Award No. 8185
Docket No. MW-7498

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

FORT WORTH AND DENVER RAILWAY COMPANY

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

(1) The Agreement was violated when Section Laborer W. W. Dodson was laid off in force reduction on February 16, 1954, and continued in a furloughed status and a junior section laborer was retained in service;

(2) Section Laborer W. W. Dodson be allowed pay equivalent to what he would have been paid had he been properly retained in service in preference to a junior section laborer.

EMPLOYES' STATEMENT OF FACTS: The Claimant, Mr. W. W. Dodson, has been employed as a section laborer since February 1, 1946, and has seniority as such since that date. Mr. H. C. Alexander was employed as a section laborer on August 1, 1949, and has seniority as such since that date. Section Laborer W. W. Dodson has been employed on the Memphis, Texas section for some two years prior to February 15, 1954, during which time he continued to reside at Clarendon, Texas with no objection from the Carrier as to his point of residence while working at Memphis during the aforesaid two years.

Mr. Dodson's primary purpose in residing at Clarendon was because he owned his own home at Clarendon and because a daughter who lived with him had regular employment at that point. Mr. Dodson was a subscriber to public telephone service during all the time that he resided at Clarendon and could have been easily called for any services required at Memphis. The foremen had been furnished with the Claimant's telephone number.

On February 15, 1954, Mr. Dodson was advised that forces would be reduced at the close of that work day and that he would then be required to move his point of residence to Memphis as a condition of his continued employment with the Carrier. Inasmuch as Mr. Dodson's service for the preceding two years had not been objected to by the Carrier despite the fact that he resided at Clarendon and his headquarters were at Memphis, Mr. Dodson felt that he could continue to perform satisfactory service under the same arrangement.

to February 16, 1954, when his residence at Clarendon went unchallenged. The facts of record show that this Claimant, throughout his employment period prior to February 16, 1954, was an employe in a so-called "Floating" or "Bucket" gang, periodically employed as an auxiliary force to the several sections in the vicinity of Clarendon, for the specific purpose of surfacing track. This supplementary force therefore had none of the duties or responsibilities beyond that work such as those that are attached and a prerequisite to the section laborer who is regularly assigned to the permanent force of the section gang proper.

While the Employes are in the instant case maintaining that a section laborer living 27 miles from his headquarters is in compliance with Rule 25(c), it can well be imagined what their position would be if they were required by employers to use their automobiles and report each morning at the assigned beginning time at a point 27 miles from their residence. They would probably be making claims for travel time. In this particular case, it cannot be said that the housing conditions entered into the Claimant's desire to live at Clarendon instead of Memphis. If anything, the housing conditions at Memphis should be superior to, or better than, the housing conditions at Clarendon. Living conditions at Memphis, so far as utilities are concerned, are superior to those found at Clarendon.

It is the Carrier's position that the practice here followed has been recognized and concurred in by the Employes through the years. Therefore, my contention that the Carrier acted arbitrarily or unilaterally is without merit, and denial of the claim is respectfully requested.

The Carrier affirmatively states that all date herein and herewith submitted have previously been submitted to the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant here requests that he be made whole for any wage loss suffered account of his alleged improper furlough from service on February 16, 1954 and the retention in service of another employe, junior in service, during this period, that is until September 2, 1954, when he was returned to service.

The Organization took the position that Claimant's furlough combined with the retention of another employe with less seniority was in violation of the effective agreement. It was pointed out that there was no rule in he agreement that required the residence of Section Laborers at headquarters, that both claimant and other employes had, over a protracted period of time, lived at various distances from headquarters without protest and with the full knowledge and acquiescence of the Respondent. It was further contended that within the meaning of Rule 25 (c) Claimant should have been permitted to replace any junior employes in the Roadmaster District.

The Respondent pointed out that the Claimant was hired as a Section Laborer on the Clarendon section, and assigned to a "bucket gang", later becoming attached to the Memphis section. It was asserted that the Carrier has the right to make rules governing the place of residence of its section employes, and was particularly justified in requiring Claimant to move as a condition of continued employment since the Claimant lived some 27 miles from the Memphis section headquarters.

While we agree with those awards of this division to the effect that even in the absence of a rule on the subject, a Carrier has the right to institute requirements that its employes live at or in proximity to the assigned headquarters, we are of the opinion that the facts and circumstances in this

particular case are such that the adoption of this principle here is not justified.

For some two years prior to Claimant's furlough he had resided at Clarendon. Of this period his headquarters had been at Memphis for some eight and one-half months. This fact was well known to the Respondent and was continued with their apparent acquiescence. There is no evidence of record that the Claimant's record of job performance was other than satisfactory, that he had ever failed to answer a call for duty, emergency or otherwise, or had ever been late in so reporting. While in no way controlling, it is noted that the Claimant when returned to service was permitted to maintain his residence as he had in the past.

There is also evidence of record that numerous other employes have, and still do, maintain residence at varying distances from their headquarters. While this Carrier has the inherent right to promulgate and make effective residence requirements for its section forces, such rules and regulations should be uniformly applied, at least on a section or district basis. Any rule, regulation or custom and practice must apply to all alike to be controlling. This was not done here.

The Respondent argues that this claim, if valid in any respect, should only be sustained for that period between February 16, 1954 and June 1, 1954; such latter date being the date the junior employe who was initially retained in lieu of Claimant was furloughed; for the reason that there is no showing Claimant could or would have otherwise exercised his seniority and continued in service beyond that date. We are of the opinion that this contention is without merit for the reason that there is no indication in the record that the Claimant would have been permitted to return to service and maintain his residence at Clarendon. So therefore, we are of the opinion that the Claimant is entitled to pay for all time lost between February 16, 1954, and September 2, 1954, less any sums earned by him in other employment.

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 Carrier violated the effective agreement to the extent indicated in the above opinion.

AWARD

Claim sustained to the extent indicated in the above opinion and findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December, 1957.

DISSENT TO AWARD NO. 8185, DOCKET NO. MW-7498.

The majority correctly find that the Carrier has an inherent right to promulgate and make effective residence requirements for its section forces,

but the authority of this Division is exceeded in finding that any rule, regulation, custom or practice must apply to all alike to be controlling. The right to promulgate and make effective a rule, regulation, custom or practice carries with it the right of the maker to make exceptions thereto for justifiable cause in individual cases in order to best effectuate, with reasonableness, the purposes of the requirement.

The Carrier's Statement of Facts shows that the junior laborer at Memphis was removed in further force reduction effective June 1, 1954, thus terminating the claim period with a total of 73 work days. This statement of fact was not refuted, nor is there any showing that an employe junior to claimant was retained in service after that date. Absent such a showing, it is not our privilege to assume that he could have and would have exercised his seniority elsewhere beyond that date, nor is it our privilege to assume that he would not have been permitted to do so and maintain his residence at Clarendon. The majority ignored the facts and resorted to pure speculation.

For these reasons, we dissent.

/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp