

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20184
Docket Number MW-20126

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of **Maintenance** of Way Employees
(Norfolk and Western Railway Company (Lake
(Region)

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

(1) The Carrier violated the Agreement when it refused to reimburse Ballast Regulator Operator J. F. Mowery for expenses incurred and to pay him a mileage allowance for the use of his personal automobile when required to leave his regular headquarters point and to work elsewhere on October 25, 1971 (System File **MW-BVE-71-14**).

(2) Ballast Regulator Operator J. F. **Mowery** be allowed a total of SL3.83 because of the violation referred to within Part (1) of this claim.

OPINION OF BOARD: Claimant, a regularly assigned ballast operator, was displaced by a senior employee on October 19, 1971 and on that date exercised his seniority and assumed the position of **trackman** on Section Gang No. 5 headquartered at St. **Marys**, Ohio. At that date he became the senior ballast regulator operator not **regularly** assigned as such. On October 25, 1971 Claimant was instructed to report to **Bellevue**, Ohio, to operate a ballast regulator at that location. He was not furnished with transportation and drove his personal automobile from St. **Marys** to **Bellevue**, a distance of 132 miles. On October 26, 1971 Carrier bulletined the position of ballast regulator operator at **Bellevue**, and Claimant filled the position temporarily. On November 15, 1971, being the senior applicant, Claimant was assigned to the position. The dispute herein arises **from** the refusal of Carrier to pay the mileage allowance for the trip from St. **Marys** to **Bellevue** on October 25th plus the expense of the evening meal that day.

Petitioner contends that Rules 46(f) and 48(b) of **the** Agreement, revised by Memorandum of Agreement dated July 10, 1968, are applicable. Those rules read:

"RULE 46 (f)

Employees other than those referred to in Rule 48(a), **who** are required in the course of their employment to be away from their headquarters point as designated by the carrier shall be compensated as hereinafter **provided**.

"The Carrier shall designate headquarters point for each regular position and for each **employee** performing extra or temporary service. No designated headquarters point may be changed more frequently than once each sixty (60) days and only after at least fifteen (15) days' written notice to the **employee** affected.

An **employee** in such service shall be furnished with free transportation by the railroad company in traveling from his headquarters point to another point and return, or from one point to another if such transportation is not furnished, he will be reimbursed for the cost of rail fare if he travels on other rail Lines, or the cost of other public transportation used in making the trip; or if he has an automobile which he is willing to use and the Carrier authorizes him to use said automobile, he will be paid an allowance of nine cents for each mile in traveling from his headquarters ~~point~~ to the work point, and return, or from one work point to another."

"RULE 48(b)

Employees taken away from their regular headquarters point, camp cars or outfits, to work elsewhere either off or on their assigned territory, when not permitted to return to their regular headquarters point, camp cars or outfits at the end of their regular tour of duty, will be allowed actual expense for meals and lodging unless the same are furnished by the railroad. Such allowances shall also be made to employees regularly required to live away from home in hotels or motels. This paragraph (b) shall not apply to **employees** customarily carrying mid-day lunches and not held away beyond their second meal period or when **traveling** in the exercise of their seniority rights or for other personal reasons."

Carrier contends that Rule 46(f) is not applicable and states that 46(e) covers the situation. That rule reads;

" RULE 46(e)

Except as provided in (b), (c), and (d) of this Rule 46, when employees, who are required to live away from home in

"camp cars, outfits, hotels or motels, are required to travel from one work point to another outside of regularly assigned hours or on a rest day or holiday time so spent shall be paid for at the straight time rate.

Such an **employee** who is not furnished means of transportation by the railroad company from one work point to another and who uses other forms of transportation for this purpose shall be reimbursed for the cost of such other transportation. If he uses his personal automobile for this purpose in the absence of transportation furnished by the railroad company he shall be reimbursed for such use of his automobile at the rate of nine cents a mile. If an **employee's** work point is changed during his absence from the work point on a rest day or holiday this paragraph shall apply to any mileage he is required to travel to the new work point in excess of that required to return to the former work point."

Carrier argues that Claimant's assignment to **Bellevue** was required by seniority rules and hence was no different than had the position been advertised and he had been assigned by bulletin. Further Carrier contends that if Rule 46(f) applied, then Claimant would have had to been given a fifteen day notice before his headquarters could be changed. Carrier states that the temporary **assignment to Bellevue** was a seniority move **and** the issue is similar to that in Case No. 54 of Public Law Board No. 369 wherein the Board held that the assignment was a **seniority** move. We note however, that in that Award the Board said: "All that is material is that the assignment is to a regular position and that it was made pursuant to prescribed seniority rules." That factual circumstance, of a regular assignment, is not similar to the temporary assignment herein.

Petitioner argues that the issue herein is whether Claimant incurred expense in "exercise of seniority" or in "recognition of seniority". It is contended that Claimant was sent to Bellevue in recognition of seniority rather than of his requesting opportunity to fill an advertised position.

The issue in this dispute has been considered by this Board on numerous previous occasions. Carriers have often argued that temporary assignments similar to that herein are instances of the exercise of seniority. In Award 3426 we said:

"...**Claimant** was eligible for promotion to a position of Section Foreman: that the custom was to assign such an assistant section foreman to temporary vacancies in positions of section foreman. We think this custom on the part of the Carrier amounts, at most, to recognition of seniority rights on its part. It falls far short of **exercise** of seniority rights by the **employee**."

In sustaining a claim with a virtually identical issue **to that** herein, in Award 6170, after Carrier's argument on the "exercise of seniority", we said:

"This Division has often held that when Carrier acts to fulfill the seniority requirements of its **employees** in filling temporary vacancies, such as here, it is not an exercise of seniority by the **employee** but the performance of Carrier's duty and done at its direction."

In this dispute Claimant could not have exercised his seniority since the bulletin dated October 26, 1971 did not appear until October 28, 1971 and he was assigned to **Bellevue** on October 25th. Furthermore, it was Carrier's responsibility to fill temporary vacancies in accordance with seniority rules pending **formal** posting: we concur in the earlier thinking expressed in the Awards quoted above. We note that contrary to Carrier's contention, St. **Marys** continued to be Claimant's headquarters point and there was no need for a fifteen day notice for the temporary assignment. The Claim will be sustained.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and **all** the evidence, finds and holds:

That the parties waived **oral** hearing:

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and **Employees** 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.

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Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A.W. Pauler*
Executive Secretary

Dated at Chicago, Illinois, this 15th day of March 1974.