Award No. 12003
Docket No. MW-10040

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (Western Lines)

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 allow meal expenses incurred by B&B Mechanic J. E. Coffield while performing relief service as a B&B Foreman during the months of April, May and June, 1956.

(2) The Carrier now be required to allow the meal expenses submitted by B&B Mechanic J. E. Coffield for the months of April, May and June, 1956.

EMPLOYES' STATEMENT OF FACTS: The claimant, Mr. J. E. Coffield, was regularly assigned to the position of Bridge and Building Mechanic, with headquarters at LaJunta, Colorado.

Mr. Coffield was directed by the Carrier to temporarily leave his headquarters at LaJunta for the purpose of filling the position of B&B Foreman during the absence of three vacationing B&B Foremen as follows:

B & B Foreman S. J. Howey, B&B Gang No. 4 from April 16 through May 4, 1956

B & B Foreman F. R. Wallace, B&B Gang No. 2, from May 21 through June 8, 1956

B & B Foreman T. J. Keaton, B&B Gang No. 1, from June 11 through June 29, 1956.

During the above referred to periods in which the claimant performed relief B&B Foreman service at the Carrier's direction, he incurred meal expenses totaling $30.97 during April; $34.79 during May and $59.08 during June.

the National Mediation Board in Case A-3139 as set forth in Item (1) of Mediation Agreement executed by the parties at Chicago, Illinois, under date of June 30, 1949.

4. It has been evidenced that all agreements in effect at the time of change in representation, including accepted and practiced interpretation and application of all rules of such working agreements, have been carried forward through the years to and including acceptance thereof by the Petitioner herein, as shown by Letter-Agreement signed by the parties hereto under date of December 9, 1952.

5. In a number of the awards of this Board examined by Carrier wherein claims were sustained for travel time and/or meal expense, decision of the Board to allow such claims seemingly rested on the conclusion that exercise of seniority was not involved. The Carrier here before your Board respectfully asserts it has shown by competent evidence that difference in rules, plus demonstrated mutual acceptance of the meaning of Article II, Section 16, Foreman's Agreement, borne out by accepted interpretations of the rules in effect on this property, create a basic difference fundamentally sound under the Railway Labor Act on which to base a denial award in this case.

6. Carrier has produced evidence of unsuccessful efforts by the Employes to negotiate changes in the governing rule, Article II, Section 16, which, if granted, and they were not, would have had the effect of validating claims under circumstances of the case in point. This in itself is acknowledgment this claim is denied by existing rules. Thus it is clear the Employes' claim now before you is a further effort to obtain such a rule by an award of this Board. A denial of the claim is clearly in order and is respectfully requested by the Carrier.

7. Article V, Section 1 (a) and 1 (c), of the National Agreement of August 21, 1954, in effect on this property, is invoked by Carrier to the full extent of the rule's application to the facts in this case.

The Carrier is uninformed with respect to the arguments the Brotherhood will advance in its ex parte submission and accordingly reserves the right to submit such additional facts, evidence and arguments as it may conclude are necessary in reply to the Brotherhood's ex parte submission or any subsequent oral arguments or briefs presented by the Brotherhood in this dispute.

All that is contained herein is either known or available to the Employes or their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant Coffield, in the Spring of 1956, was a regularly assigned B&B Mechanic headquartered at LaJunta, Colorado. He also held seniority as a B&B Relief Foreman which placed him first in line for three vacation vacancies arising in his seniority district. Accordingly, Claimant served as B&B Foreman on Gang No. 4 from April 16 through May 4, on Gang No. 2 from May 21 through June 8, and on Gang No. 1 from June 11 through June 29.

During these assignments Claimant was provided lodging but no meal allowance (i.e. he was treated in the same manner as the foreman whom he

relieved). The claim here is for meal expenses: $30.97 for April, $34.79 for May, and $59.08 for June.

Petitioner contends that, since Claimant was directed by Management to fill the vacation vacancies, the provisions of Article VI, Section 27 apply; namely:

"**Work Away From Headquarters**

"Section 27-a. Employes sent out on the road for service from home station . . . shall be paid while working, according to rules for regular assignment . . . When waiting or traveling they shall receive straight time, . . .

"When meals and lodging are not provided by the Company, actual necessary expenses will be allowed."

"Section 27-b. Employes taken off their assigned territory to work elsewhere, will be furnished meals and lodging by the Company, if not accompanied by their outfit cars . . ."

Petitioner also cites Article 12(b) of the Vacation Agreement:

"As employes exercising their vacation privileges will be compensated under the agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute 'vacancies' in their positions under any agreement. When the position of a vacationing employe is to be filled and regular relief employe is not utilized, effort will be made to observe the principle of seniority."

Carrier contends, on the other hand, that Claimant is not entitled to meal expenses because he filled the temporary vacancies in exercise of his seniority, instead of being directed by Carrier in recognition of his seniority. Carrier cites:

"Article II

"**Exercise of Seniority**

"Section 16. Employes, accepting positions in the exercise of their seniority, will do so without expense to the Company."

March 12, 1942 Letter Agreement

Item 2. "Excepting in instances where Section 2(b) of the Vacation Agreement is applied, vacation relief will be provided in the same manner as ordinary relief is provided at the present time."

"Article III

* * *

"**Filling Vacancies and New Positions**

"Section 4-b. Temporary vacancies of thirty (30) days or less that are to be filled may be filled without bulletining, by advancing or recalling the senior available qualified employe of the class actually

working on the seniority district in a lower class or out of service in force reduction and holding rights to recall, except that employes with seniority as section foreman or assistant section foreman will not be required or permitted to protect temporary vacancies of thirty (30) days or less as section foreman or assistant section foreman while working or assigned as extra gang foreman, assistant extra gang foreman or roadway machine operator. Other than employes covered in the foregoing exception, employes available on the seniority district who fail to respond to call for temporary service, under the provisions hereof, will forfeit their seniority in the class in which the vacancy occurs. The employe affected and the Division Chairman of the Brotherhood will be notified in case of loss of seniority under the provisions of this rule."

This Board, in several cases, has ruled on the meaning of clauses like II, 16 when considered in conjunction with seniority and temporary assignment provisions and past practice. From these decisions the following principles emerge: (1) When an employe receives a temporary assignment by virtue of his contractual seniority rights, and he has no real choice regarding the acceptance of such assignment, he is not exercising his seniority; (2) If he bids off a position, or uses his seniority to displace another man in a different location, he is exercising his seniority; (3) If he has a real choice in accepting or rejecting a temporary assignment he is exercising his seniority when he makes his decision.

These principles (and there has been no serious conflict among the decisions) are set forth in Awards 769, 3426, 3495, 5293, 6170, 6252, 7648, 10988, 5488, 5518 and 11491. All but 769 and 5488 involve the Brotherhood of Maintenance of Way Employes. Awards 5488 and 10988 concerned this Carrier.

The common thread running through the sustaining Awards is that the employe on temporary assignment had no real choice in determining whether he should accept that assignment. In some cases (Award 3426 for example) the Rule was silent; nevertheless it was the custom to assign an assistant section foreman to temporary vacancies in foreman positions. This custom, the Board held, "amounts, at most, to **recognition** of seniority rights on its part. It falls far short of **exercise** of seniority rights by the employe." In Award 3495, while the record does not recite the seniority or temporary assignment rules, the Board found that in filling a temporary Section Foreman position "it was the duty of the Carrier to fill it in accordance with seniority rules." Consequently, the exception in Rule 27 (referring to "employes traveling in the exercise of their seniority") did not apply, despite Carrier's contention that under such circumstances it had never been the practice to allow expenses.

In Award 5293, controlling Rule 13(a) specifically provided that a "temporary vacancy or . . . position of section foreman . . . will be filled by using the senior foreman of the class in which the position is open on the supervisor's district, who is not at work as foreman at the time . . ." Another Rule accorded employes the right "to protect temporary vacancies or positions in the order of their seniority . . ." and stated, further, that they "may be required to protect temporary work . . ." The Board held that the Claimant was "sent traveling in recognition of his seniority rights which the Carrier was obligated to observe in his selection and "this was not an exercise of seniority rights . . ." Accordingly, the Board determined, "the Rule governs, notwithstanding past contrary practices."

In the above illustrative cases it is clear that the employe was offered no choice in deciding whether or not to accept a temporary assignment. But in Award 5518 there was a choice. Claimant there headed the eligibility list for appointment to temporary foreman vacancies. The Agreement required Management to use this list, in seniority order, for filling such vacancies. But the Rule also provided that "the available employe on the 'eligible list' who declines to accept assignment to a vacancy of six work days or more in his turn in the 'eligible list' will be placed at the foot of the list." The Board held that, when Claimant agreed to serve a two-week foreman stint, "his acceptance thereof was an exercise of his seniority rights" since "we consider that he was entitled to choose as to whether to accept such vacancy or not."

A similar ruling under a like clause was rendered by this Board in Award 11491 where (1) the assignment was for less than five days; (2) Claimant was entitled to choose as to whether or not he would accept the assignment; (3) Claimant acted on his own volition without jeopardizing his seniority rights. (The Board distinguished Awards 5488 and 10988 since "it was recognized in those Awards that the employe acted under compulsion, not on his volition so, consequently, there was no exercise of seniority.")

As indicated, in Award 5488 (a B. of R.C. case on this Carrier) the "choice" was not considered realistic since it involved possible forfeiture of all seniority rights. In that dispute, which concerned the recall of an employe who had been laid off during a reduction in force, Article III, Section 13-b declared that "failure to report for duty within fourteen (14) calendar days after notice of recall therefor, shall result in forfeiture of all seniority rights." The Board noted that, while "Carrier argues further that there was no compulsion on Claimant to accept the assignment to Gainesville." it "seemingly overlooks the provisions of Section 13-b which makes refusal to honor recall a forfeiture of seniority, a valued right." This decision was followed by Special Board of Adjustment No. 174 in Awards 2 and 3 which also involved this Carrier and the B. of R.C.

The case at hand, in our judgment, falls within the line of decisions holding that no realistic choice exists if, in declining a temporary assignment, an employe must sacrifice his seniority rights. (Here Article III, Section 4-b declares that ". . . employes available on the seniority district who fail to respond to call for temporary service, under the provisions hereof, will forfeit their seniority in the class in which the vacancy occurs.") This conclusion is buttressed by the Board's decision in Award 10988 which involved the same Carrier, same Petitioner, same Agreement, same alleged violation (even to the month), and same arguments. Disregarding a contrary practice of long standing, the Board held:

> "Our primary problem, then in resolving this controversy, is: 'Was the Claimant in accepting this assignment to relieve the vacationing Foreman, who was in a higher seniority bracket, in the exercise of his seniority?' This vacancy was not bulletined nor did the Claimant apply for the Assignment. Claimant was directed to protect the position of the Foreman while he was on vacation in recognition of his seniority rights as required by the rules. This was merely a compliance by the Carrier with the seniority rules and does not constitute the exercise of seniority rights by Claimant. Claimant was under some compulsion to accept the assignment as the provisions of Article III — Section 4-b make his refusal to honor a call a forfeiture of seniority — a valid right."

(It should be noted for the record that the Board, in a subsequent paragraph, erroneously referred to Award 5488 as involving the same parties and similar rules. As indicated above, the B. of R.C. was the petitioning Organization in Award 5488 and the rules were somewhat different. However, this error does not detract from the validity of the conclusion reached in 10988.)

Under the circumstances, the first part of the claim will be sustained. However, as Carrier points out, no claim for meal expenses in June 1956 was ever presented to the Division Superintendent as required by Article V, Section 1 (a) of the August 21, 1954 National Agreement and the procedure adopted by the parties. This fact was called to the Organization's attention on December 7, 1956 during the handling of the claim on the property. Accordingly, the second part of the claim will be allowed only for meal expenses incurred during April and May 1956.

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 has been violated.

AWARD

Claim sustained for meal expenses incurred during April and May 1956.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1963.