

Award No. 13234

Docket No. MW-13312

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when, on May 9, 1961, it directed Machine Operator C. H. Cruse to travel from Pueblo, Colorado to Glenwood Springs, Colorado for the purpose of protecting assignment on Machine D-24 on the morning of May 10, 1961 and refused to allow him travel time pay therefor.

(2) Claimant C. H. Cruse now be allowed eight (8) hours' pay at his pro rata rate because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The position of Machine Operator on Machine TB-1 at Pueblo, Colorado, was advertised as available in accordance with Agreement rule. Claimant Cruse was assigned to said position pending subsequent award by bulletin. Claimant Cruse was assigned to an outfit car.

Machine Operator Gilbert was the successful applicant therefor and he advised the Carrier that he would assume that assignment on May 10, 1961. At this time, a vacancy in the position of Machine Operator on Machine D-24 at Glenwood Springs had been under bulletin since May 8, 1961, and, as the Claimant advised:

"On May 9, 1961, Mr. Al Baker told me I was to go to Glenwood Springs on the machine D-24. So, as soon as I got off work at 3:30 P. M., I called Mr. C. R. Turner's office to find out where the D-24 was. Mr. Leo Phelan told me that it would be on the work train at Glenwood and that I was to be there by 7:30 A. M., May 10, 1961."

Of course, the Claimant's outfit car could not be moved on such short notice, so, upon his arrival at Glenwood Springs, his expenses were paid for by the Carrier until his outfit car arrived. Since there was no passenger service to Glenwood Springs that would permit the Claimant's arrival by 7:30 A. M., he was required to use his own personal automobile for travel

Mr. W. R. Ancell
General Chairman, BofMWE
Denver, Colorado

Dear Sir:

Your letter January 14, 1959, File D-2-133, proposing increase in travel time payments to work equipment operators.

Your proposal is barred by the provisions of Article VI of the Agreement signed at Chicago, Illinois, November 1, 1956.

Yours truly,

/s/ E. B. Herdman

E. B. Herdman
Director of Personnel

LGH:iha"

It will be seen from the foregoing evidence that the Employees are now attempting to secure by a claim what they have not been able to obtain through collective bargaining. By their request they admit that they have no rule to cover what they are claiming in this docket. This claim amounts to a request for the Third Division to write the rule.

Claim is without foundation and must be denied.

OPINION OF BOARD: Claimant C. H. Cruse, was assigned to a Machine Operator position at Pueblo, Colorado, pending a subsequent award of the position by bulletin, and was assigned an outfit car. Carrier, on May 9, 1961, was advised that the successful applicant for the position would assume the assignment on May 10. At this time a vacancy in the position of Machine Operator, which was under bulletin, occurred at Glenwood Springs, Colorado. It is contended by the Claimant that he was directed by the Carrier to go to Glenwood Springs. Claimant Cruse completed his work at Pueblo at 3:30 P. M. on May 9 and was notified of the vacancy at Glenwood Springs. He then called Mr. Turner, the Supervisor of Work Equipment and talked over the telephone with Mr. Phelan, Engineering Assistant in charge of bulletins and assignments of Road Equipment Operators. He was told by him that the work would be on a work train at Glenwood Springs and that he was to be there at 7:30 A. M., May 10. As there was no passenger service to Glenwood Springs that would permit his arrival at 7:30 A. M., he was required to use his own automobile for travel between Pueblo and Glenwood Springs. Claimant arrived at Glenwood Springs before his outfit car. His expenses there were paid until his outfit car arrived. Claimant contends that this assignment by Carrier represented a recognition by Carrier of Claimant's seniority rights, Claimant being the senior operator without assignment; that this was not an exercise of seniority by the Claimant.

Claimant relies on Rule 15 (c) of the Agreement:

"(c) Employees who are required by the direction of the Carrier to leave the home station will be allowed actual time for traveling or waiting during the regular working hours. All hours worked will be paid for in accordance with the practice at home station. Travel or

waiting time during the recognized overtime hours at home station will be paid for at the pro rata rate."

In opposition to Claimant's position Carrier insists that Claimant in accepting the assignment at Glenwood Springs, was in the exercise of his seniority rights and cites the following rules of the Agreement in support of its position.

Rule 15 (e):

"(e) Employees will not be allowed time while traveling in the exercise of seniority rights, or between their homes and designated assembling points, or for other personal reasons."

* * * *

Rule 3 (i):

"(1) Except as provided in Section (2), an employee displaced or cut off in reduction of force must indicate within ten days the position to which he intends to exercise displacement rights and must exercise seniority within ten days from date of displacement unless extension of time is arranged in writing with Division Engineer.

(2) Employees who do not indicate within ten days from date of displacement or cut off, position on which they desire to exercise displacement rights will be considered as furloughed employees subject to return to service under the provisions of either Rule 7 or Rule 9."

Evidence that Claimant has offered to support the contention that he was directed by Carrier to go to Glenwood Springs is rather sketchy at best. Claimant was, undoubtedly, advised of the Glenwood Springs vacancy. Claimant could have elected under Rule 3 (1) to not exercise his displacement rights at the time here involved. It is apparent from the record that he did, of his own volition, elect to exercise his seniority right and take the temporary position. This is evident from the fact that Claimant called Mr. Turner's office; Mr. Phelan didn't call him.

The question submitted for our determination is whether the assignment involved was accepted by the Claimant in the exercise of his seniority right or whether he was directed to go to Glenwood Springs in recognition of Claimant's seniority right, entitling him to an allowance for travel time under Rule 15 (b) of the Agreement.

The distinction between "recognition of an employee's seniority right by a Carrier" in directing a working force and "the exercise of seniority rights by an employee" is whether or not an employee accepts an assignment by Carrier on his own volition or by his own choice or whether he does not. See Award 5518—Whiting; Award 11491—Hall.

We must conclude that Claimant in the present case was entitled under the Rules to make a choice as to whether to accept the vacancy at Glenwood Springs or not, and that the acceptance thereof by Claimant, was an exercise of his seniority rights under Rule 15 (e) of the Agreement.

This case is distinguishable from Award 10988—Hall, as under the rule prevailing on that property, the employee acted under compulsion, not on his

own volition. So, consequently, there was no exercise of seniority by the employe. See Award 12003—Stark for a thorough discussion of this problem.

Other issues were raised in the submissions which we find it unnecessary to pass upon.

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 not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1965.