

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

THE DENVER UNION STOCK YARD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6408) that:

1. The Company's action in holding Mr. Carl Achizer out of service is unreasonable and unjust.
2. The Company shall now be required to return Mr. Achizer to service and pay him for all time lost, at his protected rate of pay of \$2.5528 per hour, retroactive to June 26, 1966.

EMPLOYEES' STATEMENT OF FACTS: Mr. Carl Achizer has a seniority date of May 29, 1947 with The Denver Union Stock Yard Company and is covered by all rules of the Agreement.

On June 26, 1961, Claimant slipped and fell while heading off a hog that ran loose in a chute and as a result of this he broke his right arm in two places. Claimant was on sick leave until June 24, 1966, when he returned to his former position of Weighmaster. Claimant presented a letter to the Company from his doctor, J. C. Tyor, which read:

"Mr. Carl Achizer may return to work, but will be unable to raise his right arm and must do light work."

Claimant worked the position of Weighmaster on June 24 and 25, 1966.

The Company abolished the position of Weighmaster as of close of shift June 25, 1966. The Organization representative met with Company's Superintendent to determine what position the Claimant could hold. It was decided that he could work the Janitor-Foreman position and Claimant notified he was bumping the Janitor-Foreman position. Claimant placed a bid on position of Janitor-Foreman; however, the Company wrote him a letter on June 27, 1966 stating that the Company would not accept the doctor's release as it imposed severe restrictions on the type of work Claimant could do and further the Company would not accept any bids or displacements from Claimant, (Em-

OPINION OF BOARD: Due to an injury, Claimant was unable to work from June 26, 1961 through October 30, 1961; from November 30, 1961 through March 3, 1962; from June 1, 1962 through July 29, 1963; and from August 1, 1965 through June 25, 1966. By his own volition, he remained out of service because of his injury for approximately 32½ months during the 60-month period, June 26, 1961 through June 25, 1966. Claimant instituted a claim before the Industrial Commission of Colorado based on his injury of June 26, 1961. The Referee's Order in this proceeding, dated April 29, 1964, awarded him permanent partial disability in the amount of 17.5% as a working unit. Based on his claim that his condition worsened following that award, the matter was re-opened and the Commission found that Claimant's disability had increased to 25%.

On Saturday, June 25, 1966, Claimant reported for work with a release from his doctor stating, "Mr. Achziger may return to work but will be unable to use his right arm and must do light work." Claimant worked Saturday and Sunday, June 25-26. Consistent with the provisions of the contract with the Brotherhood, the Company abolished the position held by Claimant effective June 26, 1966, and on June 26, 1966, he attempted to "bump" Mr. George Howard, Janitor-Foreman. When Mr. Ray Purcell, Yard Superintendent, learned on Monday, June 27, 1966, that Claimant had returned to work subject to the limitations imposed by the doctor's release, he served notice by certified mail on Claimant that the Company would not accept any "bumps" by him until he was released from his doctor's care as being fully recovered.

Organization contends that Carrier violated Rule 34 by its failure and refusal to assign Claimant to the Janitor-Foreman position. The Rule reads:

"INCAPACITATED EMPLOYEES

Employees covered by these rules who have become physically unable to perform the work of their positions will be given preference to such work as they are able to perform."

The Organization failed to adduce evidence, during the handling of the case on the property, that Claimant was "able to perform" the work of the Janitor-Foreman position. The burden of proof was on Organization.

In its Submission to this Board Organization alleges, for the first time, an agreement between Carrier's Superintendent and the Local Chairman that Claimant could work the Janitor-Foreman position. Carrier: (1) denies that such an agreement was made; (2) the allegation was untimely since it was not raised on the property. Inasmuch as the alleged agreement was not put in issue on the property and made part of the record we are compelled to disregard the allegation made in the Submission.

We will dismiss the case for failure of proof.

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

That the parties waived oral hearing;

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 Claim must be dismissed for failure of proof.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of June 1968.