

Award No. 3252

Docket No. 3006

2-TM-CM-'59

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Roscoe G. Hornbeck when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L.—C. I. O. (Carmen)**

THE TEXAS MEXICAN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier violated the provisions of the June 1, 1953 Agreement,

(a) when they refused to allow Journeyman Carman Painter F. G. Saldivar to displace J. M. Gonzales as a painter on December 26, 1956,

(b) and Rule 63 of the Agreement effective September 1, 1949 when they placed J. M. Gonzales on the Carman Painters' seniority roster at Laredo, Texas with a seniority date of May 1, 1956.

2. That accordingly the Carrier be ordered to:

(a) remove J. M. Gonzales' name from the Carman Painters' seniority roster at Laredo, Texas,

(b) compensate Journeyman Carman Painter F. G. Saldivar in the amount of eight (8) hours at the applicable pro rata rate of pay for each day that J. M. Gonzales has been allowed to work as a Carman Painter beginning with June 19, 1957 and continuing until such time as the Carrier complies with the provisions of the Agreement.

EMPLOYES' STATEMENT OF FACTS: The Texas Mexican Railway Company, hereinafter called the carrier, not being able to employ four year carmen and having no regular or helper apprentices or helpers available to upgrade, hired one J. M. Gonzales on May 1, 1956, who had never before

not in the employ or ever having been in the employ of this carrier would be without any basis or precedent, and, further, the carrier points out that such claim is not a proper claim to come before your Honorable Board. Consideration should be given to Article V of the agreement made 4th of June, 1953, which provides that such agreement

“shall be construed as a separate agreement by and on behalf of each of said carriers and its said employees” etc. (Emphasis supplied.)

Mr. Saldivar, in whose behalf the instant claim is made, is not an employe, has never been, and has no claim on this carrier for employment through contractual or any other rights.

Rule 15 of the agreement, the seniority rule, is clear in the subdivision maintained under carmen's craft, and also that seniority lists approved by the master mechanic and local chairman are permanently established unless protested in writing within thirty (30) days after posting, which protest was not made until several months after the hiring of Mr. J. G. Gonzalez. Further, classification of work rule, Rule 64, is clear that it includes painting within the scope of carmen's work and points out “all other work generally recognized as painters work”, which divides the duties of painter from that generally considered as carmen's work.

Carrier also takes position, without prejudice to any other position expressed or implied, that application for employment submitted to the carrier by Mr. Saldivar, was dated **January 31, 1957** (emphasis supplied), reproduced and made a part hereof as Exhibit No. 12, while claim that the carrier violated the provisions of the June 4, 1953 agreement, “when they refused to allow Journeyman Carman Painter F. G. Saldivar to displace J. M. Gonzalez as a painter on December 26, 1956 (part 1(a) of claim) predates his application for employment.

This carrier takes the position that the employment of personnel is a managerial prerogative, that it has no obligation to employ furloughed employes from other railroads, industries, or from any other source. In the instant claim, carrier has shown that Mr. Gonzalez is a qualified painter, substantiated by affidavit reproduced as Exhibit No. 13 and made a part hereof.

The claim before your Honorable Board should be denied in its entirety for all the reasons and causes as set out by the carrier.

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.

Parties to said dispute were given due notice of hearing thereon.

This claim may be determined for the same reason as set out in Docket No. 3117.

But the merits of the claim of the employes in behalf of Carman Painter F. G. Saldivar need not rest alone on the effect of the agreements discussed on this submission.

Assuming that the agreements between the Carrier of December 15, 1937 and September 8, 1950, and the multiple agreement of June 1, 1953, to which the Carrier, the party here, the Missouri Pacific Railroad, the employer of Mr. Saldivar, and the Employes, were signers, are effective, the controversy may be resolved upon correspondence in this record.

Following considerable interchange of letters respective the classification of Mr. Gonzales, as a Carman Painter, and his seniority rating, and the insistence of the Organization that Mr. Saldivar be permitted to replace him, J. O. Roe, Vice General Chairman — Carmen, in a letter to R. E. Johnson, Vice-President and General Manager of the Texas Mexican Railway, of date July 6, 1957 made a proposal. Mr. Roe said, in part:

“We cannot allow anyone to establish seniority as a Carman until he has met the requirements of this Rule 63 of the Agreement, and we are again requesting that the name of Mr. J. M. Gonzales be removed from the Carmen’s seniority roster.”

“Mr. Gonzales’ name should properly be placed on the Carman Helper’s seniority roster as of the date he first went to work for The Texas Mexican Railway.”

“With reference to the claim in favor of Mr. F. G. Saldivar, we will be glad to withdraw this claim if you will agree to remove Mr. Gonzales’ name from the Carman’s roster and properly place it on the helpers’ roster.”

“Also, if you will agree to the proper application of the June 1, 1953 agreement to the extent that you will without question allow a bona fide mechanic to displace any upgraded or provisional mechanic that may be working for the Texas Mexican Railroad.”

Accepting the foregoing proposition of date January 20, 1958, Mr. Johnson said, in part:

“You have requested earlier that Carman Painter Gonzales’ name be withdrawn from the seniority roster, and I have a similar request from the Local Chairman of the B. R. C. A., Mr. Luis G. Martinez; however, account the peculiar status of this matter and giving consideration to the fact that Mr. Gonzales’ name has been shown in the seniority roster without protest, I believe that his name should only be withdrawn as Carman Painter and **by formal agreement which I am willing to make.**” (All emphasis ours.)

“Carman Painter Jose M. Gonzales’ seniority as Carman Painter to be changed and in lieu of Carman Painter seniority, he to be given retroactive seniority as painter helper from date of employment, May 1, 1956.”

“If you are agreeable to so handling the seniority status of Carman Painter Jose M. Gonzales, please affix your signature to duplicate copies of this letter and return to me, which will indicate that we have agreement in this respect.”

At the bottom of this letter appears: Agreed
J. O. Roe
 Vice General Chairman, B.R.C.A.

This letter from Mr. Johnson is not a full acceptance of the two proposals of Mr. Roe, but he accepted it as satisfactory and made no objection to the failure of Mr. Johnson to approve Mr. Roe's proposals in their entirety.

Conformable to the foregoing agreement, the status of Mr. Gonzales was changed and he was so notified. He, in all probability, knew of the conditions which resulted in the changes. He, and the Carrier, relinquished their rights, which had considerable merit and had not been promptly challenged, to Mr. Gonzales' classification as a Carman Painter and his seniority rating as such on the roster.

In the situation thus developed, the Organization is estopped to assert and press the claim here presented.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
 By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
 Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1959.

DISSENT OF LABOR MEMBERS TO AWARD NO. 3252

The carrier, by removing Jose M. Gonzales' name from the carmen painters' seniority roster and placing it on the painter helpers' seniority roster at Laredo, Texas, with a seniority date of May 1, 1956, acknowledged the fact that Gonzales did not have the requisite qualifications to be employed as a carman painter since he did not have the qualifications prescribed in Rule 63 of the agreement effective September 1, 1949; that is four years' practical experience at Carmen's work.

According to the record, at the time Gonzales was hired, the carrier was unable to employ a carman with four years' experience, nor did it have employes eligible to be upgraded to carmen in accordance with Article III of June 4, 1953:

"In the event of not being able to employ carmen with four years' experience who are of good moral character and habits, regular and helper apprentices will be advanced to carmen in accordance with their seniority. If more men are needed, helpers will be promoted. If this does not provide sufficient men to do the work, men who have had experience in the use of tools may be employed . . ."

Therefore, after hiring Gonzales the carrier had the right to upgrade him and retain him in service as a carman painter until such time as a qualified carman became available. The record shows that a qualified carman did become available on December 26, 1956. Thus the majority

should have held that the carrier's retention of Gonzales in service as a carman painter after that date was a violation of that portion of Article III which prescribes that

“They will not be retained in service as carmen when four-year carmen as described above become available.”

James B. Zink

R. W. Blake

Charles E. Goodlin

T. E. Losey

Edward W. Wiesner