

Award No. 3965

Docket No. 3579

2-D&RGW-CM-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 10, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

**THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYEES: 1—Rules of the current agreement, particularly Rules 27 and 91, were violated by the carrier's unilateral action of assigning a seniority date as a journeyman carman to John Iannacito of February 3, 1944, on the Burnham—Bond Roster of Carmen.

2—The carrier's unilateral action was unjust treatment of Alex Bauer, Carman, Burnham, Colorado, the claimant, who holds a seniority date on said seniority roster of March 7, 1949, for it lowered him one position.

3—Accordingly, the claimant, whenever he is adversely affected by carrier's action, should be:

- A. Compensated for any lost time;
- B. Compensated for any change in assignment created when:
 - (1) required to change shift,
 - (2) required to assume less desirable rest days,
 - (3) required to make any other move that violates current rules;
 - (4) the carman seniority date of John Iannacito on the Burnham—Bond seniority roster should be changed to June 18, 1953.

STATEMENT OF FACTS: John Iannacito, the veteran whose seniority date is in dispute, was employed by the Denver and Salt Lake Railway Company as a laborer on March 26, 1941, transferred to coach cleaner on March

faction of the Carrier. And we think there is a very high probability that he would have established his qualifications to such position as of September 21, 1942, had he been on duty and had he, instead of Wright, received the promotion to which he was then entitled.

The Carrier contends that the claim is barred by laches. Section 7, Article 3, of the earlier agreement provides that seniority rosters are subject to correction within 60 days after they are posted. The later agreement provides that the name and seniority date of an employe appearing on a seniority roster shall be 'considered permanently established' if not protested within 60 days. To apply these provisions would defeat the purpose of the Selective Service and Training Act. It is well established that provisions of contracts which run counter to enactments of Congress, pursuant to its war powers, have no force nor effect. Claimant made his protest promptly after returning to the service of the Carrier. This was all he was required to do. Obviously he had no opportunity to protest while he was in the armed forces."

In this case, the Federation is contesting with the carrier the seniority rights of an employe. The Federation has attached a punitive measure to their contention which may affect the carrier but when analyzing the real question in dispute as to whether or not John Iannacito is entitled to a seniority date of February 3, 1944, as opposed to a seniority date of June 18, 1953, it must be admitted that the carrier is nothing more or less than a nominal party to this dispute and has nothing in particular to gain or lose by the final determination of the dispute. The carrier is under no obligation to defend this employe's rights with reference to his seniority status. The employe whose seniority rights are disputed and the other employes affected by the results of this dispute have a direct interest in the matter. Under Third Division Awards 1193 and 3368, it was determined that under Section 3(j) of the Railway Labor Act reading:

"Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employe or employes and the carrier or carriers involved in any disputes submitted to them."

That notice must be given to the employe or employes involved as the awards have held that the rights of an individual cannot be affected unless he has been given notice and the opportunity to be heard. The carrier, being a nominal party to the actual dispute and not being under obligation to defend this employe, asks on the above basis that the employe affected, John Iannacito, be given notice of hearing as undoubtedly his representative in this case, which is the United States Department of Labor, Bureau of Veterans' Reemployment Rights, will want to represent him at the hearing before the Second Division of the National Railroad Adjustment Board. Mr. Iannacito's address is 1579 West Burlington Place, Denver, Colorado.

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.

The record shows voluminous correspondence between the Carrier and the Bureau of Veterans' Reemployment Rights, U. S. Department of Labor, in which the Carrier with the Organization's concurrence opposed Iannacito's 1957 claim for retroactive carman seniority as of February 3, 1944, using the same contentions urged by the Organization here, except for the McKinney decision hereinafter mentioned, which had not yet been rendered. However, at the insistence of the Department of Labor, under the claimed authority of Diehl vs. Lehigh Valley Railroad Co., 348 U.S. 960, and other precedents, the Carrier accorded Iannacito the 1944 seniority claimed. This was done on the theory that but for his absence in military service his employer would probably in its discretion have promoted him to carman, as it did three carman helpers junior to him, although the Rules did not provide such promotion automatically as a matter of right.

Four and one-half months later, on June 23, 1958, the United States Supreme Court, in McKinney vs. Missouri-Kansas-Texas Railroad Company, 357 U.S. 265, held that the only job status and seniority rights to which a returning veteran is entitled are those which, if he had not been absent on military service, he would have obtained automatically as of contract right and not through managerial discretion. The Court said:

" * * * Much there is that might have flowed from experience, effort, or chance to which he cannot lay claim under the statute * * * . The statute manifests no purpose to give to the veteran a status that he could not have attained as of right within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment."

"Thus, on application for re-employment a veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part of the employer. * * * ."

The McKinney decision did not make new law as of June 23, 1958, but interpreted the Congressional Act as it was when the U. S. Department of Labor induced Carrier to accord Iannacito the 1944 carman seniority to which he was not entitled. Because of that action, Claimant, a carman with seniority as of March 7, 1949, was lowered one position in seniority, and asks compensation for any monetary loss.

Iannacito was given third party notice and was represented in this proceeding by a Department of Labor attorney, who argued that this Board had no jurisdiction of the matter, and that the McKinney decision was not adverse to Iannacito's claim of 1944 seniority. Neither contention is valid. The McKinney decision is clearly applicable to Iannacito's status, since admittedly the Denver and Salt Lake Railway agreement did not entitle him to the promotion as a matter of right. It was therefore a violation of Claimant's seniority rights under the present Agreement for Carrier to promote Iannacito ahead of him, and this Board clearly has jurisdiction of Claimant's grievance.

It may seem inequitable to charge the Carrier for action taken under governmental coercion before the Supreme Court interpretation of the statute in the McKinney decision. But the fact remains that the Carrier's action was erroneous and in violation of Claimant's seniority rights. He is therefore entitled to be restored to his proper relative position on the seniority list and

to be compensated for any monetary loss suffered because of that action. The record does not disclose whether, because of his one-position displacement on the seniority list, Claimant lost any time or experienced any move or change in assignment, or what monetary loss, if any, resulted from such move or change. The case must therefore be remanded to the property for ascertainment of those matters.

AWARD

The claim is sustained and the case is remanded to the property for determination of the monetary loss, if any, sustained by Claimant because of the violation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 18th day of April, 1962.