Award No. 1187
Docket No. 1114
2-B&O-FT-'47

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee George A. Cook when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 30, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (FEDERATED TRADES)

THE BALTIMORE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That Boilermaker Helper Bruce Pride was improperly deprived of his service rights when furloughed to create a position for Acel Jones, and that accordingly the carrier be ordered to restore him to service with pay for all time lost since February 27, 1946.

EMPLOYES' STATEMENT OF FACTS: The carrier hired Bruce Pride, hereinafter referred to as the claimant, as a boilermaker helper, on February 12, 1945, at Washington, Indiana, and accordingly his name as of that date was included on the boilermaker helper's seniority roster at said point.

This claimant remained in the service continuously as a boilermaker helper until he was laid off, effective February 27, 1946, by virtue of the carrier having hired former Laborer Acel Jones, upon his return from military service, as a boilermaker helper on February 27, 1946. Mr. Jones had not previously, during his prior service with the carrier, established any seniority as a boilermaker helper, or never had worked as a helper in any of the six mechanical shop crafts.

This case has been handled in accordance with the current agreement, revised effective September 1, 1926, with the highest designated carrier officer to whom such matters are subject to appeal, with the result that such officer has declined to adjust it.

POSITION OF EMPLOYES: It is submitted as a fact that this claimant earned and established seniority as a boilermaker helper as of February 12, 1945, within the meaning of Rule 28 of the controlling agreement book; that such rights are retained to date; that he was laid off unjustly and in violation of the controlling rules book on February 27, 1946, and that there is no contractual reason why he should have been laid off in favor of providing a position as a boilermaker helper for Mr. Jones.

It is a further fact that the boilermakers of System Federation No. 30 are not a party to any written agreement or verbal understanding which could remotely be construed as granting to Mr. Jones, or any other laborer, any service rights as a boilermaker helper at any time except upon having earned such rights, by virtue of having been properly employed at recognized boilermaker helpers' work stipulated in Rule 73 of the agreement book.

written agreements of October 28, 1941, and October 24, 1944, carrier's Exhibits A and B. Furthermore, the non-veteran, Bruce M. Pride, received all the rights to which he was entitled before he normally would have received them, since his promotion to boilermaker helper was accelerated because the veteran Acel A. Jones was on leave of absence for military service. Therefore, it is evident that the non-veteran, Bruce M. Pride, gained rather than lost when he acquired boilermaker helper seniority date of Nov. 12, 1945, because it was, no doubt, before he normally would have acquired such seniority, if the veteran Acel A. Jones had not been on leave of absence for military service.

The only question involved in this dispute is the correct seniority date for the veteran Acel A. Jones as boilermaker helper, which, of course, must be finally decided in accordance with the provisions of the Selective Training and Service Act of 1940, as amended, and interpretations thereof by the various United States District Courts in cases involving the rights of returned veterans.

The question involved in this dispute has been adjudicated by several United States District Courts in cases involving the rights of returned veterans, particularly the case of Neil L. Hewitt v. Chicago, South Shore and South Bend Railroad Company, which held that if a veteran, at the time he left his position to serve in the armed forces under the provisions of the Selective Training and Service Act of 1940, as amended, had the right to be promoted to a higher job classification by reason of custom or written contract when a vacancy in the higher classification occurred, and there was no senior employe available to fill it, then the veteran upon his discharge from the armed forces has the right under this Act to be promoted to the higher job classification with seniority date as of the date on which such vacancy occurred while he was serving in the armed forces.

The veteran Acel A. Jones is the senior qualified fireman and oiler employe involved in this dispute and had the right by custom, practice and written contracts to be promoted to boilermaker helper on September 22, 1943, when such vacancy occurred; and would have been promoted to such position if he had not been on leave of absence for military service.

The veteran Acel A. Jones has been given a seniority date as boilermaker helper in accordance with the controlling decisions of the various United States District Courts in cases involving the rights of returned veterans under the provisions of the Selective Training and Service Act of 1940, as amended. The carrier, as well as System Federation No. 30, Railway Employes' Department, A. F. of L., is legally obligated under Selective Training and Service Act of 1940, as amended, and interpretations thereof by the various United States District Courts, to give the veteran Acel A. Jones the seniority date as boilermaker helper that he would have acquired if he had not been inducted into the armed forces. If the veteran Acel A. Jones had not been given the seniority date of September 21, 1943, he would have been penalized for having served in the armed forces, which, of course, would have violated the spirit, intent and provisions of the Selective Training and Service Act of 1940, as amended.

Any award of the Board other than in accordance with the action taken by the carrier would be a nullity because the veteran Acel A. Jones can invoke the services of a United States District Attorney, who will file suit in the United States District Court and obtain the seniority date of September 21, 1943, as boilermaker helper to which he is entitled.

In view of the foregoing, the claim is obviously without merit and should be denied.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carrier's 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 Division considered the Selective Training and Service Act and the working agreement and decided it had jurisdiction to hear and decide the grievance of Boilermaker Helper Pride.

The Board finds two working agreements involved in this case; that of the Firemen and Oilers under which the seniority of laborers is dealt with; and that of the Boilermakers which covers boilermaker helpers.

Acel Jones, who was away on military leave, might have been promoted to boilermaker helper, or helper in some other craft, before he left to join the army. He was not promoted although other employes with less seniority than Jones, working as laborers, were promoted.

The carrier laid particular stress on an Exhibit H, in which it was shown that on August 20, 1946, three local chairmen of the Firemen and Oilers Organization, together with Master Mechanic Gallaway, signed a joint statement to the effect that, "Acel Jones, returned veteran, who was given leave of absence to enter military service would have been promoted to boilermaker helper ahead of Bruce Pride had Jones been available * * *."

The evidence in this case clearly indicates that Jones might or might not have been promoted to helper. So it is necessary to go to the working agreement to determine his rights, bearing in mind that the Selective Service Act must also be taken into consideration as to Jones' rights. We cannot agree that the Selective Service Act takes precedence over or supersedes the collective bargaining agreements from which the employe's seniority rights grow. An employe's first right springs from the agreement covering a majority of the craft or class of employes with which he is working or associated.

The agreement did not provide for promotion on a strict seniority basis—so there was no right of promotion established by the agreement in this case as contended in Award No. 3402, recently decided by Division Three, National Railroad Adjustment Board.

In addition to the basic working agreements in this case, there were several memos of agreement entered into between the respective representatives of the employes and carrier making certain exceptions to the promotion rules, seniority, etc.; however, it is not found that these agreements modified the basic agreements to the extent that Jones would have an unquestioned right to promotion from laborer to helper based on seniority.

We all want each and every employe who was in the military services to have fair and just treatment under the laws and working agreements when he returns from military service. His rights should be protected and they were protected in this instance; i. e. Jones could return to the job he held on the railroad when he entered the military service and have the benefits of all rights that accrued to him under the working agreement while he was away.

The sole question in this case is one involving Jones' right to promotion to a higher rated job that becomes vacant in a different craft while he was away. We find that the agreement gave no right of promotion to Jones on a seniority basis. Promotion was more on the elective basis—Jones had not elected to take promotion before he entered military service and we do not know that he would have elected to take promotion had he been working when Pride accepted promotion.

In memo between the representative of the carrier and the representative of the employes dated November 1, 1942, entered into pursuant to Federal legislation (Public Resolution 96 and Selective Training and Service Act 1940), they agreed that, "any employe who should be ordered, inducted, or

enlisted into the land or naval forces after Sept. 8, 1939, should upon completion of such service be restored to such position (including rights of promotion) to which his accumulated seniority entitled him, all in accordance with the then existing rules of the schedule agreement, the same as if he had remained in the service * * *."

Under the Selective Service and Training Act and the schedule or working agreement, Jones was properly to be returned to service as laborer with accumulated seniority rights as laborer.

His accumulated seniority gave him no right to promotion claimed; as before stated, promotion here was not on a basis of strict seniority, and it is not highly probable that, had he remained with the carrier continuously, he would have been promoted to position of boilermaker helper.

AWARD

Claim of employes sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 14th day of May, 1947.