Award No. 4199
Docket No. MW-4306

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

LOS ANGELES UNION PASSENGER TERMINAL

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

(1) That the provisions of the Agreement of April 13, 1939, were violated by the Los Angeles Union Passenger Terminal when at the termination of the day's work November 5, 1946, it caused Mr. Pierce J. Mullaly, occupying position of Water Service Mechanic, to be displaced therefrom;

(2) That Mr. Pierce J. Mullaly be returned to position of Water Service Mechanic, Los Angeles Union Passenger Terminal, from which he was erroneously displaced, and that he be compensated for any monetary loss suffered as a result of his displacement.

EMPLOYES' STATEMENT OF FACTS: Pierce J. Mullaly was employed prior to February 6, 1945, as water service mechanic on the Los Angeles Division of the Southern Pacific Company. Effective February 6, 1945, he was regularly assigned to a position of water service mechanic by the Los Angeles Union Passenger Terminal and continued on said assignment until displaced on November 6, 1946, as a result of instructions issued by Mr. G. E. Donnatin, Superintendent, Los Angeles Union Passenger Terminal, October 25, 1946, reading as follows:

> "You are hereby notified that effective at the termination of your shift on October 31, 1946, you will be displaced from the position you now occupy at Los Angeles Union Passenger Terminal.
>
> Displacement in question is made in conformity with Agreement dated April 13, 1939, covering apportionment of positions to employes of the Proprietary Companies of Los Angeles Union Passenger Terminal."

The above instructions provided for displacement on November 1. Actual displacement did not take place however, until the termination of the day's work on November 5, 1946, when an employe of the Santa Fe Railway was permitted to occupy the position held by Mr. Mullaly, thereby causing Mr. Mullaly to exercise his seniority in placing himself as a water service mechanic on the Southern Pacific Company (Pacific Lines) effective November 6, 1946.

An agreement is in effect between the parties bearing effective date of September 1, 1926, which, by reference, is made a part of this Statement of Facts.

from the position of water service mechanic which he occupied prior to November 1, 1946, did not constitute a violation of said agreement as alleged by the petitioner but, to the contrary, such action was in conformity with the explicit terms of the agreement.

With respect to that portion of the petitioner's statement of claim requesting the return of the claimant to the position of water service mechanic at the Terminal from which it is alleged he was erroneously displaced, the Division's attention is directed to the fact that the claimant terminated his employe relationship with the Southern Pacific Company (Pacific Lines) by resignation which became effective April 22, 1947; therefore, since any claimed right that he might have to occupy or to be returned to such position would flow from his employe relationship with and his seniority status as a water service mechanic on the Southern Pacific Company (Pacific Lines), even if the claim in his behalf were otherwise valid (which the Terminal does not concede but expressly denies), since he is no longer an employe of the Southern Pacific Company (Pacific Lines) there can be no basis for the petitioner's request. The Terminal asserts that inasmuch as the claimant severed his employe relationship with the Southern Pacific Company (Pacific Lines) on April 22, 1947 and is no longer employed by said railroad, the question of his return to the position which he formerly occupied at the Terminal is moot—see Awards 619, 658, 780 and 3588 of this Division relative to moot questions.

CONCLUSION

The Terminal asserts that it has conclusively established that the claim in this docket is without basis or merit and therefore respectfully submits that it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: On February 6, 1945, claimant was regularly assigned as a water service mechanic by the Los Angeles Union Passenger Terminal. On November 5, 1946, he was displaced by order of the Superintendent of the Terminal by an employe of the Santa Fe Railway. Claimant thereupon exercised his seniority on the Southern Pacific. He claims that he was wrongfully displaced and demands that he be returned to the position and be paid monetary loss suffered. The record shows that claimant severed his employment with the Carrier on April 22, 1947 by resignation. This leaves remaining only the question of monetary loss in the event the displacement was wrongful.

The record shows that the Los Angeles Union Passenger Terminal was established by the Southern Pacific, Union Pacific and Santa Fe Railroads. Prior to placing it in operation, certain Agreements were entered into pertaining to the joint operation of the Terminal. In an Agreement under date of April 13, 1939, the Southern Pacific and the Union Pacific on the one hand, and the Brotherhood of Maintenance of Way Employes of these two Carriers on the other, entered into a written Agreement that controls the pending dispute. By this Agreement it was determined that the employes who were to operate the Terminal were to be apportioned on a "Using Cars" percentage basis. The Agreement provided that until April 15, 1940, the Southern Pacific would furnish 55% of the employes and the Union Pacific 12%. The contract then provided:

> "As soon as practicable after January 1 of each succeeding year (not later than March 1) the General Chairman will be furnished a statement showing 'Using Cars' handled for each of the railroads during the preceding calendar year; such percentages for Southern Pacific and Union Pacific will be used as basis for the subsequent apportioning of the positions among employes of the two railroads."

Under this provision the apportionment of the employes for the year 1946 would be based on the "Using Cars" percentages for the preceding year of 1945. The record shows that these percentages for 1945 were: Southern Pacific 52.56%, Union Pacific 12.08%, and the Santa Fe, 35.36%. The Carrier also asserts that there had been an increase in the number of positions at the Terminal which the Southern Pacific had filled because of a shortage of

employes on the other two roads. In October 1946, adequate employes could be provided by these roads and the Carrier was obliged to make an apportionment as required by the contract. There were in existence at the time seven positions being filled by water service mechanics having seniority on the Southern Pacific. The claimant was the junior employe among these seven. The three junior water service mechanics were thereupon displaced by employes of the Union Pacific and the Santa Fe in order to comply with the Agreement of April 13, 1939.

It will be here observed that the Agreement of April 13, 1939, did not provide when the apportionment of employes would be made after the percentages were calculated or what employes were to be first displaced in carrying out the apportionment provisions of the Agreement. We must assume therefore that it was to remain the prerogative of management. We cannot say that Carrier violated any contract provisions when it selected water service mechanics for displacement. In displacing the three junior water service mechanics, it certainly acted within the spirit of the Agreement in giving consideration to seniority. The Agreement does not allocate all water service work to the employes of the Southern Pacific. It merely allocates positions until the second paragraph of Section 2 of the Agreement becomes operative. The contention of the Organization that a Santa Fe employe could not displace an employe of the Southern Pacific is not tenable. Employes of the Southern Pacific were limited to the number of positions determined by the formula agreed upon. They had no contractual right to anything in excess of this determination. If they held the number of positions to which they were entitled, the obligations of the contract were fulfilled as to them. The Agreement is clear that employes of the Santa Fe, although it was not a signatory to this Agreement, were to occupy a part of positions at the Terminal. We think that if the Southern Pacific employes were given their portion of the Terminal positions that they cannot properly complain of displacements in excess of their allotted number by Union Pacific or Santa Fe employes in making effective the clear intent of the Agreement of April 13, 1939.

Complaint is made that the Carrier made the apportionment on the basis of the "Using Cars" percentages for the first eight months of 1946. This was, of course, contrary to the Agreement. The percentages for 1945 are shown in the record and a simple calculation shows that this claimant was subject to displacement in any event. The error in using partial "Using Cars" percentages for 1946 is without prejudice to claimant's rights.

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 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

The Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 3rd day of December, 1948.