Award No. 5324
Docket No. CLX-5295

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Angus Munro, Referee.

PARTIES TO DISPUTE:

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

RAILWAY EXPRESS AGENCY, INCORPORATED

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

(a) The Memorandum of Understanding dated August 6, 1942 and agreement governing hours of service and working conditions between Railway Express Agency and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes effective September 1, 1949 was violated at the Seattle, Washington Agency through treatment accorded employe Robert E. Levy; and

(b) He shall now be permitted to return to service with seniority rights unimpaired and compensated for full salary loss sustained retroactive to and including February 10, 1950.

EMPLOYES' STATEMENT OF FACTS: Robert E. Levy with a seniority date of August 16, 1940 was at the time of his entry into military service November 22, 1940, the regular occupant of a 6-day position titled Relief Sorter at the Seattle, Washington Agency, salary $157.84 basic per month with Sunday day of rest.

He was released from military service September 19, 1949 and November 18 following conferred with General Agent R. M. Einar in his office at the King Street Station, Seattle and showed him his discharge paper which reads:

* * *

"DISCHARGE

Under other than Honorable Conditions
From the Armed Forces of the U. S.
of America.

This is to certify that
Robert E. Levy 0298338 Major
Was Discharged from the
Army of the United States
on the 19th day of September 1949.

(s) Paul R. Goode
Colonel Infantry

AGO Form 399
Jan. 1946."

* * *

I think we have been very fair in this case. We have offered to consider Mr. Levy's reemployment if he will give us a release authorizing the Adjutant General to inform us re the conditions under which Mr. Levy's severance from the service was consummated. If Mr. Levy will provide us with such a release and we can satisfy ourselves that the conditions under which he was released from the service were such as would not militate against his reemployment with the Company, we will restore him to his rights at Seattle. Failing in that, or until such time as he is able to present an honorable discharge, we will sustain Mr. Hore's decision. The Veterans Administration representative here informs me it is possible Mr. Levy may at some future date be able to secure an honorable discharge, and if he can present such a document we will be glad to restore him to his seniority status at Seattle."

It may be urged by the claimant that his claim does not arise under the law but under the Memorandum of Understanding of August 6th, 1942 and that the requirements under the Memorandum were not as severe as those under the law. The Memorandum provides that the veteran must receive "a certificate as **provided by law** or other **proper** evidence of release." The meaning of the language used there cannot be distinguished from that used in the law. In fact it refers to and is dependent upon the law for what else could the phrase "a certificate as provided by law" mean but the certificate of satisfactory completion of service prescribed by the Selective Training and Service Act. What else could "proper evidence of release" mean but the same type of certificate. The Memorandum was merely declaratory of the law and provided the means for those qualifying under the law to reenter the express service. Any other construction would assume that the parties agreed to extend the provisions of the law to those whose conduct in the armed services did not entitle them to an honorable discharge, a condition completely opposed to the principles enunciated by the Departments of the Government charged with the administration of the law.

The claim therefore is without merit and should be denied on the ground that the Memorandum of Understanding dated August 6th, 1942, and the Agreement Rules were not violated in the refusal to reemploy Robert E. Levy when he failed to present the certificate required under the Selective Training and Service Act and the Memorandum of Understanding dated August 6th, 1942 as a prerequisite to such reemployment.

(Exhibits not reproduced.)

OPINION OF BOARD: Employe Levy presented himself to Carrier on or about November 18, 1949, and requested he be returned to active duty with Carrier in accordance with the terms and provisions of that certain Memorandum of Understanding dated August 6, 1942, by and between Carrier and Petitioner. By reason of said employe presenting for inspection by Carrier a document of discharge from the armed forces of our nation which was not of the type or kind styled honorable Carrier rejected said application and advised said employe his name would be removed from Carrier's records.

Petitioner avers he has complied with the provisions of said Memorandum and that Carrier's action constitutes a violation of Rule 29 of the Schedule. Carrier maintains such Memorandum must be construed with and is only declaratory of certain United States statutes with reference to reemployment rights in civilian employment of members of our armed forces.

The above mentioned statute established a course of procedure the employe could have pursued had he elected to. He, however, choose to seek an active duty status under and by virtue of the Memorandum. We find nothing in the law, i.e., statute, which prohibits a Carrier from entering into an Agreement with Petitioner whereby different rules were established in order to accomplish the same purpose as that of the statute. The

Memorandum simply extended a privilege or right over a wider field and while Carrier may not have so intended the language of the Memorandum does not reflect their intentions but on the contrary expressly provides "upon completion of his service he receives from the Government a certificate." Here the employe received a certificate and Carrier knew it. It is of no concern to this Board in what manner the Courts of our land and various and divers governmental agencies construe and interpret statutes, likewise it is indisputable this Board possesses the sole authority to construe and interpret the Schedule here involved.

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

It is accordingly ordered by the Board that claim herein be and the same is hereby sustained. It is further ordered by the Board that nothing herein shall be construed so as to prevent or prohibit Carrier from acting in keeping with Rule 29 of the Schedule.

AWARD

Claim sustained as per above Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of April, 1951.

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By this Award the majority holds that the Memorandum Agreement of August 6, 1942, extends re-employment benefits to veterans who have not served their country with honor. It is concluded that the Memorandum expanded "a privilege or a right over a wider field" than the Selective Training and Service Act which initially granted these re-employment benefits under proper circumstances.

Such a holding does violence to the plain language of the Memorandum and is contrary to all principles of law.

In part the Memorandum of August 6, 1942, contains the following language:

> **"Pursuant to Federal legislation (i.e., Public Resolution No. 96 of the 76th Congress, and the Selective Training and Service Act of 1940)** any employee * * * shall be restored * * * provided, upon completion of his service he receives from the Government **a certificate as provided by law or other proper evidence of release * * *."** (Emphasis added.)

It is admitted by the majority that the intent of the Memorandum was "to accomplish the same purpose as that of the statute".

Clearly the objective of the Selective Training and Service Act was to confer certain benefits solely on veterans who served with honor and

integrity. This is evidenced by the language of the Statute itself and confirmed by the Opinion of the United States Supreme Court on **Fishgold vs. Sullivan Drydock Company**, 66 S. Ct. 1105, 328 U.S. 275 (1945) which declares:

> "These guarantees are contained in Section 8 of the Act and **extend to a veteran, honorably discharged** * * *" (Emphasis added.)

Even though they recognize a common design to both the Memorandum and the Statute, the majority declared that "it is of no concern to this Board in what manner the courts of our land and various and divers governmental agencies construe and interpret statutes". A basic rule of construction is that a contract must be interpreted in terms of the objectives of the contracting parties. A representative declaration of this principle is found in **Marx vs. American Malting Company**, 169 Fed. 582, 584 (C. C. A. 6th, 1909) where it is stated:

> "Then, again, it is a fundamental rule in interpretation of agreements that we should ascertain the prime object and purpose of the parties, and, in case of ambiguity produced by its minor provisions, the latter should, if possible, be so construed with the main purpose."

Also note the general discussion in Williston, Contracts (1936), p. 1779.

In ignoring the legislation the majority have disregarded the underlying aims of the agreement they claim to interpret. Why would the parties have mentioned the statute at all if their purpose was in conflict with it? Why, indeed, would the contract be made "pursuant to" this legislation if the two were meant to be different. Inherent in the phrase, "pursuant to", is conformity and agreement. The Court in **Potter vs. Realty Securities Corporation**, 77 Fla. 768, 82 So. 298, 299 (1919), asserted:

> "'Pursuant' means conformable to, agreeable to or in accordance with."

In **Fabianich vs. Hart et al.**, 31 A2nd 881, 883 (D. C. Munc., 1943), it is declared:

> "The expressions 'pursuant to' or 'in pursuance of' **have a restrictive interpretation.** They have been regarded as equivalent to 'in conformity with' and imply what is done is in accordance * * *." (Emphasis added.)

Webster's International Dictionary, Unabridged Second Addition (1940) defines "pursuant" as:

> "Acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according * * *."

In making this Award the majority has ignored the fundamental rules of interpretation and construction. Their opinion is made arbitrarily in direct conflict with the obvious intent of the contracting parties. Clearly this sustaining Award is an improper assumption of authority by this Division.

(s) **R. M. Butler**
(s) **A. H. Jones**
(s) **C. P. Dugan**
(s) **J. E. Kemp**
(s) **R. H. Allison**