



Award No. 19057

Docket No. CL-19201

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert A. Franden, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6903) that:

1. The Carrier violated the rules of the Agreement extant between the parties when it failed to use Clerks R. R. Rios and R. P. Johnson on positions occupied by employee whose employment had been terminated under the Union Shop Agreement.

2. The Carrier shall compensate Mr. R. P. Johnson for eight (8) hours at time and one-half for September 25 and 26, October 1, 2 and 3, 1969, and Mr. R. R. Rios for eight (8) hours at time and one-half for September 29 and 30, 1969.

EMPLOYEES' STATEMENT OF FACTS: Gerlach, Nevada is a station on the Western Pacific Railroad which employs three clerks. On date of August 25, 1969, the following assignments were in effect:

R. P. Johnson	- Relief Clerk	- Various
R. R. Rios	- General Clerk	- 1 P. M. - 10 P. M.
J. W. King	- General Clerk-Warehouseman	- 3 A. M. to 12 Noon

Mr. J. W. King was cited by the Brotherhood on August 25, 1969 for failure to apply for membership in the Organization, as provided under the Shop Agreement. Mr. King was afforded his right of a hearing which he declined and, as a result thereof, he was terminated by the Carrier effective September 24, 1969. (Employee Exhibit No. "1.")

Mr. King continued to work on position of General Clerk-Warehouseman until his release October 6, 1969. Claims were filed by Clerks Rios and Johnson. (Employee Exhibit No. "2.") These claims were denied by Agent J. A. Forst on October 6, 1969. (Employee Exhibit No. "3.") Appeal was made to Superintendent J. C. Lusar on November 25, 1969, and declined by him on December 19, 1969. (Employee Exhibit Nos. "4" & "5.") Final appeal was made to Mr. W. A. Tussey, Manager of Personnel, and, after conference of March 24, 1970, declined the claim on March 31, 1970. (Employee Exhibits Nos. "6" & "7.")

Section 7.

An employe whose seniority and employment under the Rules and Working Conditions Agreement is terminated pursuant to the provisions of this agreement or whose employment is extended under Section 6 shall have no time or money claims by reasons thereof.

If the final determination under Section 5 of this agreement is that an employe's seniority and employment in a craft or class shall be terminated, no liability against the carrier in favor of the organization or other employes based upon an alleged violation, misapplication or non-compliance with any part of this agreement shall arise or accrue during the period up to the expiration of the 60 or 90 day periods specified in Section 6, or while such determination may be stayed by a court, or while a discharged employe may be restored to service pursuant to judicial determination. During such periods, no provision of any other agreement between the parties hereto shall be used as the basis for a grievance or time or money claim by or on behalf of any employe against the carrier predicated upon any action taken by the carrier in applying or complying with this agreement or upon an alleged violation, misapplication, or non-compliance with any provisions of this agreement. If the final determination under Section 5 of this agreement is that an employe's employment and seniority shall not be terminated, his continuance in service shall give rise to no liability against the carrier in favor of the organization or other employes based upon an alleged violation, misapplication or non-compliance with any part of this agreement."

(Exhibits not reproduced.)

OPINION OF BOARD: This is a Union Shop Case. Sections 5 and 6 of the Memorandum Agreement are applicable.

Section 5 reads in part:

"In the event the employe concerned does not request a hearing as provided herein, the carrier shall proceed to terminate his seniority and employment under the Rules and Working Conditions Agreement not later than thirty calendar days from receipt of the above described notice from the organization, unless the carrier and the organization agree otherwise in writing."

Section 6 reads:

"Other provisions of this agreement to the contrary notwithstanding, the carrier shall not be required to terminate the employment of an employe until such time as a qualified replacement is available. The carrier may not, however, retain such employe in service under the provisions of this section for a period in excess of sixty calendar days from the date of the last decision rendered under the provisions of Section 5, or ninety calendar days from date of receipt of notice from the organization in cases where the employe does not request a hearing. The employe whose employment is extended under the provisions of this section shall not, during such extension, retain or acquire any seniority rights. The position will be advertised as vacant under the bulletining rules of the respective agreements but the employe may remain on the position he held at the

time of the last decision, or at the date of receipt of notice where no hearing is requested pending the assignment of the successful applicant, unless displaced or unless the position is abolished. The above periods may be extended by agreement between the carrier and the organization involved."

On August 25, 1969 Mr. J. W. King was cited by the Organization for non-compliance. No hearing was requested. By letter dated September 23, 1969 the carrier informed King that "In absence of a request from you for a hearing within the time limit of ten (10) calendar days provided for in the Union Shop Agreement, I regret the necessity of notifying you that your seniority under the Rules and Working Conditions Agreement and employment with the company terminated as of September 24, 1969."

The carrier permitted King to work his position September 25, 26, 29, 30, October 1, 2 and 3. The carrier had advertised the position but was unable to fill same due to a lack of applicants until October 4, 1969. The claimants were available to work the position on an overtime basis.

There is no dispute that the carrier had the right to retain King until a replacement was found so long as he was not retained for more than sixty days subsequent to the final decision made by the carrier pursuant to Section 5.

The case is clear. By letter dated September 3, 1969 the carrier terminated King as of September 24. It is granted that had the carrier elected it could have retained him pending the finding of a replacement. By error or choice it elected to terminate him. Once the contractual relationship between King and the carrier was terminated any subsequent employment was in violation of the Agreement. Section 7 is not applicable in the instant matter.

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 Employees involved in this dispute are respectively Carrier and Employees 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 10th day of March 1972.

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