

Award No. 4538
Docket No. CL-4616

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

NORTHWESTERN PACIFIC RAILROAD COMPANY

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

(a) Carrier violated Mediation Agreement dated May 9, 1941, when it refused and continues to refuse to allow Mr. Clarence W. Bockrath dismissal wage for the period March 1, 1941, to October 30, 1941, as a result of abandonment of its Interurban Electric passenger and ferry service.

(b) Carrier now be required to compensate Mr. Bockrath in full in accordance with the terms of the Interstate Commerce Commission Finance Docket Nos. 12791 and 12792 for the period March 1, 1941 to October 30, 1941.

EMPLOYES' STATEMENT OF FACTS: On November 13, 1939, the Interstate Commerce Commission authorized abandonment of the Northwestern Pacific Railroad Company's interurban passenger and ferry service to become effective thirty days from that date; however, this order was temporarily suspended. On June 20, 1940, the Commission issued supplemental order which provided that the November 13, 1939, order should become effective from and after fifteen (15) days from the date of its supplemental order of June 20, 1940; therefore, the order permitting abandonment became effective July 5, 1940.

As a result of this abandonment the Brotherhood representatives requested an agreement providing dismissal wage to those employes adversely affected, which included among others Mr. Clarence W. Bockrath involved in this instant claim, and in connection therewith invoked the services of the National Mediation Board.

On May 9, 1941, Mediation Agreement was signed and is shown as part of this submission as employes' Exhibit "A", and for ready reference of the Board we herewith quote in part:

"The final determination reached in connection with the employes affected by the abandonment covered in Inter-state Commerce Commission Finance Dockets 12791 and 12792 will apply in the same manner and on the same basis to the employes of the Northwestern Pacific Railroad Company who have lost their employment or were otherwise adversely affected by abandonment of the

cisco were discontinued in their entirety; consequently, the claimant was obviously cognizant of the fact that the only employment that could be afforded to him by the carrier, either on the basis of his seniority status on the System Seniority Roster or otherwise, would be at locations removed from San Francisco. Notwithstanding such fact, the claimant elected of his own volition to refuse to accept employment that would have been available to him.

The carrier submits that in consideration of the foregoing fact situation, the full measure of compensation accruing to the claimant under the plain terms of paragraph 2 of the Interstate Commerce Commission Finance Docket 14426, is for the period extending from March 1, 1941, the date the claimant was first deprived of employment because of the abolition of his position of ticket clerk at the carrier's San Francisco Ferry Terminal, until May 13, 1941, the date he failed to accept the employment that was available to him and which was offered to him by the carrier's assistant chief clerk, the party delegated by the carrier to make such proffer of employment. As previously indicated, the carrier offered—and is presently agreeable to allowing the claimant—such measure of compensation; however, the carrier asserts that there is no valid basis under paragraph 2, Finance Docket 14426, or by virtue of any provision of said docket, implied or otherwise, for any further payment to the claimant.

CONCLUSION

The carrier respectfully submits that it is incumbent upon the Division to dismiss the claim in this docket for want of jurisdiction; however, if the Division does assume jurisdiction and considers the claim on its merits, then the carrier asserts that such claim being without basis or merit should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: On July 15, 1940, an order of the Interstate Commerce Commission became effective which permitted the Carrier to abandon its interurban and ferry service in the San Francisco Bay area, and the service was abandoned. It resulted in the abolishment of many positions of employes holding seniority in this service. Under date of May 9, 1941, a Mediation Agreement was negotiated by which it was agreed that a dismissal wage would be paid to employes out of and unable to obtain employment as a result of the abandonment of the passenger interurban and ferry service. The dispute arises out of the application of the following provision of the effective Agreement:

"This allowance shall be made during the protective period to each dismissed employe while unemployed, provided, however, that no such allowance shall be paid to any employe who fails to accept employment, with seniority rights, in a position, the duties of which he is qualified to perform."

Condition 2, ICC Finance Docket No. 14426.

The Claimant claims that he is entitled to this dismissal pay from March 1, 1941 to October 30, 1941, Claimant having returned to the service of the Carrier on the latter day, thereby terminating his severance pay. The Carrier contends that Claimant was offered a position on May 13, 1941 and that the refusal of Claimant to accept it had the effect of terminating his dismissal pay by virtue of the quoted portion of the Agreement.

The record shows by the evidence of the Assistant Chief Clerk in the office of the Vice President and General Manager of the Carrier that on May 12, 1941, he attempted to contact Claimant by telephone to offer him opportunity to break in as a clerk in station service on the Southern Division. Claimant was not home and on the next day he called back and informed the Assistant Chief Clerk when the offer was made that he did not want to

work outside of San Francisco. On May 14, 1941, the Assistant Chief Clerk noted the substance of the conversation on Claimant's personal record.

That Claimant held seniority as a ticket clerk in the Carrier's San Francisco terminal is not questioned. He was an employe within the contemplation of the Agreement of May 9, 1941. He also held seniority on the System Seniority Roster as of September 30, 1940. Upon the abandonment of the passenger interurban and ferry service, his position was abolished and he was unable to exercise his seniority on the System Seniority Roster. Consequently, he was an unassigned or extra employe, a status he retained until he was assigned a position with the Carrier on October 30, 1941.

Claimant says that he does not remember any offer of work and positively denies that he ever refused to accept employment. If a position was available, it should have been assigned to the senior unassigned or extra employe. The record shows three employes senior to Claimant who were not called. Carrier made no attempt to notify Claimant by mail to report for duty. The record on the subject is merely the Assistant Chief Clerk's version of a telephone conversation which he noted on Claimant's personal record the day following. The Assistant Chief Clerk says that Claimant stated he did not want to work outside San Francisco when, as a matter of fact, he did accept a position outside San Francisco when he came back to work on October 30, 1941. No report was made that disturbed the collection of unemployment compensation. The very least that can be said about the dispute is that the evidence is in hopeless conflict. That Claimant was within the purview of the Agreement awarding dismissal pay is not questioned. The Carrier asserts a defense which, if established, would defeat the collection of such severance pay. The burden is upon the Carrier to prove the facts constituting this defense. It has failed to do so by a preponderance of the evidence. Under such circumstances, the defense must fail and an affirmative award is required.

The Carrier questions the right of this Board to hear the claim because of a provision contained in the controlling Agreement. The provision is:

"In the event that any dispute or controversy arises with respect to the protection afforded by the foregoing conditions Nos. 1, 2, 3, and 4, which cannot be settled by the carrier and the employe, or his authorized representatives, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, et cetera, shall be agreed upon by the carrier and the employe, or his duly authorized representatives."

Condition 5, ICC Finance Docket No. 14426.

That the issue before us arises out of "conditions Nos. 1, 2, 3, and 4" is self evident from their reading. The claim was not settled within 30 days after the controversy arose. Under such circumstances the parties have an election of remedies. If either elects to refer the dispute to an arbitration committee, the claim must be adjusted in that manner. But where neither of the parties elect to do so, it may be brought to this Board for handling. It will be observed that we have here only the application of a plain, unambiguous rule to a set of disputed facts. This Board has jurisdiction of such a case under the circumstances here shown to exist.

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

That both parties to this dispute waived oral hearing thereon.

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 was violated as charged.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of August, 1949.