Award No. 8887
Docket No. MW-10124

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Donald F. McMahon, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) "The Carrier's action in dismissing B&B Helper C. J. Platt because he invoked and exercised the discretionary prerogative expressly reserved to him under the provisions of Rule 3 (J) was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement.

(2) B&B Helper C. J. Platt be reinstated to his former position with seniority and vacation rights unimpaired and that he be paid for all time lost account of the violation referred to in Part (1) of this claim."

OPINION OF BOARD: Claimant was discharged from service by Carrier for his refusal and failure, when requested, to proceed to Grand Junction, Colorado, from Salt Lake City, to perform service operating a pile driver.

Carrier held an Investigation and Hearing, and as a result the Claimant was discharged from service for his refusal to accept the assignment.

Claim was filed by the employe, requesting reinstatement to his regular assigned position as B&B Helper, with pay for all time lost as a result of Carrier's decision, and with all seniority and vacation rights to be restored and unimpaired.

Carrier contends it in no way violated the provisions of the agreement by its action, and denies that it acted in an arbitrary or capricious manner in discharging the employe from its service.

The record discloses the parties are in agreement as to the facts and circumstances involved here, except as to their conclusions regarding the decision of Carrier. By reference to the agreement between the parties,

Rule 3 (j) upon which Claimant relies to support his position, reads as follows:

> "Except as provided in Paragraph (d) or in case of emergency, employes will not be transferred from one division to another unless they so desire."

Paragraph (d) of this rule referred to by Carrier is not applicable to the situation here, nor is there anywhere in the record any evidence that an emergency condition existed which in any way supports the position of Carrier.

This Division has held in cases too numerous to mention, that an employe has the duty to comply with the requests of his superiors, and to progress any grievance he may have as provided by the effective agreement. We are in full accord with such holdings, but we cannot agree that the circumstances here are applicable to such principles, where we have Rule 3(j). This rule is no way ambiguous, and we must assume was negotiated in good faith between the parties. The rule speaks for itself. Carrier had no right to require the employe to accept the assignment. None of the cases cited us by Carrier contain such a contract provision. We must hold that the employe was within his rights in his refusal to accept the assignment. The fact that the employe was advised by his local chairman to perform the work, or that on previous occasions he had performed such work has no effect here. The claim should be sustained in its entirety.

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

That the claim should be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 20th day of July, 1959.

DISSENT TO AWARD NO. 8887, DOCKET NO. MW-10124

The very nature of railroad operations brands the industry as semi-military in character. Consequently, it is the uniform rule that an employe must at all times, except in the case of apparent physical danger, comply with the Carrier's instructions and seek redress later under the grievance

procedure of the Agreement if he believes that his rights under a rule of the Agreement have been violated.

In recognition of this fact, the parties adopted a grievance procedure in Rule 10 (b) of their Agreement whereby an employe must forego his recourse to self-help in cases of dispute and have his claim decided after a hearing has been held. Congress continued this plan of arbitration when it established the National Railroad Adjustment Board in The Railway Labor Act of 1934 as the administrative tribunal of last resort where such disputes should be settled.

The majority errs in holding that the above principle does not apply in these circumstances because of the presence of Rule 3 (j) in the parties' Agreement. That rule pertains to the employe's right not to be transferred from one division to another. It does not give an employe the right to resort to self-help if he thinks his right under it is being violated. Under such circumstances, he must proceed under the grievance machinery just as he is obliged to do when he believes that his right under any other rule of the Agreement has been violated.

The Supreme Court of the United States recognized the truth of these matters in **Union Pacific Company v. L. L. Price**, U. S. Sup. Ct., June 29, 1959. In that case, the respondent employe had refused to obey the Carrier's instruction to detrain and await assignment to another train at a point where there were no accommodations for eating and sleeping. He relied on Article 32 (b) of the Agreement between the Carrier and the Brotherhood of Railroad Trainmen, to wit: "Swing brakemen will not be tied up nor released at points where sleeping and eating accommodations are not available." That rule is the same in principle as Rule 3 (j) of the instant Agreement. In speaking of the propriety of the employe's dismissal under such circumstances, the Court said:

> "* * * Even if the procedure followed by the railroad constituted a proper investigation, the Board's outright denial of the claim is explicable only on the ground that the Board also held that Article 32 (b) did not justify the respondent in disobeying the dispatcher's instruction to remain at Nipton. * * *"

The **Price** case was cited to the Referee. Accordingly, there is no justification for his holding:

> "* * * None of the cases cited us by Carrier contain such a contract provision. We must hold that the employe was within his rights in his refusal to accept the assignment. * * *"

For these reasons, we dissent.

/s/ **J. E. Kemp**

/s/ **R. M. Butler**

/s/ **W. H. Castle**

/s/ **C. P. Dugan**

/s/ **J. F. Mullen**