Award No. 9059
Docket No. MW-8228

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

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

(1) The Carrier violated the effective agreement when it furloughed Section Laborer D. A. Bigelow from Section 276 at Savannah, Oklahoma on July 19, 1954 and again on November 30, 1954 in force reduction and retained Section Laborer Ishmael Harris in service on that gang;

(2) Section Laborer D. A. Bigelow be allowed the exact amount lost because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Section Laborer D. R. Bigelow holds gang seniority as such on Section No. 276 at Savanna, Oklahoma as of October 26, 1946.

Section Laborer Ishmael Harris holds gang seniority as such on Section No. 280, at Calera, Oklahoma as of August 21, 1938 and, by specific agreement between the two parties to this dispute, holds gang seniority as a section laborer on Section 276 at Savanna, Oklahoma as of the first date he was permitted to perform service thereon in 1949, with the understanding that he would not be permitted to work on Section 276 at Savanna at any time there was a senior section laborer holding gang seniority on that section cut off.

On December 7, 1953, track forces were reduced which included the abolishment of Section 280, Calera, Oklahoma, the section gang on which Ishmael Harris held his primary and superior gang seniority rights. Under the rules of the effective agreement, this force reduction gave Mr. Harris the right to exercise his primary and superior seniority rights by displacing the junior section laborer on the Roadmaster's district, who was then employed on Section No. 275 at McAlester, Oklahoma. However, for some reason or other, Mr. Harris elected not to exercise such displacement rights but chose

the common law rule of damages. No showing has ever been made to the carriers what the employes allege Bigelow lost, what he earned in other capacities, amounts paid him as unemployment insurance, or diligence with which he endeavored to mitigate alleged damages. There is nothing in evidence to support an award and accordingly the claim must be denied.

All data submitted in support of the Carriers' position have been heretofore submitted to the employes or their duly authorized representative.

The Carriers request ample time and opportunity to reply to any and all allegations contained in the submissions and pleadings of the Employes and the Brotherhood of Maintenance of Way Employes.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, expressly deny each and every, all and singular, the allegations of the Brotherhood of Maintenance of Way Employes, and Employes' alleged dispute and ex parte submission.

For each and all of the foregoing reasons, the Carriers respectfully request the Third Division, National Railroad Adjustment Board, deny said claim and grant said Railroad Company such other relief to which they or either of them may be entitled.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim is that the Carrier violated the Agreement on July 19, 1954, and again on November 30, 1954, when it furloughed Section Laborer Bigelow from Section 276 at Savannah, Oklahoma, and retained Section Laborer Harris on that gang.

The issues presented by the parties are as follows:

I. Whether all employes on the seniority list are necessary parties to this proceeding.

II. Whether this proceeding was initiated within the time prescribed by Article V of the National Agreement of August 21, 1954, after final disposition on the property.

III. Whether the Carrier's action complained of violated the Agreement.

We shall discuss them in that order.

I. At the outset the Carrier contended that the rights of all employes on the seniority list would be affected by any decision in this case, and that notice to each of them, and the right to be heard, were mandatory under Section 3, First (j) of the Railway Labor Act. Such notice was given to both Bigelow and Harris, but not to the other employes on the seniority list.

The contention is true that in the absence of notice and an opportunity to be heard the award in this case cannot conclude the rights of other employes. But their rights are not now before the Board, and our award cannot possibly conclude them.

If a similar claim should arise concerning the seniority rights of other employes the award in this case may possibly be cited as a precedent. But each claim must be decided under its own facts, rules and arguments, which this award cannot presume to foresee or adjudicate. Since the present controversy does not involve their rights this award cannot adjudicate them, and they are not necessary or proper parties.

II. The Carrier further contends that the Board has no jurisdiction of this proceeding because the appeal was not taken within the time limited by Article V of the National Agreement of August 21, 1954, effective January 1, 1955, which provides as follows:

> "* * * that in the case of all claims or grievances on which the highest designated officer of the Carrier has ruled prior to the effective date of this rule, a period of 12 months will be allowed after the effective date of this rule for an appeal to be taken to the appropriate board of adjustment as provided in paragraph (c) of Section 1 hereof before the claim or grievance is barred."

This claim was finally denied on the property on December 31, 1954; the Brotherhood on December 29, 1955 gave notice of its intention to file an ex parte submission within thirty days, and filed it on January 25, 1956. The question is whether the appeal was taken to this Board on December 29, 1955, within twelve months after December 31, 1954, or not until January 25, 1956, more than twelve months later.

This Board's Rules of Procedure provide as follows:

> "EX PARTE SUBMISSION.—In event of an ex parte submission the same general form of submission is required. The petitioner will serve written notice upon the appropriate Division of the Adjustment Board of intention to file an ex parte submission on a certain date (thirty days hence), and at the same time provide the other party with copy of such notice. For the purpose of identification such notice will state the question involved and give a brief description of the dispute. The Secretary of the appropriate Division of the Adjustment Board will immediately thereupon advise the other party of the receipt of such notice and request that the submission of such other party be filed with such Division within the same period of time."

The Third Division has held (Award 7144) that the filing of the notice of intention to present an ex parte submission constitutes the institution of the proceeding here. Like holdings have been made by the Second Division (Awards 2135, 2285 and 2342) and by the Fourth Division (Award 976). (The First Division has apparently abolished the notice of intention.)

The Carrier argues that the Board's rule and the above awards are void because Section 3, First (i) of the Railway Labor Act provides that unadjusted disputes "may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The argument is that since under that statute, a proceeding is to be "referred" to the Board "by petition * * * with a full statement of the facts and all supporting data," the Board acquires jurisdiction only by the filing of

the ex parte submission, and that the Board's Rules of Procedure and awards to the contrary are void.

While such a construction is possible, we do not consider it reasonable. The National Agreement of August 21, 1954 prescribed the time for appeals to this Board because the Congress had not seen fit to do so. The Congressional Act evinced no concern with the time or manner of this Board's acquisition and conduct of proceedings, but provided by Section 3, First (u) that the Board should "adopt such rules as it deems necessary to control proceedings before the respective divisions * * *." It did provide, of course, that such rules must not be "in conflict with the provisions of this section." But it seems clear that in providing how proceedings were to be "referred" to the Board the congressional intent was directed toward the matters to be presented for consideration rather than the time or manner of giving jurisdiction. Until otherwise decided by the courts we cannot conclude that the Board's established procedure and awards regarding the institution of a proceeding by the filing of notice of intention is in conflict with the Railway Labor Act.

In this connection the Brotherhood points out that the Carrier on January 20, 1956, unilaterally requested, and was thereafter granted, an extension of time to February 27, 1956, within which to file its ex parte submission. But the National Agreement of August 21, 1954, provided that proceedings here must be initiated within the period thereby provided, unless extended by agreement of the parties. That action is certainly inconsistent with the argument that the Board's jurisdiction begins only upon the filing of an ex parte submission if it does not actually constitute a waiver of the objection.

III. We thus come to the substantive question whether the Agreement was violated.

Rule 3 of Article 3 of the Agreement as then effective provided as follows:

> "Seniority rights of laborers as such, will be restricted to their respective gangs, except that when force is reduced laborers affected may displace laborers with least seniority on their Roadmaster's district."

The record shows that on January 1, 1954, Claimant Bigelow was the 51st man on the seniority list, with October 26, 1946, as his seniority date for both Section 276 (Savannah) and the entire Roadmaster's district. Harris was the 15th man on the seniority list; his Roadmaster's seniority date was August 21, 1938, acquired on Section 290 (Calera), but his seniority date on Section 276 (Savannah) was January 4, 1949, when he first worked on that section.

Section 290 (Calera) was abolished on December 7, 1953, in a force reduction. But Harris was not affected by the reduction, as he was then working on Section 276, as apparently he had been doing since January 4, 1949.

A Division Engineer's letter dated July 3, 1950, stated that Harris' seniority was on Section 290 (Calera), that he was working on Section 276 (Savannah), but "will not be permitted to work on the Savannah section at any time there is a senior man cut off." The Employes' Ex Parte Submission refers to the letter as a special agreement, but presumably is based on the general provision (Rule 3 of Article 3) that laborers' seniority rights are restricted to their respective gangs.

On the other hand, Rule 3 goes on to state, as an exception to the general rule, that in case of force reductions Roadmaster's seniority governs the right to continue working. There can be no other meaning or purpose for the express provision that "when force is reduced laborers affected may displace laborers with least seniority on their Roadmaster's district. In short, if a laborer's gang seniority is sufficient, the force reduction does not affect him; but if it is insufficient, the force reduction does affect him by removing him from the gang. He can then utilize his paramount Roadmaster's district seniority by displacing the laborer with the least seniority on the entire Roadmaster's district.

The Employes' Statement of Facts states:

> "On December 7, 1953, track forces were reduced which included the abolishment of Section 280, Calera, Oklahoma, the section gang on which Ishmael Harris held his primary and superior gang seniority rights. Under the rules of the effective agreement, this force reduction gave Mr. Harris the right to exercise his primary and superior seniority rights by displacing the junior section laborer on the Roadmaster's district, who was then employed on Section No. 275 at McAlester, Oklahoma. However, for some reason or other, Mr. Harris, elected not to exercise such displacement rights but **chose to remain** on Section 280 (276) **at Savannah** * * *." (Emphasis added.)

In the course of argument in the statement of their Position the Employes further state:

> "* * * he elected not to exercise such displacement rights at that time because the force assigned to Section 276, Savannah, was sufficient to permit him to continue working with that gang on the basis of his secondary seniority rights * * *."

In other words, Harris was actually working at Savannah (Section 276), and therefore was not affected by the force reduction at Calera. Not having lost his job in the force reduction there was no occasion then to invoke his right to bump the laborer with the least seniority on the Roadmaster's district. Therefore the force reduction proviso of Rule 3 was not applicable to his situation on December 7, 1953. If then he had been allowed to bump the laborer with least seniority the latter should have had a valid claim for an improper furlough and presumably would have asserted it.

The above statement contains the conclusion that "under the rules of the effective agreement this force reduction gave Mr. Harris the right to exercise his primary and superior seniority rights by displacing the junior section laborer," etc. But for the reason stated we cannot conclude that Rule 3 gave him that right, and no other rule has been cited or found which does so.

The Employes' Statement of Facts states further:

> "While so employed on Section 276, Savannah, Mr. Harris performed intermittent service as a relief foreman on various sections on the Roadmaster's territory; his last service as a relief foreman occurring during the forepart of July 21, 1954, during which time the force assigned to Section 276, Savanna was reduced with the end result that Mr. Harris was, according to the Carrier's Assistant General Manager, 'unable to hold a position as Section Laborer in

> the gang at Savanna on account of his gang seniority at that point'. The Carrier thereupon laid Claimant Bigelow off from Section 276 at the close of work on Friday, July 16, 1954, and assigned Mr. Harris to work in his stead beginning on Monday, July 19, 1954, contending that Mr. Harris 'exercised his roadmaster seniority' by displacing Claimant Bigelow."

The insertion of the number "21" in the clause "during the forepart of July 21, 1954" was obviously a clerical error.

The above quotation shows that in the forepart of July, 1954, Harris was employed on Section 276 at Savannah, except for intermittent service as a relief foreman on various sections of the Roadmaster's territory, that while so employed there was a force reduction against which his gang seniority there was unable to protect him. The proviso of Section 3 for invoking his paramount Roadmaster's district seniority therefore applied and entitled him to bump claimant, then the laborer with least seniority on the district.

The Employes' Statement of Facts says further:

> "The Employes filed claim, contending that Mr. Harris had relinquished his 'roadmaster seniority' when he failed to exercise seniority as of the date Section 280 was abolished, which was the section on which he held his primary and principal gang seniority and that, in order to protect such seniority, he should have, upon the abolishment of Section 280, exercised displacement as permitted by agreement rules by displacing the section laborer with the least seniority then working on Section 275, McAlester of the Roadmaster's territory."

But as above noted, Harris was not then working on Section 280, was not affected by the force reduction, and had no right under the exception in Rule 3 to displace anyone, not being himself displaced.

Even if he had been affected by the December 1953 force reduction and in order to continue working had thus been entitled to displace the laborer with least seniority on the district, the provision says only that he "may displace", not that he must displace. And even if we construe "may" as meaning "must", we cannot write into the rule as a penalty, either that he forfeited the right as to subsequent force reductions, or that he forfeited his Roadmaster's district seniority for all purposes.

No rule, award or argument is cited in support of such forfeitrue, and certainly seniority is too valuable a right to be held as forfeited without some compelling reason. Certainly under the record in this case we are without jurisdiction to declare a forfeiture of Harris' "roadmaster's seniority."

The Employes' Statement continues:

> "The Employes further contended that there was no force reduction when Mr. Harris completed his relief of another foreman as of July 16, 1954 and thus did not acquire any displacement rights because of the return of the regular foreman whom he relieved during the forepart of July 1954."

Admittedly Mr. Harris' completion of a temporary assignment to foreman relief on July 16, 1954, did not constitute a force reduction. But the Em-

ployes' statement quoted above shows that there was a force reduction on Section 276 during the forepart of July 1954, because of which Harris was unable to hold a position as section laborer through his gang seniority there. Since thus he had no laborer's job to resume on completion of his temporary relief assignment on July 16 he was certainly affected by the force reduction.

The record does not disclose the exact date of the force reduction in the forepart of July 1954, but in any event it cannot have been more than fifteen days before July 16th. Since admittedly Harris had been working as a laborer on Section 276 for some 5½ years except for "intermittent service as a relief foreman", it is supertechnical to argue that his loss of work on July 16th resulted from the termination of his relief assignment and not from the force reduction.

There is a suggestion, though not a definite contention, that the "special agreement" under which Harris was working on Section 276, deprived him of the protection of the force reduction provision of Rule 3. There is no evidence that he waived that provision, or even that anyone assumed to waive it for him.

We must therefore conclude that Harris was properly permitted to invoke his Roadmaster's district seniority, and that the Agreement was not violated.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of November, 1959.