Award No. 2163
Docket No. 1918
2-AT&SF-CM-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 97 RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY SYSTEM

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement Military Veteran Carman Helper Albert Ponce was unjustly deprived of his contractual rights when he returned from military service to the service of the Carrier and was denied the right to displace a Carman Helper junior in seniority as such, who was working as an upgraded helper performing Carman's work at Carman's rate of pay.

2. That, accordingly, the Carrier be ordered to:

a) Make this employe whole by additionally compensating him for the difference between Carman Helper and the applicable Carman's rate for each hour worked, commencing at 8:00 A. M. January 6, 1954 and until correction is made.

b) Permit this employe to exercise his Carman Helper's seniority over any Carman Helper junior in seniority to his seniority who was upgraded to a Carman while the Claimant was in the military service.

EMPLOYES' STATEMENT OF FACTS: Carman Helper Albert Ponce, hereinafter referred to as the claimant, was employed by the carrier in its Topeka, Kansas, car department as a carman helper, March 18, 1948, and established on the foregoing date carman helper seniority which has been intact ever since.

On August 1, 1949, the claimant was inducted into the U. S. Armed Forces. He was properly protected by leave of absence and the U. S. Selective Service Act as amended, insofar as his re-employment rights were concerned. The claimant was discharged from military service and returned to the service of the carrier on January 4, 1954.

Liberal construction should not afford an excuse for misconstruction.

Thus, an honorably discharged veteran is entitled to restoration to the position he vacated or one of like seniority status and pay and to be regarded as having been on furlough or leave of absence during his military service. Generally, and within the thought of the Spearman case, he is entitled to those betterments in his status which would certainly have come to him, but for his military service, solely by the passage of time. But the statute does not provide that he should be considered as having been on active duty in his employer's service during his period of military training and service. It need not be argued that a furlough or leave of absence is radically different from continued work on one's job. Nor does the Act in any wise guarantee to a returned veteran promotions or job reclassifications which he might—and even probably would—have received if he had remained out of the military service. And, the statute being silent in the matter, the courts have no power to supply a supposed gap or confer on veterans advantages which the Congress did not see fit to provide. Considerations of generosity in that behalf are appropriate for legislative motivation. They have no proper place in judicial study.

And with substantial uniformity the reported opinions disclose that attitude. The courts have been alert to assure to veterans the rights conferred on them by the statute but unwilling to erect novel and unprovided avenues for their preferment."

Finally, it is desired to direct the attention of your Honorable Board to the fact that the principle involved in this case was clearly enunciated in Award 1187 of this Division of the Adjustment Board, assisted by Referee Cook. In that case the employes took the identical position that this carrier has taken in the Ponce case, viz., that Boilermaker Helper Pride, who had been promoted during Jones' absence in military service, should not have been displaced by Axel Jones, a senior laborer, upon the latter's return from military service February 7, 1946. A careful review of the award in that case is respectfully suggested. In its dispute with this carrier the employes have taken the opposite position and are contending that Helper Ponce, upon returning from military service, should have been permitted to displace a junior helper promoted in his absence to fill position of craftsman in which he had no seniority. At the time Ponce entered military service he had no fixed or absolute rights to promotion. In other words, like in case 1187, the agreement does not provide for promotion on a strict seniority basis. There can be no gainsaying the fact that Ponce had no compulsory rights to a position of mechanic and there is no positive assurance that even had he not been in military service he would have been promoted to such a position.

In the face of the above cited authorities, the carrier has no alternatives but to maintain that the claimant is not entitled to make the displacement which the organization claims he should have been permitted to make upon his return from military service.

In conclusion, the carrier asserts that the claim in the instant dispute is groundless, devoid of any support in the law, the agreement or any other medium of authority and respectfully requests that it be denied in its entirety.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

Claimant entered the service of the carrier on July 10, 1947. He was promoted to carman helper on March 18, 1948. He entered military service on August 3, 1949. He was discharged from military service on December 14, 1953 and resumed his employment with the carrier as a carman helper on January 4, 1954. On January 6, 1954, claimant sought to exercise his seniority rights on a mechanic's position by displacing junior Carman Helper Apps, who was advanced to carman without seniority while claimant was in military service.

The record shows that claimant enlisted in the army on August 3, 1949 and remained therein until December 14, 1950, and re-enlisted for a further period of three (3) years. Claimant served in the army from August 3, 1949 to December 14, 1953, a period in excess of four (4) years. The claimant had no rights under the Universal Military Training and Service Act of 1951 by virtue of the requirements of Section 9 (g) (1) of the Act. This section provides:

> "Any person who subsequent to June 24, 1948, enlists in the Armed Forces of the United States (other than in a reserve component) and who serves not more than 4 years (plus any period of additional service imposed pursuant to law) shall be entitled upon release from Service under honorable conditions to all the reemployment rights and other benefits provided for by this section in the case of persons inducted under the provisions of this title."

By remaining in the armed services for more than four (4) years by voluntary enlistment, claimant took himself without the terms and conditions of the Act. Consequently, he has no rights accruing under the Act. The fact that the carrier re-employed him gives claimant nothing under the Universal Military Training and Service Act. He has only such rights as the collective agreement gives him.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 5th day of July, 1956.