force reduction and not reinstated for one (1) year from the effective date of the reduction, will automatically cease, and re-employment thereafter will be only as a new employe."

The claimant worked five days in 1936 to preserve his seniority. Sometime in July, 1937, the claimant requested a temporary assignment for the purpose of preserving his seniority for another year. As a condition of reinstatement after an absence from the service for a period of six months, the claimant, in accordance with a well established requirement of the carrier, was directed to report to the Chief Surgeon of the carrier in St. Augustine for a physical examination. The carrier furnished the claimant with transportation to St. Augustine and return so that he could take the examination.

Some ten days later, the claimant was notified that the Chief Surgeon desired to see him again. The claimant thereupon made a request for transportation so that he could consult with the Chief Surgeon. Not hearing from this request for approximately three weeks, the claimant asked the Track Supervisor to find out what had happened to his request. On August 17, 1937, the Track Supervisor replied to him by letter in which he stated that "I have been advised by the Roadmaster's Office that you were rejected by the Chief Surgeon and have received instructions that you are not to be permitted to re-enter the service." During the period from July 22 until September 12, 1937, representatives of the carrier on two or more occasions informed the claimant that, regardless of his physical condition, there seemed little likelihood that any temporary vacancy would arise to which he could be assigned. On September 12, 1937, the carrier permanently removed the name of the claimant from the seniority roster. This is the action complained of in this dispute.

The evidence of record clearly indicates that the carrier was primarily, if not entirely motivated in taking the action that it did because of the claimant's physical condition as revealed by his physical examination of July 22, 1937. If, however, the carrier was authorized under the agreement or agreements between the parties to take the action in question, its motives for doing so are not material. The question for determination, therefore, is whether the carrier, in the circumstances of this dispute, was justified under the rules of the agreements in removing the claimant's name from the seniority roster.

The petitioner, in support of the claim here presented, contends that, under the rules of the agreement between the parties, demoted foremen are entiled to be assigned to relief service in terms of their seniority, that during the year involved in this dispute a substantial amount of relief service was required, and that the claimant should have been called for some of this service. The question of positions continuing for sixty days or more, which carrier is required to bulletin under rule 11 (b), is not in issue in this controversy.

The petitioner insists, however, that during the year involved and during the period from July 22 until September 12 many temporary, unbulletined vacancies occurred to one or more of which the claimant should have been assigned. The carrier replied that under Rule 11 (b) it is not required to call furloughed employes in the order of their seniority. This rule provides:

> "Positions or vacancies expected to last less than sixty (60) consecutive days may be filled without bulletining, but if continued for a longer period they shall be bulletined as permanent positions as soon as that fact is ascertained."

Whatever should have been the just and logical interpretation of this rule, the record indicates that the carrier, with the acquiescence of the petitioner, has assigned positions of this character to cut-off men "most readily available," and not to furloughed employes in the order of their seniority. The record further indicates that the carrier, with some exceptions, has, when it has required relief service, called demoted foremen then working as section laborers. The last paragraph of the alleged agreement of May 20, 1934, to which further reference will subsequently be made, recognizes that the carrier was not required to recall demoted foremen in the order of their seniority for relief positions of less than sixty days' duration.

The petitioner, in further support of its claim, states that there is a special agreement between the parties in which it is provided that a demoted foreman may preserve his seniority standing with the carrier by working at least one day during a given year. This agreement is contained in a letter, dated October 18, 1932, written by the General Chairman to Engineer Maintenance of Way Brown. The important portion of this letter follows:

"A demoted Foreman and Assistant Foreman who is now in service as laborers, accumulates seniority for a period of one (1) year from the date last appeared in the ranks as covered by the Agreement. He must make at least one (1) work day in each year to continue to accumulate his seniority."

This memorandum agreement, while it definitely provides that a day's service within a given year will preserve a demoted foreman's seniority, imposes no duty upon the carrier to furnish any employment to an employe during a given year. Moreover, it will be noted that the agreement applies only to foremen who are "now in the service as laborers." In the present controversy, it will be remembered, the claimant at the time he requested a temporary assignment was not in the service of the carrier as a laborer, but was working regularly with the Florida Linen Supply Company.

In further support of its contention that the carrier was under an obligation to furnish the claimant with relief work to enable him to preserve his seniority, the petitioner relies upon an alleged memorandum agreement of May 20, 1934. This is contained in a letter from Engineer Maintenance of Way Brown to Roadmaster Clark. The first paragraph of this letter follows:

"I understand some of the cut off Foremen and Assistant Foremen who are working in the ranks of laborers are complaining that discrimination is being shown in regards to relief work, in that men who have never qualified as a Foreman or an Assistant Foreman are being given preference in these substitutions."

The letter, after directing that the provisions of Rule 15 (d) should be observed, continues:

"As advised before, I think that it would be well where ability and proximity to the job is equal, that the senior demoted Foreman or Assistant Foreman be given preference in relief work, unless this will work a hardship on other demoted Foremen by giving them no work at all. What I would like to do would be to help them all out as much as possible, though where there is an equality of work to be divided and each man has had an equal share, the senior demoted Foreman or Assistant Foreman I think should be given preference."

As indicated by the file note, this letter must have been the result of some understanding between the petitioner and the carrier. The last paragraph of the letter, however, in so far as it can operate as an agreement is extremely vague in its provisions. At most, it would seem, this paragraph merely imposes upon the carrier the duty to do what it can to see that all demoted section foremen shall receive consideration when relief service is being alloçated. This letter, as previously pointed out, recognizes that the practice in the past has not been invariably to assign relief service to demoted foremen in the order of their seniority. Moreover the phraseology and the tenor of this letter indicates that the carrier is interested in providing additional income for demoted foremen, and not in making it possible for them to preserve their seniority. But more important than all, the letter relates to the complaints of "cut off Foremen and Assistant Foremen who are working in the ranks of laborers." Again it is recalled that the claimant at the time this controversy arose was not in the service of the carrier as a laborer. Whatever may be the obligation of the carrier under this agreement as to demoted foremen working as section laborers, it seems clear that the agreement does not include the case of a demoted foreman not in the service of the carrier as a laborer, who desires temporary work for the purpose of preserving his seniority.

On the evidence of record and under a proper interpretation of the agreements involved, the Division concludes that the carrier was not required to furnish the claimant with an opportunity to perform any amount of relief service to assist him in preserving his seniority. The fact that the carrier

may have acted more generously with other demoted foremen in this respect is not material. That the carrier did not deal more generously with the present claimant is perhaps unfortunate. This, however, is a matter over which the Division has no jurisdiction.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute, are respectively carrier and employe 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 carrier in the action complained of in this dispute did not violate any agreement or agreements existing between the parties.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 12th day of August, 1938.