

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 10921
Docket No. 11006-I
2-NRPC-I-CM-'86

The Second Division consisted of the regular members and in addition Referee Raymond E. McAlpin when award was rendered.

(John J. Fenton
Parties to Dispute: (
(National Railroad Passenger Corporation

Dispute: Claim of Employees:

John J. Fenton was employed by Conrail as a carmen-welder from December, 1975 through June, 1981 when he was furloughed from the Beech Grove Shops. He registered with the Board and the State of Indiana. Jurisdiction is confirmed upon the Second District by virtue of Claimant's former carman employment.

Fenton's right to first hire under Sec. 703 of Title VII of the Regional Rail Reorganization Act has been violated by the fact that he was technically qualified for a carman's position and there has since been hired a number of people with less seniority who were not better qualified for the position. This action is brought under Sec. 3 of the Railway Labor Act as specified by Sec. 704(g) (3) of the Rail Reorganization Act.

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 employees 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.

The Claimant was employed by Conrail at their Beech Grove Shops from December, 1975 through June, 1981, at which time he was laid off. During his layoff, the Claimant had applied for employment with the National Railroad Passenger Corporation. During this time, the Carrier hired thirty-nine individuals.

The Claimant contends that he was discriminated against by the Carrier. The Carrier states Claimant was not hired because he has the inability to work safely. The Claimant argued he had only one injury during his employment. This resulted in two Claims. However, the injury occurred

when conditions were icy. This one incident does not preclude the Claimant from working safely. Most of the individuals who were hired instead of the Claimant had no previous railroad experience, therefore, the Carrier would have no way of knowing how safely they could work under railroad conditions. The Claimant is not less qualified because of the injury; the fact is he had worked for five and one-half years with a good record of employment and only one accident. The Claimant argued the Claim was processed properly, in that after receiving a letter from the Railroad Retirement Board dated December 21, 1984 and conferences with several Officials, the Claimant and his attorney determined that it would be appropriate to pursue his grievance directly to the Second Division. The Claimant asked that he be hired and given retro-active seniority and backpay to the date that he should have been hired.

The Carrier argued that the Claim was not handled in the usual manner on the property. A written grievance was not filed with any of the stipulated Officers of the Carrier. The Carrier argued no one can relieve the Claimant of the obligation to process Claims in the usual manner and that identical cases recently decided support the Carrier's position. Without prejudice to the threshold argument, the Carrier also stated the Claimant was not qualified. He has two instances, during his tenure with Conrail, of filing Claims in connection with on-the-job injuries. Therefore, the Claimant was less qualified than other applicants, and under the applicable statutes, the right of preferential hiring would not apply to this Claimant. The Carrier notes there was no showing that any of the other individuals that were hired had any safety problems. Finally, the Carrier argued there was no remedy requested by the Claimant and submits that this Board has no power to grant a remedy in the absence of a request. The Carrier states the most the Board could order would be that the Claimant be considered for employment without backpay.

Upon complete review of the evidence, the Board finds it is clear from the record that this Claim was not handled in the usual manner on the property. The Claimant argues he and his representative did the best they could to determine the appropriate forum. They consulted with a number of individuals. The language in the contract and in the applicable statutes seems to be exceedingly clear. The purpose of a grievance procedure is to create a record that would allow the Board an opportunity to properly review the merits of the case. In this instance, because the Claimant did not follow the proper procedure, there is no appropriate record for the Board to review. Section 703 of Title VII of the Regional Railroad Reorganization Act cited by the Claimant incorporates the Railway Labor Act which states in pertinent part "(i) The disputes between an employee or group of employees and a Carrier or Carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual

manner up to and including the Chief Operating Officer of the Carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate Division of the Adjustment Board with a full statement of facts and all supporting data bearing upon the disputes". It is the Claimant's responsibility to follow the proper procedures. The Law is exceedingly clear and specific. Because the Claimant did not advance his Claim as required by the statute the Claim is procedurally defective and the Board has no alternative but to deny the Claim without ruling on the merits of the case.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of July 1986.