

Award No. 11491
Docket No. MW-10959

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
FORT WORTH AND DENVER RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when it failed and refused to reimburse Section Laborer C. F. Garman for cost of meals and lodging incurred while he was away from his headquarters at Clarendon, Texas to relieve Section Foreman Butcher at Texline, Texas from October 13, 1957 through October 17, 1957;

(2) Mr. C. F. Garman now be reimbursed in the amount of \$9.75 which represents the cost of meals and lodging incurred by him while away from Clarendon, Texas to provide relief service at Texline by and at the Carrier's direction from October 13 through October 17, 1958.

EMPLOYEES' STATEMENT OF FACTS: The Claimant is regularly employed as a Section Laborer by this Carrier with headquarters at Clarendon, Texas.

Under date of October 12, 1957, the following orders were given to the Claimant by Roadmaster R. C. Williams:

"G.F.G.

Amarillo 10/12/57

Clarendon

Take charge Texline Section 15 Monday 14 account Foreman Butcher off account Death in Family advise if you will be there.

R. C. Williams . . . 11:25 A. M."

Special arrangements were made for the Claimant's transportation from his headquarters at Clarendon to Texline, indicating that a pass and permit to cover said transportation would be at Amarillo. Said transportation orders, a copy of which was sent to the Claimant, read:

(2) Rules 12 and 18 specifically provide that compensation for travel time and reimbursement for expenses will not be made to employees traveling in the exercise of seniority rights.

(3) The employees have recognized and concurred in the present application of Rule 18 for many years, which is most persuasive evidence that they have not regarded its application to the situation involved as a violation of the agreement.

In consideration of the facts advanced herein, it is submitted that this claim is not supported by the applicable agreement, and it is therefore respectfully requested that the claim be denied in its entirety.

All matters contained herein have been subject of conference discussion and correspondence between the parties.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant, G. F. Garman, is a regularly assigned section laborer at Clarendon, Texas (Carrier contends that though his home was at Clarendon, Claimant was working regularly as a section laborer at Ady, Texas). In arriving at a decision in the matter before us whether or not his home station is at one location or the other is relatively unimportant.

Under date of October 12, 1957, the following order was given Claimant by the Roadmaster:

"Amarillo 10/12/57

"G.F.G.

Clarendon

"Take charge Texline Section 15 Monday 14 account Foreman Butcher off account Death in Family advise if you will be there.

"R. C. Williams . . . 11:25 A. M."

Claimant went to Texline in compliance with the order and sent the following telegram, October 14, 1957.

"AR-3-(2)-Z Texline, Texas, October 14, 1957.

"JDM- RCW- AR

"Taking charge Sec. No. 15 Texline - 8:00 A. M.

"C. F. Garman — 7:51 A. M."

There is no disagreement between the parties that Claimant, at the time of the assignment, was regularly assigned as a section laborer and held seniority as a section foreman. It is further agreed that Claimant, at the direction of the Carrier, filled vacancies occurring in the section foreman classification prior to the time involved here when Claimant was taken away from his regular assigned position as section laborer to occupy a temporary vacation

of section foreman at another location. Claimant contends that he was not in the exercise of his seniority rights and Rule 18 of the Agreement is applicable.

"Employees will be reimbursed for cost of meals and lodging incurred while away from their outfits or headquarters by direction of the Management. This rule not to apply to midday lunch customarily carried by employees, nor to employees traveling in exercise of their seniority rights."

Claimant contends that the Carrier's obligation to comply with the seniority rules of the agreement by recognizing employee's right to a position is not an exercise of seniority by the employee.

Carrier, to the contrary, contends the Claimant was in the exercise of his seniority rights and that Claimant was traveling in the exercise of his seniority rights under Rule 27 (b) of the Agreement which provides, as follows:

"(b) Employees who have satisfactorily passed the required examination will be placed on an 'eligible list' in the order of their seniority and the 'eligible list' will be posted for the information of all concerned. Such employees will be used in the order of their rank on the 'eligible list' for filling vacancies of assistant foreman or foreman unless such vacancies are filled by employees holding seniority in such grades. The available employee on the 'eligible list' who declines to accept assignment to a vacancy of five work days or more in his turn of the 'eligible list' will be placed at the foot of the list." (Emphasis ours.)

It is evident that the controlling issue is, simply, whether the Claimant moved on to the foreman position in recognition of his seniority rights by the Carrier under the Agreement or whether he moved there in the exercise of his seniority rights.

In Award 5293, a sustaining award, a rule similar to Rule 18 of this Agreement was involved but the Agreement there had no such rule as contained in 27 (b) of this Agreement. It was indicated by the Board that if the employee had some free choice between traveling and sitting still, "the expense is his if the choice which he makes involves traveling." In Award 5488 and 10988, sustaining awards, there was a rule similar to Rule 18 involved but there was also another section of the Agreement which provided that an employee's refusal to honor a call would result in a forfeiture of seniority—a valid right. It was recognized in those awards that the employee acted under compulsion, not on his volition so, consequently, there was no exercise of seniority.

The assignment here was for less than five days. Claimant was entitled under the Agreement to choose as to whether he would accept the assignment or not. He acted on his own volition without jeopardizing his seniority rights and his acceptance of the assignment was an exercise of his seniority rights.

The difference between recognition of employee's seniority rights by a Carrier in the direction of the working force and the exercise of seniority rights by an employee is, simply, that the latter involves an act of volition or choice by the employee.

In Award 5518, though not on the same property, rules similar to Rule 18 and 27 (b) were involved and the same conclusion arrived at.

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 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 there has been no violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of June 1963.