Award No. 4134
Docket No. CL-4016

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Nathan Swaim, Referee.

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

FORT WORTH AND DENVER CITY RAILWAY COMPANY

THE WICHITA VALLEY RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that:

(a) The Carrier violated the Clerks' agreement on March 18, 1946 when it permitted Mr. Vic Bates to displace Mr. R. F. Murphy, Derrick Operator at Childress, Texas. Also

(b) Claim that Mr. Murphy be restored to the position of Derrick Operator, and that all employes involved in or affected by the agreement violation be compensated for all losses sustained.

EMPLOYES' STATEMENT OF FACTS: On February 4, 1946 Mr. Bates returned to Carrier service after having been released from military service. He exercised displacement rights under the rules of the agreement dealing with employes returning from leave of absence, and in accordance with the provisions of the military service agreement between the parties hereto.

Upon his return Mr. Bates exercised his seniority and displaced on position of Head Laborer in the Store Department at Childress, Texas, effective February 4, 1946.

Mr. Bates worked the position of the Head Laborer from February 4, 1946 until March 17, 1946, both dates inclusive.

On March 18, 1946, without having been disturbed in any way whatever, the Carrier permitted Mr. Bates to exercise displacement a second time, displacing Mr. Murphy who then held position of Derrick Operator.

POSITION OF EMPLOYES: The question here involved is very clear. Can an employe, returning from leave of absence, exercise displacement rights a second time, without having been disturbed in any way, after he has once done so and worked a position from February 4 to March 17? The answer is obviously "No".

When Mr. Bates returned from military service he had a very definite right to return to his former position or, if he desired, to exercise displacement rights on any position bulletined during his absence. Such rights had to be exercised upon his return or within three days thereafter.

The action of the Carrier was under a certain supplemental agreement by and between the Carrier and the Employes, bearing date of November 14, 1942, and on the subject-matter of military leaves of absence. A copy of that supplemental agreement, consisting of two pages, is attached hereto as Carrier's Exhibit "A", and made a part of this record. Attention is directed to the opening phrase, "Pursuant to Federal legislation * * *".

Bates is presently on leave of absence attending school under provisions of Servicemen's Readjustment Act of 1944 (G.I. Bill of Rights). The present incumbent of derrick operator position is L. B. Portwood Sr., who is senior to the claimant, Murphy, and which position was acquired by Portwood by the advertisement and bid method.

POSITION OF CARRIER: The action of the Carrier in permitting Bates, a war-veteran, senior to Murphy, a non-war-veteran, to displace Murphy after a short qualifying period after returning from military service, was in accordance with the terms of the aforesaid supplemental agreement. Further, in view of the fact that the aforesaid supplemental agreement was made "Pursuant to Federal legislation", support for the course followed by the Carrier and the principle guiding it is found in a certain court decision, namely, the case of Rufus J. Roberts, Petitioner, versus American Saw Mill Machinery Company, respondent, in United States District Court, District of New Jersey, Civil 8784, February 5, 1947. In that case a purchasing agent was given a qualifying period before being restored to his job of purchasing agent for the machinery company and this qualifying period was due to the growth of the company since his induction into the military service.

Carrier asks that the claim be denied.

Exhibits not reproduced.

OPINION OF BOARD: A returning veteran on reporting back to the Carrier for duty February 1, 1946, resumed his service with the Carrier February 4, 1946, as head laborer, the position he had held before entering military service. He held this position until March 18, 1946, when he was permitted to displace the claimant, Murphy, in the position of derrick operator. The claimant was then assigned as laborer.

The claimant asks for reinstatement to position of derrick operator and for compensation for all losses sustained by him and all other employes affected by the alleged violation.

Rule 11 of the current agreement provides as follows:

> "Rule 11.—Bidding After Absence. An employe returning after leave of absence, may return to former position, or may, upon return, or within three days thereafter, exercise seniority rights to any positions bulletined during such absence, subject to the provisions of Rule 4. Employes displaced by his return may exercise their seniority in the same manner."

An agreement between the parties, executed November 14, 1942, provided that veterans returning to the service of the Carrier shall "be restored to such position with this Company (including rights to promotion) to which his accumulated seniority entitles him, **all in accordance with the then existing rules of the schedule agreement,** the same as if he had remained in the service (such right to be exercised by the individual within five days from his reporting for duty) * * *" (our emphasis).

The Carrier insists that the returning veteran on reporting for service expressed his desire for the derrick operator position; that he was not then qualified for that position; that the General Storekeeper assigned him his former position of head laborer from February 4 to March 18 in order to qualify him for the position of derrick operator and that none of this constituted a violation of the agreement.

These contentions by the Carrier seem to ignore the plain provisions of Rule 11 and of the Military Agreement and to be an argument as to why the

provisions of the Agreements should not be enforced. Rule 11 clearly calls for an employe returning after an absence to make a decision as to whether he will return to his "former position" or exercise his seniority rights "to any positions bulletined during such absence." The Military Agreement just as clearly provides for restoring a returning veteran to his former position (including rights to promotion) but **all in accordance with the then existing rules of the schedule agreement.**

If the General Storekeeper made a private agreement with the returning veteran as alleged by the Carrier, such agreement, of course, cannot supersede the provisions of the Schedule Agreement and the Military Agreement made by the Carrier and the Organization.

Here the returning veteran did return to his former position. He thereby made his decision. It was a violation of the Agreement to permit him to take the Derrick Operator position a month and half later.

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

The Carrier violated the Agreement as claimed.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of October, 1948.