Award No. 4739
Docket No. SG-4562

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Request that Mr. Ralph N. Clark be paid the amount of money that he would have earned, in the several classes of the Telegraph and Signal Department of the St. Louis Division, Pennsylvania Railroad, Western Region, between June 1, 1942, and April 21, 1947, inclusive, had he been recalled to the service of the Carrier on June 1, 1942, and promoted in the usual order of seniority while men junior to him in seniority were employed in the several classes in the said Telegraph and Signal Department.

EMPLOYES' STATEMENT OF FACTS: Mr. Ralph N. Clark began work in the Signal (M.ofW.) Department of the Carrier during the month of August 1917. He continued in the service in several capacities until September 1928, when he was placed on furlough by the Carrier.

During his years of service he served successfully and satisfactorily, but because of economic and other conditions not particularly relevant to this claim, he reentered the service of the Telegraph and Signal Department of the carrier as a Signal Helper on January 4, 1928.

Mr. Clark actually worked as a Signal Helper until August 29, 1928, when he requested and was granted a thirty (30) days leave of absence. During the time he was on this leave of absence force reductions were made by the Carrier, and he was furloughed from service in September 1928.

After remaining on furlough for a number of years and never being recalled to the service by the Carrier, he learned during the summer of 1942 that employes his junior in seniority had been recalled to the service in the order of their seniority. Upon learning this fact, he directed a communication to the Supervisor, Telegraph and Signal Department, Mr. K. M. Lockerby, and requested copy of his service record with the company. On June 24, 1942, Mr. J. P. Newell, Jr., Superintendent of the Carrier's St. Louis Division, wrote Mr. Clark as follows:

"THE PENNSYLVANIA RAILROAD
St. Louis Division

Terre Haute, Indiana,
June 24, 1942.

Mr. R. N. Clark,
4432 Washington Avenue,
Apt. 115, Katherine Bldg.,
St. Louis, Missouri.

Dear Sir:

Referring to your letter of the 1st inst. addressed to Mr. K. M. Lockerby, our Supervisor T. & S., requesting information regarding your record of service with this company.

III. **Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, is Required to Give Effect to the Said Agreements and to Decide the Present Dispute in Accordance Therewith.**

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreements, which constitute the applicable Agreements between the parties, and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, Subsection (i) confers upon the National Railroad Adjustment Board, the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of Agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreements between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreements between the parties hereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The Carrier has shown that under the applicable Agreements between the parties the Claimant is not entitled to the compensation claimed.

Therefore, the Carrier respectfully submits that your Honorable Board should dismiss the claim of the employes in this matter.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimant, with the right to test the same by cross examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a record of all of the same.

(Exhibits not reproduced).

OPINION OF BOARD: Claimant held seniority in the Telegraph and Signal Department of the St. Louis Division of the Carrier as of January 4, 1928. He was furloughed in September 1928. It is conceded that Claimant should have been recalled to service in May 1942. He was not recalled until April 21, 1947. Claimant demands that he be compensated the amount of money he would have earned if he had been properly recalled to service as the Agreement provides. The Carrier insists that Claimant is entitled to the amount he would have earned, less his earnings in other employment. This constitutes the sole issue in this dispute.

There is no provision in the applicable Agreement as to the compensation to be allowed an employe who is furloughed and not recalled to service in accordance with his seniority. It is not unusual for contracts of employment to fail to specify the damages to be paid in case of a breach. This is so for the simple reason that a breach of the Agreement is not contemplated. The measure of damages for the breach of such Agreements has consistently been held to be the amount that would have been earned under the contract less any money earned in other employment. It is clear that if Claimant had been recalled in service in accordance with the Agreement he would have earned a certain sum. If by reason of the breach he is deprived of any part of it, he is entitled to the amount of such loss in order that he be made whole, but if he earns money from other sources during the period, he is required to mitigate the loss by deducting such earnings from the amount claimed. Such a rule is one of justice and common sense which applies to the present Agreement as well as any other contract for personal services. See Awards 1608, 4105, 4291 and 4325.

It will be conceded that the contract itself may provide a different yardstick for fixing the loss in case of a violation and the compensating loss

stipulated will usually be enforced. But no such provision exists in the present Agreement.

The Organization contends that the rule is different where the Claimant is working for the same employer; that is to say, if an employe working a lower rated position is deprived of a higher rated one, his compensatory loss is the difference in the two wage rates, while if the lower rated position is that of another employer, his compensatory loss is the rate of the position to which he was entitled without deduction of the earnings of the other employment. Sound logic will not support any such differentiation. The compensatory loss, if any, in both instances is the same and is properly calculated by determining the difference in the amount that would have been earned on the one and that which was actually earned on the other.

It is urged that the interpretation given the discipline rule throws light on the situation presently before us. It is contended that an employe charged and exonerated under that rule is entitled to be compensated for wage loss at the rate of his position without deduction of earnings in other employment. Assuming only for the sage of argument that this is true, it cannot affect the result here. As we have heretofore said, the general rule as to the measure of damages for violation of an Agreement for several services may be changed by the Agreement itself. Such contractual changes are in derogation of the general rule and will be applied only within the scope of the language used. To extend that portion of this discipline rule to other provisions of the Agreement would constitute a rewriting of the contract. Our only function is to enforce the Agreements which the parties themselves have made.

We conclude that the Agreement was violated and that Claimant should be paid the amount of money that he would have earned had he been recalled to service between June 1, 1942 and April 21, 1947, less his earnings in other employment during the same period.

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 Agreement was violated.

AWARD

Claim sustained for time lost less earnings from other employment.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 2nd day of March, 1950.