Award No. 5138
Docket No. MW-5098

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI PACIFIC RAILROAD COMPANY

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

(1) That the Carrier violated the effective agreement when it assigned Section Laborer Thomas E. Jeffery to work on various days in April, 1948 instead of assigning Section Laborer D. M. Layton;

(2) That Section Laborer D. M. Layton be paid the same amount earned by Section Laborer Thomas E. Jeffery during the period referred to in part (1) of this claim.

EMPLOYES STATEMENT OF FACTS: D. M. Layton, Extra Gang Laborer, with seniority date of September 7, 1947, and Thomas E. Jeffery, Extra Gang Laborer, no seniority date, were both working in Extra Gang No. 8, White River Division on April 3, 1948 when they were notified that they were to be laid off in force reduction.

Subsequent to April 3, 1948, Thomas E. Jeffery was employed as an Extra Gang Laborer in Gang No. 8, while D. M. Layton was off on furlough.

A claim on behalf of Extra Gang Laborer D. M. Layton was filed with the Carrier and claim was declined.

The agreement in effect between the two parties to this dispute, dated July 1, 1938, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Scope Rule of the effective agreement reads as follows, in part:

"These rules govern the hours of service and working conditions of all employes herein named in the Maintenance of Way Department and sub-departments thereof (not including supervisory forces above the rank of foremen) as follows:

"(b) Roadway Track Department:
Section and Extra Gang Foremen
Assistant Section and Extra Gang Foremen
Section and Extra Gang Laborers, including employes engaged in the operation of Maintenance of Way

seniority rights. Extension of seniority rights under this rule will expire unless returned to active service within one (1) year." (Underscoring ours.)

A careful study of Rule 3 (f) quoted above will convince you that the Carrier has agreed to give preference to senior laid off employes when filling temporary vacancies, but it is abundantly clear from a close study of Rule 3 (f) that in order to invoke such action on the part of the Carrier, the employe who has been laid off **must file his name and address in writing** with the appropriate division officer, with copy to Local Chairman, **at the time laid off.** Claimant D. M. Layton failed to comply with the provisions of Rule 3 (f) at the time he was cut off. He cannot, therefore, maintain a claim based on the allegation that the Carrier failed to give him preference in filling temporary vacancies.

Rule 3 (f) goes much farther than the above paragraph would indicate because it also provides that emloyes who are laid off must file their name and address in writing with the apropriate division official at the time laid off in order **to retain their seniority.** Claimant Layton did not file his name and address with the proper official at the time he was laid off and, therefore, he actually lost his seniority, as well as other employment rights.

The Carrier takes the position that the Board should deny jurisdiction of the claim as filed for the reasons stated in our protest on Page No. 2 and Page No. 3 of this submission.

If, however, in the face of the Carrier's protest, it is the decision of your Board to take jurisdiction of this claim as stated, then it is the Carrier's position that the claim as presented and progressed on the property is without merit or support under the agreement and should, therefore, be denied.

The Carrier requests the privilege of making an additional submission in the event the Employes present additional questions not dealt with in this submission because of the failure of the Employes to progress the claim in accordance with the provisions of the Railway Labor Act, the provisions of the effective agreement and the practice on this property.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was laid off in a force reduction, but it was some eleven days later before he complied with Rule 3 (f), which requires filing of name and address, at time of lay-off, in order to retain seniority and to claim employment preferences.

While claimant was in laid-off status, the Carrier filled temporary vacancies on the job, from the senior furloughed man reporting and available at the job site each morning. The requirement to make one's self available for temporary work, by reporting each day at the headquarters of the crew, is not provided by contract. The Agreement seems to require the Carrier to notify the senior employe before filling temporary vacancies and when forces are increased.

Claimant appeared at the job site on April 6th, but was not used. Thereafter he did not report again, but, on April 14th, did advise the Division Engineer and Roadmaster, in writing, to retain his name and address on the seniority roster. There is no evidence that the Carrier took steps to remove claimant's name from the seniority roster, but, to the contrary, his seniority would have been recognized had he reported from day to day. Claim is made for every day claimant was deprived of work in April 1948, by reason of Carrier having assigned an employe, with less seniority, to temporary vacancies during that month. The Carrier admits that had claimant shown up at the job each day, to ascertain whether work was available, he would have been used for temporary vacancies in place of the junior man, even though he had not filed his name and address, as Carrier now maintains he should have done.

One cannot read the record in this case without feeling that the parties have always placed matters of convenience, at the subject point on the Carrier's system, above the Agreement. As frequently is the case, all concerned were happy with the arrangement until a dispute arose, and then both clamor for strict construction of their Agreement, although it has been treated by them, to some extent, as a mere scrap of paper up until this time. Neither party is without fault, from the record before us, but the Carrier must assume the blame. The responsibility, in the first instance, has always rested with the Carrier to see that the Agreement was correctly applied. Such has consistently been this Board's view and there appears good reason for invoking that doctrine here. There can be no doubt, from the evidence before us, that the Carrier's indifference to the Agreement has not only posed problems for it, such as inexcusable absenteeism, but has lulled its employes into the false notion that contract requirements are of secondary importance. Thus the failure to file name and address promptly at time of lay-off, and, instead, to show at the site of the job to claim work that was available.

It being conclusively shown by the record that it was claimant's failure to show up on the job each day, to ascertain whether work was available, which caused him to lose the work, and not his failure to promptly file his name and address at the time of lay-off, the loss of the work was not due to employe's failure to comply with Rule 3 (*f*).

Ordinarily an employe laid off in a force reduction may not file his name and address at any time which may suit his convenience, if the rule provides otherwise, but neither can it be said that two wrongs make a right. By reason of the record in this case, the primary fault rests with the Carrier, and the claim for compensation being only an incident resulting from the Carrier's failure to correctly apply the Agreement without deviation, the consequences thereof must be borne by the Carrier, if the integrity of the Agreement is to be upheld, in all its parts. Further, the Carrier having failed to call claimant for work, in accordance with his seniority, it is no defense to the claim that Carrier did not know of claimant's availability. See Award 4200.

Carrier's objections to the Board's jurisdiction have been noted, but are considered hypertechnical and without merit. See Award 5074.

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

The Carrier violated the Agreement.

AWARD

Claim (1 and 2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 13th day of December, 1950.