

Award No. 1418

Docket No. 1331

2-FEC-CM-'51

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Frank M. Swacker when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 69, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Carmen)**

FLORIDA EAST COAST RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That the removal, suspension or dismissal of Car Cleaner J. C. Conner from the service without a hearing on January 17, 1950, was not authorized by the current agreement.

2. That accordingly the carrier be ordered to restore or reinstate this employe to all prior service rights with compensation for all time lost subsequent to the aforesaid date.

EMPLOYES' STATEMENT OF FACTS: J. C. Conner, hereinafter referred to as the claimant, was employed by the carrier on December 16, 1949, at its Buena Vista shops, Miami, Florida, as a car cleaner, with hours of assignment from 11:00 P. M. to 7:00 A. M., Thursday through Monday, with rest days Tuesday and Wednesday, and as of this date of employment he is shown on the carrier's seniority roster of car cleaners, issued January 1, 1950.

Prior to December 16, 1949, the claimant was employed in a classification known at this point as hose cutters, and at the time of his employment as a car cleaner he was furloughed as a hose cutter and subject to recall as such. About 12 o'clock noon, January 17, 1950, Car Foreman J. E. Smith requested the claimant to forfeit his rights as a hose cutter, and refusing to accede to the request of Foreman Smith the claimant was then and there removed from the service as a car cleaner.

This dispute has been handled in conformity with the agreement effective November 19, 1935, as subsequently amended, up to and including the highest carrier officer to whom such matters may be appealed, with the result that this officer has declined to make any satisfactory adjustment.

POSITION OF EMPLOYES: It is submitted there is nothing expressed or implied in Rule 29 of the aforesaid controlling agreement, reading in applicable part,

"No employee shall be disciplined without a fair hearing by a designated officer of the Railway. Suspension, in proper cases, pending a hearing, which shall be prompt, shall not be deemed a

When men governed by the shop crafts' agreement were furloughed and subsequently were awarded positions in another classification governed by the shop crafts' agreement, they would retain and continue to accumulate seniority in the classification from which they were furloughed and establish seniority in the classification in which they were employed and would be carried on both seniority rosters until recalled to the position from which they were furloughed. At the time of recall they would be given the choice of returning to the classification from which furloughed and relinquishing their seniority in the classification in which employed or remain where they were employed with the seniority established on that position and relinquished their seniority in the classification from which they were furloughed.

The requirement that an employe working under the laborers' agreement loses his seniority as a laborer when transferred or promoted to a position under the shop crafts' agreement is supported by your Award No. 272, Docket No. 259, dated the 10th day of October, 1938.

There has been an established practice on this railway for a number of years whereby a man holding seniority under an agreement in one department of the railway could not be hired by another department without resigning from the department in which he had established seniority. There have been violations of this rule by the employing officer overlooking the rule or misrepresentation by the applicant for a position denying that he had worked for and enjoyed seniority in another department.

The rule has been invoked by officers of System Federation No. 69 protesting the employment of men holding seniority in another department and their protest has been recognized as legitimate and the men required to resign from one of the departments.

George Whittle, hose cutter in the transportation department, resigned his position as hose cutter May 19, 1944, to accept a position as hostler helper in the mechanical department.

Tommie Myles, hose cutter in the transportation department, resigned his position April 10, 1947, to accept a position in the mechanical department as laborer.

The agreement covering hose cutters is a transportation department agreement in which the mechanical department had no part and men working under that agreement can not establish seniority in any classification under mechanical department agreements until they comply with the requirements governing transfer from one department to another.

J. C. Conner had no rights under the current shop crafts' agreement and could not establish any rights under that agreement until he complied with the rules governing transfer from one agreement to another.

The instant claim is without merit and should be denied.

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 employees 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.

Prior to his employment out of which claimant's present claim arose, he had been employed by this carrier under the classification of hose cutter. He had been displaced in that capacity and thereafter qualified for the

employment of car cleaner. A grievance was brought on his behalf for his displacement from the hose cutter position and this Board by its Award 1406 found such displacement to have been wrongful, and ordered his reinstatement with pay for time lost. While that grievance was pending, the carrier demanded that the claimant resign from the hose cutter job and upon his refusal so to do preemptorily discharged him from the car cleaner job without a hearing or charges of any nature. This discharge and claim for time lost is the subject of the present grievance. Under Award 1406 he was restored to service on October 11, 1950, and paid for time lost in the hose cutter capacity. His discharge by the carrier from the car cleaner job was clearly wrongful and this Board so finds.

However, inasmuch as he was compensated for the time lost under Award 1406 up to October 11, 1950, and has continued in employment in that capacity, the only damage he has suffered as a result of the wrongful discharge is the difference between the hose cutter rate and car cleaner rate (the latter being the higher) on such dates as he may have stood to work in the car cleaning capacity, between January 17, 1950 and such time as he may be accorded an opportunity to elect which capacity he chooses to continue in. Therefore, he should be offered an opportunity within ten days following receipt of this award to elect which job he wishes to continue in. If it happens at that time that the car cleaner job to which he would be entitled by his seniority is furloughed he shall be accorded an opportunity thereafter to make such election if and when the furlough is recalled.

The acceptance of the job October 11, 1950 pursuant to Award 1406 did not constitute an election so as to bar the present claim—rather, he was under a duty to accept the employment so offered as a minimization of the damages on this claim; to constitute an election it is necessary to have an opportunity to choose between two courses. At that time the carrier was denying him any opportunity to choose the other classification.

AWARD

Claim sustained to the extent indicated by the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of March, 1951.