

**Award No. 2522**

**Docket No. 2447**

**2-L&N-CM-'57**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee J. Glenn Donaldson when the award was rendered.

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**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 91 RAILWAY EMPLOYES'  
DEPARTMENT, A. F. of L. (Carmen)**

**LOUISVILLE AND NASHVILLE RAILROAD COMPANY**

**DISPUTE: CLAIM OF EMPLOYES:**

1—That under the current Agreement, the Carrier improperly assigned carmen helpers to perform carmen's duties, beginning on March 17, 1954, and

2—That accordingly the Carrier be ordered to additionally compensate a carman at the applicable rate for each day helpers were so assigned.

**EMPLOYES' STATEMENT OF FACTS:** On March 17, 1954, the carrier's local officials at Montgomery, Alabama, shops arbitrarily assigned Carman Helper R. C. Jones to fill the vacation vacancy of Carman W. P. Moore; he (Jones) worked this assignment 10 days. On April 6, Jones was again assigned and worked the 10 day vacation vacancy of Carman J. A. Walker.

On May 1, 1954, Carman Helper W. L. Davis was assigned and worked the 10 day vacation vacancy of Carman B. B. Cavnar.

On May 6, 1954 Carman Helper Obie Hayes was assigned and worked the 10 day vacation vacancy of Carman J. J. Gilchrist. Subsequently, these and other carmen helpers have been arbitrarily assigned to fill carmen's vacation vacancies.

On March 17, 1954 the beginning of these arbitrary assignments of carmen helpers to carmen's vacancies, the local carrier officials had in their possession not less than three applications for employment from qualified carmen, namely: E. R. Anderson, R. L. Hamilton, and Allen J. Henderson. Furthermore, on June 29 and 30, 1954 C. P. Aday and Calvin Blizzard, respectively, both qualified carmen, made application for employment to the local officials at Montgomery. None of the applications have been given proper consideration by the carrier.

The foregoing was brought about because on many occasions necessity demanded that the chief mechanical officer seek a waiver of age limit. In most instances this was granted. On the occasion cited in the dispute, however, he did not feel justified in making such a request. This for the reason that the services of the men would be required only for a very short period of time, and also we had carmen helpers in the service who were fully qualified to perform the work at hand. It is carrier's position that under the terms of the upgrading agreement these employees were eligible to be placed on the vacancies to which they were assigned. No regularly assigned carman was deprived of any earnings because of the action taken.

Carrier feels that its handling was justified and was not a violation of any agreement. Therefore, claim of employees 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 employee or employees involved in this dispute are respectively carrier and employee 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.

Two carmen helpers were assigned and worked ten day vacation vacancies of three carmen. At the time, carrier had in its possession applications for employment from several men with carmen experience. The organization contends that the carrier was thus able to employ carmen with four years experience and of good moral character and habits, and therefore it had no authority to assign carmen helpers to fill the vacation vacancies.

The carrier answers that the applying carmen were overaged and hence not qualified for employment, stating that it had a maximum hiring age policy in respect to carmen of 42 years.

The National Upgrading Agreement of June 1, 1953 is relied upon by the carrier. Article III thereof, reads, in part, as follows:

"In the event of not being able to employ carmen with four years experience who are of good moral character and habits, regular and helper apprentices will be advanced to carmen in accordance with their seniority. \* \* \*"

The organization countered by arguing that only two conditions appear in the above-quoted Article III, namely, experience and good character and that the carrier cannot inject a further condition, that of age, into said Agreement.

Except as restricted by the collective agreement or by statutes prohibiting discriminatory practices, management retains the unqualified right to hire. By statute, qualifications based upon the factors of race, creed or color, are, in most jurisdictions, unlawful. Perhaps to some, conditioning eligibility for employment upon one's age despite his or her physical fitness, is as odious as those factors legislated upon. If such be, their voices have not been heard by legislative bodies and the imposition of maximum age rules by management, is not today considered legally discriminatory.

An examination of the Agreement between the parties hereto does not reveal any express rule by which management has bargained away its right to consider maximum age in connection with employment practices. Neither do we find any restriction upon its requirement of good health and physical fitness in connection with its hiring practices. These are two important managerial rights which we have no justification to lightly regard or ignore. Evi-

dence of the relinquishment of such rights should be clear and unmistakable and not dependent solely upon rules of statutory construction as the organization urges. Failing to find express relinquishment of such rights, we must read them into Article III as implied conditions. So doing, we find that no qualified carmen were available at Montgomery Shops on the dates in question.

To test the validity of our conclusion, we suggest the application of the provisions of Article III to a situation where the applicant is ninety years of age. Would the simple fact that he had served four years as a carman at some point in his life and was of good moral character qualify him for the job. The parties in negotiating Article III could have intended no such result.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman  
Executive Secretary

Dated at Chicago, Illinois, this 21st day of June, 1957.