

SUPPLEMENTAL

Award No. 473

Docket No. 378

2-MKT-MA-'40

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Originally the following dispute covered by our Docket No. 378, Award No. 473, was submitted by System Federation No. 8, Railway Employees' Department, A. F. of L. (machinists) and the Missouri-Kansas-Texas Railroad Company to this Division for adjustment.

"DISPUTE: CLAIM OF EMPLOYES: That top rate seniority date of Machinist John Henry Watson, Dallas, Texas, of June 15, 1923, as established by management is incorrect. It is the employees' position that his top rate machinist seniority date should be as of date promoted and regularly assigned to that classification, said date being August 1, 1936."

The following award was rendered by the Division with Referee Frank M. Swacker sitting as a member thereof July 10, 1940:

"Claim sustained."

Under date of August 6, 1940, John Henry Watson, obtained a temporary injunction in the District Court for the 101st Judicial District, Dallas County, Texas, restraining the Missouri-Kansas-Texas Railroad Company from applying the above award, based on the fact that he had no notification or opportunity to appear before the referee prior to award being made. The Railway Employees' Department, A. F. of L., thereupon requested the Division to grant a re-hearing before a referee for the purpose of affording the parties the right to appear before a referee and argue their case. The Division deadlocked on the question of granting a re-hearing and also deadlocked in its attempt to agree upon the selection of a referee. The National Mediation Board then appointed Mr. Frank M. Swacker as referee to sit with the Division as a member thereof for the purpose of considering the question of a re-hearing of the case. The Division, with Referee Swacker sitting as a member thereof, on November 25, 1940, adopted the following:

"OPINION AND DECISION OF THE SECOND DIVISION, NATIONAL RAILROAD ADJUSTMENT BOARD, ON THE PETITION FOR RE-HEARING ON DOCKET NO. 378, AWARD NO. 473 (M-K-T RR—MA).

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

The petitioner herein (Railway Employees' Department, A. F. of L.) having petitioned the Division to grant a re-hearing in this case and the Division having considered the request with said referee sitting as a member thereof, resolves to grant said re-hearing, all parties in interest to be notified thereof."

The re-hearing was held December 16, 1940, all parties in interest having been duly notified of said hearing. On December 19, 1940, the Division, with Referee Swacker sitting as a member thereof, rendered the following supplemental findings and award:

FINDINGS: This case was reopened and reheard because one, adversely affected, was not made a party or noticed of the original proceedings. That has now been done and full opportunity offered for him to defend the rights he claims were invaded. He did not take advantage of the opportunity. Little additional evidence was developed; it only tended to verify the conclusion reached earlier, that there was an understanding between carrier and the organization that there should be separate seniorities, i. e., of top rate and step rate machinists. This was not contrary to the letter of the schedule, it was merely definitive.

We find as a fact that the agreement was interpreted by the parties to it as calling for this subdivision of seniority although not uniformly observed.

There can be no controversy on the evidence but that Mr. Watson, the adversely affected employe, worked for thirteen years on the step rate level with no right, nor any attempt to assert one, in the top rate roster. It happened, however, that one other employe, who, when advanced to the top rate classification was given his step rate seniority date, and so when Mr. Watson reached his top rate classification the same thing was done. It was immediately protested by the organization. Upon review by the management it was recognized that this was erroneous and seniority was corrected to the date of his advancement. Later, however, the management placed him back to the old date, so far as we can see, merely because that had been done as to the other man. The organization explained this, that it was not the bargaining agent at the time the change was made as to the other man, but considered that the change, having been made by the previous bargaining agent, was binding.

At common law, employment was at will; it is now a right under the contract, but a man may not attempt to claim under the contract and in the same breath repudiate it. Mr. Watson has only such rights as the contract gives him. He cannot be heard to ask an interpretation of the contract different from what the bargaining agencies assert.

An incidental feature of the case is that when Mr. Watson was first employed in 1923 he was employed in the top rate class, but he was set back within a few months and took and held the seniority date in the step rate class from then on. It must be and is found that he abandoned what rights he had in the top rate class. It must be borne in mind other men came in and their rights are affected and certainly not to be set back by a sleeping claim. (See *Burton v. Oregon-Washington R. & Nav. Co.*, 38 Pacific (2d) 72. See *Donovan v. Travers*, 188 N. E. (Mass.) 705.)

AWARD

Former Award No. 473, Docket No. 378, affirmed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 19th day of December, 1940.