

**Award No. 1966
Docket No. 1797
2-AT&SF-CM-'54**

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Glenn Donaldson when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Carmen)**

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY (Eastern Lines)**

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the current agreement Military Veteran Carman Helper Viviano Gonzales was unjustly deprived of his contractual rights when he returned from military service to the service of the Carrier and was denied the right to displace a carman helper junior in seniority as such, who was working as an upgraded helper performing carman's work at carmen's rate of pay.

2. That accordingly the Carrier be ordered to:

- a) Make this employe whole by additionally compensating him for the difference between Carman Helper and the applicable Carman rate for each hour worked by the Claimant commencing 8:00 A. M., February 9, 1954 until correction is made.
- b) Permit this employe to exercise his Carman Helper seniority over any Carman Helper junior in seniority to his seniority who was upgraded to a Carman while the Claimant was in the military service.

EMPLOYEES' STATEMENT OF FACTS: Carman Helper Viviano Gonzales, hereinafter referred to as the claimant, was employed by the carrier in its Topeka, Kansas, car department as a carman helper, December 7, 1948, and established on the foregoing date carman helper seniority which has been intact ever since.

On August 4, 1950, the claimant was inducted into the U. S. Armed Forces. He was properly protected by leave of absence and the U. S. Selective Service Act as amended, insofar as his re-employment rights are concerned. The claimant was discharged from the military service January 28, 1954, and returned to the carrier service February 8, 1954.

On February 9, 1954, the claimant made request in writing to his supervisor to displace upgraded Carman Helper Kenneth Rider, who has a

classifications which he might—and even probably would—have received if he had remained out of the military service. And, the statute being silent in the matter, the courts have no power to supply a supposed gap or confer on veterans advantages which the Congress did not see fit to provide. Considerations of generosity in that behalf are appropriate for legislative motivation. They have no proper place in judicial study.”

“And with substantial uniformity the reported opinions disclose that attitude. The courts have been alert to assure to veterans the rights conferred on them by the statute but unwilling to erect novel and unprovided avenues for their preferment.”

In the face of the authorities referred to in this Part One of the position of the carrier, the carrier has no alternatives but to maintain that the claimant is not entitled to make the displacement which the organization claims he should have been permitted to make upon his return from military service.

In conclusion, the carrier asserts that the claim in the instant dispute is groundless, devoid of any support in the law, the agreement or any other medium of authority and respectfully requests that it be denied in its entirety.

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.

Claimant was employed as a Carman Helper with a seniority date, as such, of December 7, 1948. On August 4, 1950, he was inducted into the armed forces. He was discharged therefrom on January 28, 1954. The following day he advised his supervisor of his desire to displace Carman Helper Rider who held seniority date, as such, of July 20, 1950 but was working as a Carman at the Carman's rate of pay. Carman Helper Rider had been upgraded to the position in question on December 9, 1952, during the time claimant was in the military service. Claimant rests his claim on certain rules of the Agreement and the reemployment sections of the Universal Military Training and Service Act of 1951.

Carrier asserts that it has reinstated claimant to his position without reduction in his seniority, status and pay and the said Act requires no more. Or, stating its position in the converse, that the veteran is not entitled to seniority in a position which he might have obtained had he not left the employment of the carrier. It also argues that claimant had no fixed or absolute right to promotion.

The Organization points to Item (5) of Appendix “A” Section (d) which provides “(5) By helpers with two or more years' seniority as such” and argues that claimant had a fixed or absolute right to promotion on his seniority as a helper.

The carrier in its submission, relies in part, upon the District and Circuit Court decisions in *Paul W. Diehl, Jr. v. Lehigh Valley Railroad Co.*, 211 F2d 95. Subsequently, and on March 14, 1955, this case was overruled by the Supreme Court by a Memorandum Decision reported in 75 S. Ct. 522. The high court there cited its earlier decision in *Oakley v. Louisville & Nashville R. Co.*, 338 U. S. 278, 70 S. Ct. 119, 94 L. Ed. 87 as controlling.

The same argument was made by the carrier in the Diehl case as here, namely, that the employer had fulfilled its duty of restoring the veteran without loss of seniority by returning him to the position he had left, with seniority credit in that position for the time of his military absence. It would appear that the Supreme Court of the United States has definitely rejected that contention and recognizes in its stead the escalator theory i. e., that he steps back on the seniority escalator at the precise point he would have occupied had he kept his position continuously during his armed service absence. That would have brought him into the position he now claims unless the Agreement forms a bar.

The carrier, it appears, had exhausted the first four categories of manpower available for augmenting its mechanical force and had upgraded employes in group (5) of which claimant and Rider were members. There was no showing made that claimant could not qualify (he had 30 days to do so) and accordingly he was entitled to promotion in seniority order. Claimant was senior to Rider and he was entitled to opportunity to qualify under Section (i). Award 1187 is distinguishable because of difference in contract terms and facts.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1955.