Award No. 13705

Docket No. MW-14243

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY (System Lines)

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

(1) The Carrier violated the Agreement and practices thereunder when, beginning on April 15, 1962, it discontinued furnishing a section house and water to Section Foreman Ray Wilson, Section No. 21, Vancouver, Washington.

(2) Section Foreman Ray Wilson be reimbursed for all rental and water charges incurred beginning on April 15, 1962, and to continue until the violation referred to in Part (1) is discontinued.

EMPLOYES' STATEMENT OF FACTS: For over forty years housing facilities and domestic water have been furnished free of charge by the Carrier to its Section Foreman at Section 21, Vancouver, Washington.

The claimant, Mr. Ray Wilson, is the regularly assigned Section Foreman at Section 21, Vancouver, Washington. He acquired such position by bulletin in 1954. Housing facilities and domestic water were made available free of charge to the claimant until he was advised by letter, dated March 9, 1962, that the section house he occupied at Vancouver was a part of the Urban Renewal Project at Vancouver, and, therefore, it would be necessary for him to vacate this property within the next ninety days. Claimant vacated the section house on April 15, 1962.

The Carrier refused to provide other living quarters or rental allowances in lieu thereof.

The Employes have contended that the Carrier violated the Agreement and practices thereunder when it discontinued furnishing a section house and water to the claimant. The Carrier has declined this claim.

The Agreement in effect between the parties to this dispute, dated June 1, 1956 and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

cated that the Company had not contracted to furnish section houses rent free to section foremen, Referee Cluster found that because at those section headquarters where section houses were furnished to section foremen it had been the practice to furnish them rent free, the Company was obliged to reimburse the claimant foreman the amount he had paid for rent; and because he was occupying a Company building, to also reimburse him the amount he had paid for water under Rule 47.

Obviously the Findings of Referee Cluster in Award 7282 lend no support to the instant claim. In fact, if anything, those Findings support Carrier's position in the instant docket, because the conduct of the parties over the years since the rule in question was negotiated, clearly indicate their mutual interpretation of Rule 48, up until now at least, to be that the rule has not created an obligation on the Company to replace any of the several section houses that were formerly maintained at Pasco, Portland, Camas, Astoria and Sweet Home but which have since been disposed of; or in the alternative to reimburse the section foremen at those locations for the expense of providing their own living quarters, which is the claim here.

In summary Respondent submits that this claim must be denied in its entirety for the following reasons:

1. There is no requirement in any rule in the controlling agreement that a section house must be provided or maintained at any particular section headquarters. Actually there are ten section headquarters on this property where no section house is provided. At each of these locations the section foreman provides his own living quarters at his own expense.

2. Even at those section headquarters where a section house is provided there is no requirement in any rule in the controlling agreement that the section foreman must live in the section house.

3. The rule relating to section houses merely contemplates that at any section headquarters where a section house is provided the section foreman and his family will have a preferential right to occupy the section house if he so desires.

4. Third Division Award 7282 relied on by Petitioner lends no support to this claim inasmuch as a different issue was there involved; but Referee Cluster's Findings in that Award with respect to the ambiguity of Rule 48 requiring an examination of the conduct of the parties under the rule would support Respondent's and not Petitioner's position in this docket.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant is the regularly assigned Section Foreman at Section 21, Vancouver, Washington. He acquired such position by bid on Bulletin No. 27 dated August 13, 1954, which stated, "Living quarters are NOT provided at this point for the Section Foreman, but Company house is available for nominal rental fee." Prior to the August 13, 1954 Bulletin No. 27 advertising of this position for Section 21, foreman, Vancouver, had read, "Living quarters are provided at this point for the Section Foreman." Claimant was assigned to the position on September 1, 1954 and occupied rent free and water furnished, the Company house Section 21, Vancouver. Claimant was notified to vacate the house, which he did on April 15, 1962, as the prop-

erty was taken over by the Urban Renewal Authority of Vancouver. Claimant has since furnished his own living quarters and water at Vancouver.

The Employes contend that Carrier unilaterally discontinued a consistent custom and practice which had been in effect for more than forty years when Carrier discontinued furnishing a section house and water to the Claimant on April 15, 1962. Such practice derived from the parties intent as reflected by two rules of the effective Agreement:

"Rule 47

"Water Supply

"The railroad will furnish an adequate supply of water suitable for domestic uses to employes living in its buildings, camps and outfit cars. Where it must be transported and stored, the receptacle shall be adapted to the purpose."

"Rule 48

"Section Houses

"Section houses shall be for the use of section foremen and their families. Occupants of these houses shall keep the houses and surroundings neat and clean."

Further, they contend Carrier and the Organization agreed to hold in abeyance the question of "living quarters and water at Vancouver" and to dispose of the same on the basis of a dispute similar in nature before this Division between these same two parties, identified as Docket MW-7229. That dispute was resolved favorable to the Organization and became Award 7282 on March 21, 1956, thereby resolving the instant dispute now before the Board. The letter of Agreement relied upon reads as follows:

"SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY
PORTLAND 7, OREGON

"April 12, 1955

"File: 1748, 616-b

"Mr. H. G. Harper, General Chairman
Brotherhood of Maintenance of Way Employes
316 Fitzpatrick Building
Portland 5, Oregon

"Dear Sir:

"Your letter February 23, 1955 and previous correspondence relative to protest and claim in connection with the issuance of Bulletin No. 27 dated August 13, 1954 advertising vacancy in the position of Section Foreman at Vancouver.

"The Carrier is willing to comply with your suggestion that this case be disposed of on the basis of the award which may be issued in Docket MW-7229 now pending before the Third Division, National Railroad Adjustment Board.

"Very truly yours,

"/s/ E. H. Showalter
General Manager"

The Brotherhood further asserts that on June 1, 1956, Schedule No. 4 of the present Agreement between the Parties became effective. Rules 47 and 48 were incorporated without change thus continuing the interpretation placed upon the present Agreement by the past practice of the parties and the interpretation placed on these rules by Award 7282 of the Third Division.

Carrier submits that there is no requirement in any rule in the controlling agreement that a section house must be provided or maintained at any particular section headquarters; that even at those section headquarters where a section house is provided there is no requirement in any rule in the controlling agreement that the section foreman must live in the section house; that the rule relating to section houses merely contemplates that at any section headquarters where a section house is provided the section foreman and his family will have a preferential right to occupy the section house if he so desires; that Third Division Award 7282 relied on by the Petitioner lends no support to this claim inasmuch as a different issue was there involved; but Referee Cluster's Findings in that Award with respect to the ambiguity of Rule 48 requiring an examination of the conduct of the Parties under the rule would support Respondent's and not Petitioner's position in this docket.

The Board finds that the Record supports the Organization's position that full force and effect must be given to the binding Agreement between the parties, as contracted upon the property. The letter of Agreement is binding in that both agreed that the instant dispute before this Board would be resolved by the decision of the Third Division in Award 7282. The Third Division Award sustained the Organization's position by holding the Rules 48 and 47 are ambiguous in meaning and that it is proper to look at the past conduct and practice of the parties for interpretation of these Rules; that although the Carrier has provided housing and water free of charge to section foremen at some locations, and has provided no such facilities at other locations, it still was found that where the section houses had been provided, (at points) they had been provided free rental and water; that by this practice, the parties have interpreted the language of the rules to mean that section houses, where provided, shall be for the free use of section foremen; and

> ". . . Once having provided a section house, the Carrier became bound to make it available for the free use of the section foremen under the rule as interpreted by past practice. Rule 48 was incorporated without change into the 1947 agreement, the current one between the parties, thus continuing the interpretation placed on it by the past practice of the parties . . ."

Significantly, Rule 48 and 47 were incorporated without change into the June 1, 1956 Agreement, the current one between the parties, "thus continuing the interpretation placed on it by the past practice of the parties." Incorporation was subsequent to the interpretation and adoption of Award 7282 on March 21, 1956. Carrier chose not to abrogate the past practice, interpreted by Award 7282, in the Collective Bargaining Agreement of June 1, 1956.

Subsequent to the March 21, 1956 award and the June 1, 1956 Agreement, the Employes submit that the Carrier recognized its obligations, as to past practice, to furnish its incumbent Section Foremen, at certain points, with living quarters. Employes' Exhibit "C" of the Record is a letter dated April 17, 1958 in which the Carrier relates to the Organization, that the Carrier had an inquiry from an industry to purchase property on which a section house at Willbridge is located. It reads in part:

"In the event this deal were consummated **and the company assumed rental in providing other living quarters during the duration of the present section foreman's assignment,** would you be willing to forego this as a precedent in the filling of future assignments for the position?" **(Emphasis ours.)**

The Brotherhood replied on May 19, 1958, reading in part:

"It would be poor policy on our part to go record as opposing industrial expansion that might bring additional revenue to the employer. Therefore, your suggestion **that the company assume rental in providing other living quarters for the present section foreman is acceptable." (Emphasis ours.)**

Both parties reached a written understanding as to past practice in protecting the assignments and "in providing other living quarters" of the incumbent foreman, in the event the living quarters were to be eliminated by reason of the property being sold at Willbridge. It appears therefore, that whether it be a Willbridge or Vancouver, the successful bid made by the incumbent is premised that the position of Section Foreman will be furnished living quarters and water, or rental allowance in lieu thereof, until the termination of the incumbents' tenure.

Carrier asserts that in the Willbridge incident, the incumbent had secured his assignment on a bulletin advertising "that living quarters were provided", while the position at Vancouver was bulletined and assigned to the incumbent as "living quarters not provided". We do not disagree that the Bulletins were so advertised, however, after the Award of 7282, to which the parties were bound, the bulletined position at Vancouver reverted to "Living quarters are provided at this point for Section Foreman". The Record supports this statement and the Carrier admits it furnished free facilities to the incumbent from October 9, 1954 to April 15, 1962.

In Award 13018, the Board held:

". . . the Letter of Agreement, above quoted, was intended to bind the parties to dispose of this case, as well as others held in abeyance, . . . This is the only obvious purpose for such an Agreement and Carrier has offered no alternate purpose which could logically serve as the intent of the parties. . . . if it were conceded that the case now before us is, to some degree, distinguishable from the other cases, Carrier cannot now assert such a distinction . . . Although we prefer to rule upon the merits of any case before us, it is imperative that the parties abide by agreements reached by them upon the property."

We find the Petitioner has successfully sustained the burden of proving that the Carrier is obligated to furnish the Claimant living quarters and water or rental allowance and water charges in lieu thereof beginning as of April 15, 1962. This finding is only for the Claimants tenure at Section 21, Vancouver, Washington and does not add or subtract from either the agreement of the parties or a long continued past practice of the parties. Additions, changes, or modifications to this existing agreement, by the parties, may only be brought about through the process of collective bargaining.

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 violated.

AWARD

Claim sustained for the tenure of the Claimant with reimbursement for rental and water being economically agreed upon by the parties at Section 21, Vancouver, Washington.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1965.

CARRIER MEMBERS' DISSENT TO AWARD 13705, DOCKET MW-14243

(Referee Mesigh)

In stating the facts **preceding** the present claim, the **Majority has in**accurately portrayed the circumstances involved in the Letter Agreement of April 12, 1955. The issue there was whether Carrier, **on its own initiative** and in possession of **existing facilities**—i.e.—an available section house, could charge the section foreman rent for the existing section house and for the use of water, or whether it must continue to allow him to enjoy the house and water free. The question was decided in **Award 7282,** only as to the situation where there was an **existing** section house and was made applicable at Vancouver by virtue of the 1955 Letter Agreement as to **existing facilities.**

In our case, the section house and land on which it was located was taken over by the Urban Renewal Authority. The issue in our case therefore, unlike that decided by the agreed upon precedent **Award 7282,** was whether Carrier would have to furnish **another** section house for the one that was being eliminated. The 1955 Letter Agreement did not purport to cover this problem.

The Majority apparently realized this was an entirely different factual case—one possibly calling for different conclusion—so they constructed an indefensible explanation for their ultimate conclusion that Carrier must not only **continue** to provide existing facilities free of charge, but must provide "other living quarters" free of charge when the existing facilities are eliminated.

The Majority's explanation seems to be that Carrier made an agreement in another case where the section house was to be eliminated at Willbridge to provide "other living quarters" providing it would not constitute a precedent.

The fact that the deal was never consummated at Willbridge, a condition precedent to the existence of any agreement, did not seem to bother the

Majority. Nor did it seem to occur to them the subject matter of the aborted agreement at Willbridge was Willbridge **not** Vancouver. **There was no similar agreement covering Vancouver.** If the agreement at Willbridge was considered so essential to the allowance of "other living quarters" in lieu of those eliminated, as the Majority now suggests it was—and we quite agree—and there is no comparable agreement covering Vancouver—then on what rational basis can the Majority find a violation of the contract? Certainly Rule 47 and 48, standing alone do not justify this decision. If they did, the Majority would not have expanded itself discussing the Willbridge agreement.

Thus, if we maintain a totally objective perspective, the most natural and reasonable conclusion we could reach from the facts recited by the Majority, would be that Rules 47 and 48 do not, standing alone, support the Petitioner, and in the absence of a special agreement such as the parties reached in the Willbridge case—there is no foundation for a holding that Carrier must provide "other living quarters" at Vancouver.

For the reasons set out above, among others, we dissent.

/s/ W. F. Euker
W. F. Euker

/s/ R. A. DeRossett
R. A. DeRossett

/s/ C. H. Manoogian
C. H. Manoogian

/s/ G. L. Naylor
G. L. Naylor

/s/ W. M. Roberts
W. M. Roberts