

Award No. 540

Docket No. 265

2-ACL-MA-'41

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee John A. Lapp when award was rendered.

PARTIES TO DISPUTE:

**RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L.
(MACHINISTS)**

ATLANTIC COAST LINE RAILROAD COMPANY

Originally a dispute, covered by our Docket No. 265, was submitted by the Railway Employees' Department, A. F. of L. (Machinists) and the Atlantic Coast Line Railroad Company to this Division for adjustment, all of which is a part of this case.

"DISPUTE: CLAIM OF EMPLOYEES: Request for reinstatement of Machinist Hugh Salter to service with Atlantic Coast Line Railroad Company at Waycross, Georgia, shops, with original seniority date of March 1, 1923, and pay for time lost since removal from service January 6, 1934."

The following (Award No. 265) was rendered by the Division with Referee John A. Lapp sitting as a member thereof, October 4, 1938:

"AWARD

Claim sustained"

In October, 1940, the representatives of the claimant petitioned the Division to rehear the case as contained in our Docket No. 265. On this request the Division deadlocked. A referee, John A. Lapp, sat with the Division and on November 4, 1940, the Division rendered the following Opinion and Decision:

**"OPINION AND DECISION OF THE SECOND DIVISION,
NATIONAL RAILROAD ADJUSTMENT BOARD, ON THE
PETITION FOR REHEARING ON DOCKET NO. 265,
AWARD NO. 265 (A. C. L. RR.—MA).**

The Second Division consisted of the regular members and in addition Referee John A. Lapp when award was rendered.

The issue in the matter before the Board is solely whether the Division will hold a rehearing or not on Docket No. 265.

The petition for a rehearing is presented to this Division by the Railway Employees' Department, A. F. of L., the representative of the claimant in the case when it was heard by the Board. The petitioners' intended purpose in asking for a rehearing, is to correct an alleged

tunity was given to the carrier to present summaries of the evidence and arguments of the case, but the carrier declined to take advantage of this opportunity, falling back on the contention that there was testimony that had been presented in the oral hearing which the referee had not heard. If there was such evidence, then the carrier had failed to conform to the rule which requires all evidence to be presented in the submissions of the parties. It is not clear from anything in the docket that witnesses were heard or testimony given. The record presents the appearances, but is silent on the subject of witnesses or of testimony.

Upon completion of the hearing, November 27, 1940, Mr. Mulholland, representing the employe, said:

"We are submitting this case for final determination upon the written record, copy of which is in possession of the Board and in possession of counsel for the carrier, and that representing the employe involved, we respectfully request counsel for the carrier to enlighten the Board with reference to that evidence by an argument representing its contentions."

The chairman asked the representative of the carrier, Mr. Davis, if he had "anything to say with regard to the merits of the case," and Mr. Davis replied: "No sir, nothing further."

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

This Division has jurisdiction to rehear this case to correct a procedural defect.

The Second Division of the National Railroad Adjustment Board, having reviewed the briefs admitted into Docket 265, reaffirms, in accordance with the foregoing memorandum, its previous decision of November 4, 1940, that it is within its jurisdiction to rehear the case to correct a procedural defect. The case having been reheard by the Division on November 27, 1940, after due notice, for the purpose of giving the right to the parties to appear and argue the merits of the case and for the further purpose of giving opportunity to any persons affected by the seniority claim of Hugh Salter to appear and be heard, and no additional arguments or evidence having been presented, the Second Division arrives at its conclusion on the basis of a review of the facts in the docket when Award No. 265 was rendered. The facts of that docket disclose the following:

The issue in this case relates to the place and date of seniority of Machinist Hugh Salter. Salter had seniority rights as of March 1, 1923, at the Waycross shops of the carrier. When new shops were opened at Tampa, January 8, 1927, Salter went to Tampa with the understanding that his seniority rating would be transferred with him. He remained in Tampa only five days, and on recommendation of the doctor, returned to Waycross, where he would have facilities for medical care. He began work again at the Waycross shops immediately and continued for seven years. The carrier insists that his seniority was only temporary at Waycross, upon his return, while the employes contend that full seniority was restored. The carrier contends that the Division had no jurisdiction because there was a system board of adjustment on the property at the time this action arose.

The carrier contended that this Division had no jurisdiction because the case had been settled on the property and was not one pending and unadjusted at the time the Act took effect. The contention is not sustained by the facts in the docket. The Division has jurisdiction over this matter as a grievance which had not been adjusted by the parties.

Salter had seniority either at Tampa or Waycross. He could not lose his seniority rights by technicalities in the transfer. The record does not disclose that he was given seniority rating at Tampa. He returned to Waycross within five days and worked for seven years before the issue was raised. It was alleged that he had been allowed to go to work at Waycross on his return merely as a favor until his health permitted him to return to Tampa. This was denied in sworn affidavits of a large portion of the employes present at the meeting when it was alleged that he was returned on a temporary basis. There is certainly doubt in the record as to the alleged fact that he was placed on a temporary basis at Waycross, and obviously it must be assumed that after seven years an employe could not be considered as on a temporary basis. To take an opposite view would be to accept the conclusion that Salter had lost his seniority at Waycross through technicalities. The conclusion of the Division is that Salter's seniority is at Waycross and should date from March 1, 1923.

AWARD

- (1) Award No. 265 is hereby vacated.
- (2) Claim in Docket No. 265 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD By Order of Second Division

ATTEST: J. L. Mindling
Secretary

(NOTE: The complete record is not here reproduced.)

Dated at Chicago, Illinois, this 15th day of January, 1941.