

Award No. 3376
Docket No. 3103-I
2-UP-I-'59

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

PARTIES TO DISPUTE:

UNION PACIFIC RAILROAD COMPANY

GAETANO DI MARTINO, CARMAN-UPHOLSTERER

DISPUTE: CLAIM OF CARRIER:

Claim of Union Pacific Railroad Company that seniority date of March 24, 1942, is the proper seniority date of Gaetano DiMartino, Carman-Upholsterer, Omaha Shops, which date was accorded him after he had completed four years of railroad work at the trade as prescribed by the qualification rule of the controlling agreement.

CARRIER'S STATEMENT OF FACTS: Gaetano DiMartino was first employed by this carrier on May 21, 1921, as a carman-apprentice at Omaha, Nebraska. He resigned from this employment on April 13, 1922.

DiMartino was again employed by the carrier on March 22, 1935, as an upholsterer. In his application for employment form, he listed the following record of previous employment:

Year	Employer	Position Held
1932	American Upholstering Co.	Upholstering
1930	National Upholstering Co.	Upholstering
1933	F. E. R. A. Court House	Upholstering

It will be noted that DiMartino did not list, and he did not have, any prior experience in the railroad industry as a carman-upholsterer.

Except for periods when he was furloughed account reductions in force, DiMartino worked as a carman-upholsterer until the present time and is presently so employed.

DiMartino was listed on the seniority roster for carman-upholsterers dated January 1, 1936, as number 12 with a seniority date of March 22, 1935. This same date is shown in subsequent rosters for the years 1937, 1938 and 1939. DiMartino's name was not shown on the 1940, 1941 or 1942 rosters. It is shown on the 1943 roster with a seniority date of March 24, 1942. His

kindness view of their action, sought to represent members of the union when it knew that the union's interest and position was adverse, contrary and incompatible with the interest of this employe, and those likewise situated. Such "representation" is worse than no representation at all, for by their silence, they imply no disagreement exists among the union members. Such "representation" is condemned throughout our legal processes, why shouldn't the same be condemned here?

Instead of really representing the union, the carrier and the union entered into a "gentlemen's agreement" that if the seniority of this employe is reduced, the union will not present any time claims in the adjusting of this particular case. **Thus, in one breath, the union specifically recognizes that the affected men would have claims, but dogmatically and somewhat dictatorially declares that the union would not "present them".** We will not comment further on such action for the deed is apparent to all fair-minded men.

The union may have had a right, had it followed the procedure of the National Railway Act, to change the interpretation of the collective bargaining agreement, as regarding the seniority acquisition of future employes, but we earnestly contend that in addition to not complying with the National Railway Act, the union in collaboration with the carrier was without authority and could not abrogate vested seniority rights already established on which all parties, the union, the carrier and the employe relied on in good faith.

CONCLUSION

What we have in the instant case is a situation wherein an employe recognized to be a journeyman or mechanic upholsterer, is employed by a carrier with the understanding that his seniority date would commence as the day he goes to work for the carrier. The employer and the employe, with the concurrence of the union, act in accordance with this understanding for five years. After five years the union "agrees" with the carrier that this employe is not entitled to such a seniority date.

We respectfully contend that having adopted interpretation by the acts of the carrier and union in which the employe was entitled to a seniority date that the carrier was estopped from rendering a new interpretation to the detriment of an employe who acted upon and relied upon the original interpretation.

If some dissatisfaction resulted from the original interpretation, there was procedure under the Railway Labor Act which the carrier and union could follow, which neither chose to do. What we particularly condemn is attempting to change the employe's status by an organization which did not in truth represent him, and without the affected employe's participation. Protection of this employe's seniority status should have been provided. The arbitrariness and injustice of the action taken by the carrier and the union gnawes at one's conscience.

This employe's position has merit. Your sincere consideration of this matter is invoked.

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.

Parties to said dispute were given due notice of hearing thereon.

This dispute has been progressed here by the Carrier under its Statement of Claim asserting that the date of March 24, 1942 is the proper seniority date of Gaetano DiMartino, Carman-Upholsterer, Omaha Shops. It is DiMartino's position that his proper seniority date is March 22, 1935. Hearing has been held and both parties were represented thereat by counsel; DiMartino appeared personally.

The record discloses that Mr. DiMartino was employed by the Carrier as a carman-upholsterer on March 22, 1935. At that time he had had no prior experience as a carman-upholsterer. He was shown on the 1936, 1937, 1938 and 1939 seniority rosters as having a carman-upholsterer's date of March 22, 1935.

We find that the Carrier was in error in according DiMartino a seniority date of March 22, 1935 as a carman-upholsterer because at that time he did not have the requisite qualification prescribed in Rule 133, namely, "four years' practical experience at carmen's work . . ." The other qualification prescribed in Rule 133, i.e., apprenticeship, is not here involved.

DiMartino's experience as an upholsterer in outside industry at the time of his employment in 1935 has no bearing upon the requisite qualification under the above rule.

It is shown in the record that the Carmen's Organization's protest of DiMartino's seniority date of March 22, 1935 as a carman upholsterer ultimately led to a conference between the Carmen's Organization and the Carrier, which conference resulted in the correcting of DiMartino's seniority date in accordance with an understanding reached between the Carmen's Organization and the Carrier, which understanding is shown in the record as Carrier's Exhibits A and B. As a result of this understanding DiMartino's employment in 1935 was, in effect, treated as being under Rule 154 and after he had acquired four years' practical experience at carmen's work (1160 days), he was accorded a seniority date of March 24, 1942. He holds this date at the present time and we find it to be proper and correct under the applicable agreement provisions. The adjustment in DiMartino's seniority date was prospective in its application. It was not retroactive and had no effect on his employment by the Carrier under Rule 154.

In reaching the foregoing findings, we have carefully considered all of the arguments and contentions made in the submissions filed on behalf of DiMartino, but we find such arguments and contentions to be without merit. Many, if not all, of the arguments advanced on DiMartino's behalf are answered in *Edelstein v. Duluth, Missabe & Iron Range Ry. Co.*, 226 Minn. 508, 31 N.W. 2d 465. We find that DiMartino's seniority date of March 22, 1935, was erroneous and that it was properly changed to March 24, 1942.

AWARD

Claim of Carrier sustained and claim of DiMartino denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois this 16th day of December, 1959.