

Award No. 4237
Docket No. 4035
2-NP-FO-'63

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. 7, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.—C. I. O. (Firemen & Oilers)**

NORTHERN PACIFIC RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current Agreement, Shop Laborer Sterling D. Fink, Livingston Shop was unjustly withheld from being assigned to the Bulletined position of Leading Laborer.
2. That accordingly the Carrier be ordered to compensate the Claimant for difference in rate of pay between Leading Laborer and Common Laborer for eight hours for each working day from May 27, 1960 until April 28, 1961.

EMPLOYEES' STATEMENT OF FACTS: Mr. Sterling D. Fink, hereinafter referred to as the claimant, has been continuously employed by the Northern Pacific Railway Company, hereinafter referred to as the carrier, since May 2, 1950.

The carrier posted bulletin No. 20 on the bulletin board May 16, 1960 stating that bids would be received for the position of leading laborer until May 20, 1960.

Responding to this bulletin No. 20 were two (2) laborers, namely Sterling Fink, the claimant, with a seniority date of May 2, 1950 and A. L. Thorson whose seniority date is March 11, 1954.

The carrier on May 24, 1960 posted notice that A. L. Thorson had been awarded the position listed on Bulletin No. 20, namely the position of Leading Laborer in the Livingston Shop.

This dispute has been handled with the carrier officials designated to handle such affairs, who all declined to adjust the matter. The agreement effective March 1, 1953, as subsequently amended is controlling.

not substitute its judgment for that of the Management in determining the fitness and ability of an employe to fill a particular position in the absence of a showing of bias or prejudice.

The record in this docket is completely barren of any showing of bias or prejudice. In fact, the employes do not allege that Mr. Fink possessed the necessary fitness and ability to fill the position of leading laborer. What the employes do allege is that Mr. Fink should have been awarded the position of leading laborer and then given an opportunity to demonstrate his fitness and ability for that position. This theory is contrary to Rule 28. Moreover, the March 1, 1953 firemen and oilers' agreement does not obligate the management to award an employe a position on a trial basis and subsequently resort to disqualification after a demonstration of the absence of the necessary fitness and ability. In the application of Rule 28, fitness and ability are a condition precedent to making an award of a position.

The carrier in its judgment determined that Mr. Fink did not have sufficient fitness and ability to fill the position of leading laborer. It behooves the carrier to assert that this Division is not in position to superimpose its judgment over that of the carrier in the absence of a showing of discrimination or bias. There has been no such showing.

The carrier respectfully submits that Mr. Fink does not have sufficient fitness and ability to fill the position of leading laborer and, accordingly, this claim should 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.

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

Claimant was entitled to the position by virtue of seniority if he had fitness and ability for it. The claim was denied on the property upon the ground that the local mechanical officers had determined that claimant lacked the necessary fitness and ability. But his ability was apparently not in question. The shop superintendent denied his claim on the ground that "this office considers your physical condition has been impaired to the extent where this position would be hazardous." Thus only physical fitness was questioned.

Claimant had filled this position of lead laborer during the period from 1954 to 1957 as relief during the regularly assigned occupant's vacation, illness and other absences.

Except for the other items mentioned below, the only physical defects shown by the record were a fractured knee cartilage, fully remedied by operations in 1957 and 1958; cataracts successfully removed from both eyes in 1958, making his vision correctible to 20/20 with eyeglasses; and a knee sprain in April, 1960, which the chief surgeon stated was entirely unrelated to the previous knee trouble and was completely cured.

Thus the only permanent impairment shown was the limitation of peripheral vision resulting from the cataract operations, which would seem little if any more, and perhaps less, material to a lead laborer than a laborer. His physical condition was therefore approved for his resumption of work in March, 1959. On June 7, 1960, the chief surgeon mentioned all of these matters, stated also that claimant had "chronic glomerulonephritis" (a form of kidney inflammation) and inactive rheumatic heart disease, but concluded: "Since he had made suitable recovery from this sprain, we have pronounced him fit to return to his normal occupation". There was thus no evidence of a substantial impairment of his physical condition.

Although the carrier's submission states that "the position of leading laborer in the shops at Livingston is a rather important one," it had apparently been found unnecessary, and therefore abolished, five months previously. The leading laborer's duties had merely been to receive instructions from a department foreman and then to direct and assist other laborers in cleaning diesel locomotives, engine pits and shops. Being of a semi-supervisory nature, with regular occasion to direct work, the physical activity and effort of the leading laborer would seem less strenuous and hazardous than that of a laborer, rather than more so.

The record does not support the conclusion that claimant lacked the necessary fitness or ability for the position.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 17th day of June, 1963.