

Award No. 2733
Docket No. CL-2643

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

SAVANNAH AND ATLANTA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employes that the Carrier has violated and continues to violate the Clerks' Agreement of December 1, 1943, as hereinafter stipulated and that therefore,

(1) Clerk W. E. White shall now be restored to the position of Chief Clerk, Office of Traffic Manager, without loss of seniority or other rights, and that,

(2) Clerk W. E. White now shall be paid for all time lost (less amount earned elsewhere) from December 2, 1943, effective date of his arbitrary and unilateral removal from the service, at his proper and correct salary or \$220.60 per month (204 hours of service).

OPINION OF BOARD: The petitioning Organization became the representative of the Carrier's clerical-group employes in the month of September, 1943. A collective bargaining agreement was negotiated during November and was made effective as of December 1, of that year.

On Sunday, October 31, 1943, the Carrier's Traffic Manager wrote a letter, directed to the claimant, his Chief Clerk, which recited that said employe's services had long been unsatisfactory and which concluded as follows:

"I have therefore decided to make a change, effective at once, and am enclosing herewith a check in full payment of your salary thru December 1, 1943."

This letter was delivered to the claimant when he appeared at his place of employment on the following day (November 1), for which he was also paid and after which he did not report for work or perform any service for the Carrier. There is an entry on the Carrier's pay roll which recites that the claimant was paid the amount of his regular salary to and including December 1, 1943. The Carrier alleges, and the Petitioner admits, however, that there was in existence at the time a practice of paying discharged salaried employes one month's salary in advance. Both parties have injected many additional facts into the record, but these are not stated here because we deem them to be wholly immaterial to the issue to be determined.

The Petitioner says that the claimant's employment continued until and including December 2, 1943, which was one day after the Agreement relied upon by it became effective, and that the Carrier violated Rules 18 and 19 (A) of said Agreement by dismissing the claimant without furnishing him with a written statement of the charges and without according him a hearing, which he requested on December 6. On the other hand, the Carrier says the claim should be dismissed for want of jurisdiction because there was no agreement in effect between the parties on November 1, on which day it says the claimant's employment came to an end.

The Railway Labor Act confers upon this Board jurisdiction over disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." Ever since Award 42 was handed down it appears to have been the consistent policy of the Board to confine itself to disputes where there was evidence of a binding agreement between the carrier and the employe or employes involved, although it was suggested in Award 928 that our authority is not strictly limited to such cases. It is not presently necessary for us to explore that field, however, since the Petitioner here before us claims no rights except those that flow from an alleged violation of an agreement. In other words, the Petitioner is definitely committed to the theory that the Agreement relied upon by it was in effect at the time the claimant was discharged. If that issue is resolved against the Petitioner the claim may be denied on account of a failure of proof, without reference to the matter of jurisdiction, since the right to determine whether an agreement was violated necessarily includes the question as to whether there was an effective agreement in force.

Had the letter written by the Traffic Manager recited that it had been decided to discharge the claimant, instead of "to make a change," effective at once; and had it been further stated that a check for an amount equal to a month's salary was enclosed as a gratuity, in accordance with an established practice, instead of "in full payment of your salary thru December 1st.," there could hardly have been any doubt that the claimant would have been discharged before the Agreement became effective. Nevertheless, it must be concluded that such were the understandings of the parties, in view of their subsequent conduct, and more especially that of the claimant. Both parties must have had in mind that the relationship that had existed between them was such that the claimant was expected to render definite service for the Carrier and that the Carrier was to pay the claimant a fixed amount therefor; and yet it does not appear that the claimant performed or offered to perform any service whatever after the day upon which he received the letter. This can only be construed as evidence that the claimant well understood that his services had been dispensed with and that he acquiesced in the action of the Carrier. Likewise, the payment of the claimant's salary "thru December 1st.," is readily explained by the admitted custom. There is a total lack of evidence of any facts or circumstances to indicate that either party regarded the claimant as in the service of the Carrier after November 1.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of December, 1944.