Award No. 4079

Docket No. 3927

2-DW&P-EW-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Carroll R. Daugherty when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 148, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (ELECTRICAL WORKERS)

DULUTH, WINNIPEG & PACIFIC RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement electrician Helper J. Blatnik was improperly deprived of his service rights when furloughed by the Carrier to create a position for Laborer M. C. Mellak.

2. That accordingly the Carrier be ordered to:

(a) Restore J. Blatnik to service with seniority rights, vacation rights, and all other rights unimpaired and compensate him for all time lost since February 16, 1959 at the applicable rate of pay account aforesaid violation.

(b) Remove from Electrician Helpers' seniority roster Laborer M. C. Mellak's seniority date of May 22, 1956.

EMPLOYES' STATEMENT OF FACTS: Electrician Helper J. Blatnik, the claimant, was employed by the carrier prior to May 22, 1956, as a laborer.

In May of 1956, the carrier issued a bulletin at West Virginia, Minn., advertising an electrician helper's position; the claimant, while not the senior employe available, was the successful applicant and was assigned the position, establishing a seniority date of May 22, 1956, as an electrician helper.

On December 3, 1958, Laborer M. C. Mellak, upon returning from military service, reported for duty and on January 12, 1959, was assigned to his former laborer's position from which he had departed for military service.

Under date of February 16, 1959, the claimant was advised by the carrier that laborer M. C. Mellak was granted a seniority date of May 22, 1956, and was being placed above him on the electrician helpers' seniority roster; that he, the claimant, was displaced, resulting in the claimant being furloughed.

from military service, had the right to displace Blatnik from the position of electrician helper.

This claim was taken up by the Brotherhood with the various officers of the carrier concerned. On April 8, 1960, conference was held on the property between representatives of the brotherhood and representatives of the carrier with a view to resolving this claim. At this conference the general chairman submitted letter dated April 6, 1960, to which the carrier made reply under date May 18, 1960.

CONCLUSION

It is the position of the carrier that in the instant case, Mellak properly displaced Blatnik as electrician helper and that in so doing, there was no violation of any agreement. There is no basis for a sustaining award and claim should be denied.

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.

A study of the parties' contentions fathers the conviction that, given the controlling provisions of the two relevant agreements, this case can and must be determined by an application of the U. S. Supreme Court's decision in the so-called McKinney case to the critical facts of record.

Said facts may be summarized as follows: (1) Carrier decided that claimant Blatnik was to be displaced from the position of electrician helper by one Mellak as of February 9, 1959, because (2) some time after the latter had returned from armed-forces service in 1958, carrier decided that he (Mellak) would have been promoted from laborer to electrician helper on May 22, 1956, if he had not been in armed service, because (a) his seniority as laborer had been greater than Blatnik's when on May 22, 1956, Blatnik had achieved electrician helper seniority by being successful bidder for the newly created temporary position of helper, and (b) an earlier government interpretation of the provisions of the Universal Military Training and Service Act relevant to the re-employment and seniority rights of returning veterans seemed to support carrier's proposed action.

Petitioner here relies mainly on the above-mentioned decision of the Supreme Court in the McKinney case. That action took place because a railroad employer had denied to a returning veteran a job to which he said his seniority would have entitled him if he had not been absent in military service. The agreement between the defendant carrier and the plaintiff employe's organization made such promotion discretionary with the carrier; that is, such promotion for the veteran would not have been mandatory or purely automatic on the basis of his seniority alone. Given this kind of agreement on promotion, the Court, apart from certain legal technicalities, said in substance that the veteran could not force the railroad to give him the job he wanted.

In the light of this controlling decision, the issue here comes down to whether the facts of the instant case are the same as those in the McKinney case. In the first place, there can be no question that, under the instant agreement covering laborers, carrier has discretion in the promotion process; under the relevant provisions of Rule 10 of said agreement management has the last word on whether a senior laborer has sufficient ability to attain and hold a job to which his seniority entitles him. Carrier here has contended, without contradiction from petitioner, that under actual practice promotion has in fact been automatic and based wholly on seniority. But in the eyes of this Division such practice must yield to the clear language of the agreement. Therefore, in this respect the instant case may be said to be on all fours with the McKinney one.

But here the similarity stops. There is one compelling difference. In the McKinney case the railroad resisted the returning veteran's request; and the Court upheld this resistance. In the instant case, carrier did not oppose any such desire of Mellak. All that carrier did here was to exercise retroactively its lawful discretion to promote Mellak on the basis of his seniority and sufficient ability. (Petitioner, in fact, does not challenge carrier's judgment on his competence.) Carrier, in effect, has said, if Mellak had been with us and wished us to do so, we should have moved him up ahead of Blatnik to electrician helper; and now that he has come back, we propose to treat him as we would have then.

The Division finds that carrier's complained-of action was not inconsistent with the McKinney decision. On the contrary, it is in harmony with same and with other court decisions interpreting the provisions and spirit of the U.M.T. and S. Act.

The Division finds further that carrier's action did not violate any provision of the several labor agreements here involved. Accordingly, a denial award must issue.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 15th day of November 1962.

DISSENT OF LABOR MEMBERS TO AWARD NO. 4079

The findings of the majority completely misconstrue the issues involved in this dispute, and ignore the undisputed provisions of the controlling agreement upon which the claim is based.

The only justification urged by the carrier for its replacement of claimant, with established seniority as a regular electrician helper, by a returned veteran holding seniority only as a laborer, was the contention that the Universal Military Training and Service Act required the carrier, as a matter of law overriding any agreement provisions to the contrary, to accord the veteran a promotion to electrician helper with fictitious or back-dated seniority in that category sufficient to enable him to displace claimant.

This contention of the carrier is properly rejected in the findings of the majority. Under the controlling decision of the Supreme Court of the United States in **McKinney v. Missouri-Kansas-Texas R. Co.**, 357 U.S. 265, the veteran is not entitled to retroactive promotion and back-dated seniority in the promoted position unless it appears that he would have achieved such promotion automatically, solely on the basis of his seniority in the lower position, had he not been absent in the armed forces. The majority correctly finds that "there can be no question that, under the instant agreement covering laborers, carrier has discretion in the promotion process."

It is at this point, however, that the majority hopelessly loses sight of the issues involved here. Having found that the statute did not require the carrier to take the action complained of, it then proceeds to find that neither is such action prohibited by the statute; that "All that carrier did here was to exercise retroactively its lawful discretion to promote Mellak on the basis of his seniority and sufficient ability"; and, most incredibly, "that carrier's action did not violate any provision of the several labor agreements here involved."

The last quoted holding is of course completely in error. Absent any statutory mandate which would override agreement provisions, it is clear that the carrier's action here was in direct conflict with provisions of the controlling agreement with respect to seniority. Claimant had almost three years' accumulated seniority in the electrician helper classification and the veteran had none, when the latter was allowed to displace claimant — a clear violation of the seniority provisions of the applicable agreement, as well as those embodied for years in agreements throughout the railroad industry. The idea of a carrier having **carte blanche** to grant retroactive promotions and seniority status, at the expense of employes who had previously established seniority, is the antithesis of the whole seniority principle, and as patent an agreement violation as could be conceived. Having held that such retroactive treatment of the veteran was not required by the statute in question, it is completely erroneous for the majority to hold that no agreement provision was violated, and to deny the claim.

E. J. McDermott

C. E. Bagwell

T. E. Losey

R. E. Stenzinger

James B. Zink