Award No. 475
Docket No. 382
2-T&P-EW-'40

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. 121, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L. (ELECTRICAL WORKERS)

THE TEXAS AND PACIFIC RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES: That R. A. Cook, crane operator, should be placed back in service at Lancaster shop, Fort Worth, Texas, in accordance with his seniority in preference to junior Crane Operator M. L. Knight, as provided for in Rule 18, Paragraph (c), and compensated for all time Crane Operator M. L. Knight has worked and R. A. Cook has remained on furlough.

EMPLOYES' STATEMENT OF FACTS: M. L. Knight, crane operator, was furloughed January 11, 1938; R. A. Cook, crane operator, was furloughed March 28, 1938; both operators were furloughed in accordance with Rule 18, paragraphs (b) and (c) of current agreement.

Crane Operator M. L. Knight was called back in service July 23, 1938. There is no record of local committee being furnished a list of men to be returned to work as is provided for in Rule 18, paragraph (f) of present agreement.

Seniority dates of crane operators, Lancaster shops, Fort Worth, Texas, are as follows (also shown in Exhibit A):

R. A. Cook	3-21-28
M. L. Knight	8-19-35

R. A. Cook worked in Marshall shops from 1923 until transferred to Lancaster shops, Fort Worth, March 21, 1928, operating all types of cranes; has operated cranes in Fort Worth from March 21, 1928, until March 28, 1938.

POSITION OF EMPLOYES: Rule 18, paragraphs (b), (c), (d) and (f), being part of present agreement read as follows:

"RULE 18

(b) When the force is reduced, seniority as per Rule 20 will govern; the men affected to take the rate of the job to which they are assigned.

(c) Twenty-four (24) hours notice will be given before hours are reduced. If force is to be reduced, seventy-two (72) hours notice

"The evidence of record establishes a physical ailment of a recurring nature, and E. A. Kircher has not been dismissed but is considered still in the service of the carrier, and while denied the privilege to work as a foreman or helper because of the known condition of his shoulder, he is furnished such other employment as can be found for him, which should be done.

In view of the above facts it is not necessary to pass on the question of reinstatement, as complainant still holds his seniority rights, but the Division is not disposed to take any action that would force the carrier to permit complainant to take service where, as a result of his condition, a hazard would be created; but if by competent medical examiners one or more to be agreed on by the carrier and Kircher, it is found the ailment no longer exists, then he should be permitted to return to yard service.

AWARD

Dispute disposed of per Findings."

Would also refer the Board to Award No. 728 of the Third Division, which was assisted by Referee DeVane, which also denied the claim in that case.

The Board held in part in its opinion:

"* * * The carrier's liability for the safe operation of its transportation facilities makes it responsible for the fitness of its employes to hold their respective positions. While this liability does not give a carrier a license to hold employes out of service at will, where it acts in good faith and upon facts that justify such action it is clearly within its rights under the prevailing agreement. * * *"

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.

The parties to said dispute were given due notice of hearing thereon.

At the location involved there were two cranes, one of 15 ton capacity and the other 250 tons. Under Rule 18, paragraph (c), upon the restoration of forces senior laid off men are entitled to preference in returning to service if available within a reasonable time. Claimant was available, but the carrier instead appointed a junior man to operate this crane. The explanation given at the time was that he was regarded as incompetent to handle the large crane.

The defenses here are that claimant had never operated a 250 ton crane although he had been operating the 15 ton crane. The organization emphatically denies the contention that the claimant had not previously operated the 250 ton crane. Next it is contended that unless claimant would submit to a physical examination and be found physically fit he was not entitled to the appointment. It is claimed by the management that claimant's hearing was impaired and that this would incapacitate him since it is said it would result in hazard not only to himself but to other employes. There is nothing in the schedule providing for physical examination; there is, however, an operating rule requiring physical examination of crane operators which was promulgated in 1924. This, the organizations say, was an ex parte publication by the carrier and not known to them until 1938. The organization further claimed that the rule had not been applied in all cases.

The contention of the organization is that there was deliberate discrimination against claimant because of the desire to use a junior man who apparently did have more experience operating the large crane. The employes point to an operating rule which expressly forbids the giving of signals for the moving of crane orally and requires that they should be manual and therefore contend that even if claimant's hearing is somewhat impaired it would not disqualify him for the work; in fact it is even argued that it is to some extent an advantage. It is difficult to see how there would be any more hazard to himself or fellow employes in the operation of the 250 ton crane than of the 15 ton crane. Certainly if the cargo of a 15 ton crane was dropped on a fellow employe it would seem that the hazard to him would be just as great as that of the 250 ton. It is undisputed that the claimant has been permitted to operate the 15 ton crane for years.

It appears that on the recall to duty only one operator was to be recalled, he to operate both cranes. From all the evidence it is a reasonable conclusion that the junior man was considered more competent and was chosen for that reason. The seniority provisions of the schedule do not permit the carrier to choose the better of two qualified men if he should be the junior. They would be of little value if they did.

We conclude that claimant was denied his seniority rights and is entitled to the time worked by the junior man while claimant has remained on furlough.

AWARD

Claim sustained

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 10th day of July, 1940.