Award No. 19002
Docket No. CL-19380

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert M. O'Brien, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6988) that:

1. Carrier violated and continues to violate the September 11, 1969 Agreement, which became effective October 1, 1969, at Houston, Texas, by failing and refusing to restore C. W. Calhoun to his protective status and pay when Universal Carloading and Distributing Company, Inc. refused to hire and retain him pursuant to the aforementioned Agreement.

2. Carrier shall now be required to restore C. W. Calhoun to his protective status and compensate him eight (8) hours' pay at his protective rate of pay each day until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: Prior to October 1, 1969, the Universal Carloading and Distributing Company, Inc. (hereinafter referred to as Universal) had an arrangement with the Missouri Pacific Railroad Company (hereinafter referred to as Carrier) whereby the Carrier performed certain freight house functions involving the physical handling of Universal freight at Houston and San Antonio, Texas.

Universal advised the Carrier that they were going to discontinue the above mentioned arrangement with the Carrier, as they desired to perform their own freight house functions involving the physical handling of freight at Houston and San Antonio, Texas.

Due to change in operations at Houston and San Antonio, Texas, being made by Universal, as stated next above, the Carrier was faced with one (1) tremendous financial problem, and Universal was faced with two (2) serious operational problems as listed below:

CARRIER'S PROBLEM

(a) Carrier due to change in operation being made by Universal, would have 25 to 30 idle employes, with all of them being fully pro-

operations should be handled directly with the appropriate officer of that Company.

In view of these facts there exists no basis for changing the decision given you on December 3, 1970 declining this claim."

OPINION OF BOARD: At the outset, Carrier requests that the claim be dismissed inasmuch as we are without jurisdiction and authority to interpret Mediation Agreement A-7128 of February 7, 1965. However, the claim is predicated upon the alleged violation of the agreement of September 11, 1969 and not the February 7, 1965 agreement and we clearly have jurisdiction to interpret that agreement. Nor should the claim be dismissed, as Carrier suggests, because the claim as submitted to the Board has been changed substantially from the claim that was filed initially on the property. While there is a variance, it is not substantial and the nature of the claim is unaltered. The Carrier has not been misled as to the issue confronting it. We will thus decide the claim upon the merits.

The issue before us is whether the Claimant is an employe of Carrier and thus entitled to restoration to service? It is Carrier's contention that under the September 11, 1969 Agreement, Claimant was transferred to and accepted employment with the Universal Carloading Co. and the only way he could return to Carrier's service was pursuant to item 10 of the Agreement and since Claimant was not laid off in a force reduction, pursuant to item 10, he was precluded from returning.

We cannot agree with Carrier's contention. While Claimant, on October 7, 1969, stated his willingness to accept employment with Universal, the employment relationship never came into being due to Claimant's injury and recuperation therefrom. Since item 10 presumes an employment relationship with Universal, which never existed here, then item 10 is inapplicable to the present claim.

Rather it is the opinion of the Board that item 3(d) of the Agreement of September 11, 1969 is controlling. Claimant was in a protective status with Carrier before the above mentioned Agreement was negotiated. This much is undisputed. Since he was not retained by Universal then he may return to the Carrier without the loss of any protective benefits to which he is entitled. This, we believe, is required by the clear and unambiguous terms of item 3(d). The proviso was agreed to in order to protect Missouri Pacific employes who transferred to Universal but were not retained. Not only was Claimant not retained by Universal, but he never even consummated an employment relationship with them. Consequently, the Agreement allows him to return to Carrier without the loss of any protective benefits he is entitled to.

Claimant's physical ability to perform the work in question has no bearing on the claim, since it was never properly raised in the handling of the claim on the property so that adequate discussion could take place thereon, and Carrier is precluded from raising the issue here.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 11th day of February 1972.

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