

Award No. 825
Docket No. 734
2-NYO&W-CM-42

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee I. L. Sharfman when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 31, RAILWAY EMPLOYES'
DEPARTMENT, A. F. OF L. (CARMEN)

NEW YORK ONTARIO AND WESTERN RAILWAY

DISPUTE: CLAIM OF EMPLOYES: That Harry Parker, carman at Mayfield Yard, New York Ontario and Western Railway be paid for all time worked by Frank J. Cawley from November 27, 1939 to January 2, 1940 and March 1, 1940 to May 13, 1940, because the carriers violated Rule 27 of the agreement effective October 1, 1938.

JOINT STATEMENT OF FACTS: Frank J. Cawley was employed as car inspector and car repairer at Mayfield yard, July, 1906. He was placed in charge of car shop boilers in 1909; placed in charge of generators on June 4, 1913, and assigned to tank repairer on July 20, 1934.

Harry Parker was employed as helper and car oiler in car yard at Mayfield yard on March 17, 1926, and was promoted to car repairer at Mayfield yard repair track on May 1, 1934.

In reduction of car department force at Mayfield yard, Harry Parker was laid off November 27, 1939, to January 2, 1940, and March 1, 1940, to May 13, 1940. Frank J. Cawley was retained in service during these periods.

POSITION OF EMPLOYES: It is the contention of the employees that Frank J. Cawley's employment with the carrier on other than carmen's work during the period 1909 to July 20, 1934, approximately 34 years, nullified any and all rights as a carman which he may have established prior to taking charge of the car shop boilers in 1909. This contention is sustained by Supplement No. 4 to General Order No. 27, the National Agreement and numerous other government agency decisions of record.

As of June 4, 1913, Frank J. Cawley's name appeared on the seniority roster of generator attendants, and when his position as such was abolished in July 1934, the management assigned him as a tank repairer on July 20, 1934. It was then, if the transaction was legal in the absence of System Federation No. 31 having an agreement with the carrier, that Frank J. Cawley, on July 20, 1934 established seniority rights as a carman. This is supported by the fact that on the Mayfield seniority roster posted February 1, 1940, Harry Parker and Frank J. Cawley ranked thereon as follows:

No. 26—Harry Parker, May 1, 1934.
No. 27—Frank J. Cawley, July 20, 1934.

In force reductions at Mayfield yards, November 27, 1939, and March 1, 1940, Carman Harry Parker was laid off and Frank J. Cawley was retained

department on July 12, 1939, as indicated by Mr. McAndrew's letter to Mr. Fox dated July 14, 1939, pending final settlement of seniority roster. (Carrier's Exhibit No. 1.) Also, at a meeting prior to issuance of this letter, July 14, 1939, at which meeting Cawley appeared and his seniority not being disposed of, it was decided that the executive committee of the B. R. C. of A. was to go into the matter further; also, in subsequent meeting of the same committee, with Mr. McAndrew, then Superintendent of Motive Power, held in his office at Middletown, New York, April 1, 1940 Mr. McAndrew again requested this committee to go further into the matter of Cawley's seniority so that the Cawley-Parker case could be disposed of.

Under date of October 30, 1940, Mr. L. Westington, acting chairman of a joint protective board, wrote Mr. O. C. Gruenberg, superintendent of motive power, requesting a conference to discuss grievances. This conference was granted and held in the superintendent of motive power's office November 20, 1940. Those present were: Representing the employes, Mr. L. Westington and Mr. G. G. Buder; Representing the management, Mr. A. R. Green and Mr. O. C. Gruenberg. Previous to this meeting it was not known that a joint protective board had been established, of which Mr. Westington advised Mr. Gruenberg he was chairman.

The Cawley-Parker case was discussed and as Mr. Gruenberg had recently been appointed superintendent of motive power of this railroad, and was not familiar with all the angles of this case, he requested Mr. Westington to write up the case so that it could be thrashed out.

This was never done. Later, the case was taken up by Mr. James Longson, general chairman, B. R. C. of A., who is representing the employes in this case.

Carrier's Exhibits Nos. 1, 2 and 3 are submitted and are a part of the carrier's position.

Inasmuch as Mr. Cawley has a seniority date as of April 25, 1923, which is the date on which he returned to work after the strike, and Mr. Parker has a seniority date of May 1, 1934, which is the date he was promoted to car repairer, we believe it will be apparent to the Board that Mr. Cawley was properly permitted to work during the above mentioned lay-off periods and that Mr. Cawley's seniority date as tank repairer has been properly established as of April 25, 1923.

Present residence address of Frank J. Cawley is 546 North Main Street, Archbold, Pa.

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.

The primary issue in this proceeding is one of fact. Was Frank J. Cawley, who was assigned as tank repairer on July 20, 1934, senior to Harry Parker, who was promoted to car repairer on May 1, 1934? Under Rules 27 and 31 of the agreement the senior carman was entitled to the work involved—from November 27, 1939 to January 2, 1940, and from March 1, 1940 to May 13, 1940.

It is the contention of the carrier, supported by Cawley, that there was a verbal understanding with Cawley upon his assignment to the power plant as generator attendant on June 4, 1913 that he would retain his rights as a

carman. It must be assumed that this assurance was based upon the fact that Cawley had been originally employed, in July, 1906, as a car inspector and car repairer. Yet, on the seniority rosters dated January 10, 1922, Cawley appears as a generator attendant, with seniority date of June 4, 1913, and is not listed among the carmen.

Upon Cawley's return to employment after the shopmen's strike of 1922, he was restored to his old position as generator attendant, and his seniority date was fixed as April 25, 1923, the date upon which he resumed work. But there is no evidence that he was recognized as a carman with this seniority date. Not until the proposed roster of November 5, 1938 was issued—after he had been assigned as tank repairer on July 20, 1934, and after the agreement of October 1, 1938 had become effective—did he appear as a carman (tank repairer), with seniority date of April 25, 1923.

It is decidedly questionable whether, even in the absence of a collective agreement, the carrier is free to manipulate seniority rights arbitrarily and insist upon their enforcement; in any event, the evidence in this proceeding is inadequate to establish the contention that, prior to the effective date of the current agreement, Cawley was actually granted seniority rights as a carman as of April 25, 1923.

In these circumstances Parker is senior to Cawley as a carman, and Parker was entitled to the work at issue. He would be equitably and amply compensated, however, if paid the net loss suffered by him as the result of his being furloughed in violation of the agreement during the periods specified in the claim.

AWARD

Claim sustained to extent indicated in above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois this 13th day of October, 1942.