

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

Parties to Dispute: (System Federation No. 16, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That the Carrier violated the applicable rules of the Current Working Agreement by discriminately disallowing Carman Frederic Kercher a wreck car groundman position on the wreck car list at Bellevue, Ohio, after the position had been awarded to him.
2. That the Carrier be ordered to place Carman Frederic Kercher on the wreck car list at Bellevue, Ohio, and also compensate him for all time he would have been available to work had he been placed on the wreck car list by position awarded him per bulletin dated October 15, 1974.

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 employees 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 waived right of appearance at hearing thereon.

On October 8, 1974 a bulletin was posted for a wreck car groundman. On October 15, 1974 the Claimant was accepted for this position. The Carrier rescinded the wreck car groundman position on October 17, 1974. The Claimant had received a favorable verdict in a personal injury lawsuit against the Carrier.

Rule 16 of the agreement provides, in part:

"When new jobs are created or vacancies occur in the respective crafts, the oldest employe in point of service shall, if sufficient ability is shown by trial, be given preference in filling such new jobs or any vacancies that may be desirable to them. All

"vacancies or new jobs created will be bulletined.
Bulletins must be posted five days before vacancies
are filled permanently....." (Emphasis Added)

Under this rule new jobs are created when they are bulletined and they are filled permanently when an employee is accepted subject to a trial period to show his ability. Once an employee applies for a position his seniority rights control. His rights then are subject to his demonstrating his ability in the new job. In the absence of his personal injury lawsuit the Claimant clearly would have established his seniority rights to the job. The Carrier then would be required to follow reduction of force procedures to eliminate that job.

Initially, the Organization on the property charged that the Carrier was discriminating against the Claimant because of his successful personal injury lawsuit. The Carrier denies this charge on the property and now asserts part of the record in that case to support its position before this Board. The record in the Claimant's lawsuit, however, was never presented or discussed on the property. This Board has consistently held that new evidence may not be considered by this Board if such material was not presented or discussed on the property. This Board therefore cannot consider the record of the trial court in the Claimant's personal injury case, nor can it consider evidence of the Organization's allegation that the Claimant was awarded a wrecking crew groundman position on August 27, 1975.

In the absence of any evidence that the Claimant has waived or been estopped from asserting his seniority rights, this Board must sustain this claim.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 31st day of July, 1978.

CARRIER MEMBERS' DISSENT TO AWARD NO. 7630
DOCKET NO. 7172 - REFEREE WILLIAMS

In his zeal to find something to sustain, the author of this Award has completely ignored the basic factual situation which existed and has thereby committed a grievous error.

The basic facts are that the position of wreck car groundman which was bulletined on October 8, 1974 and on which claimant submitted a bid was never effectively awarded. One of the Employee's own Exhibits to their Ex Parte Submission to this Board clearly indicated that the effective date of the award on this position was to have been "8:00 A.M. 10-20-74". Three (3) days before that effective date, Carrier - in an exercise of their managerial discretion - concluded that the position was not needed and the bulletin was cancelled.

In spite of this overpowering fact, the author has opined:

"Under this rule new jobs are created when they are bulletined and they are filled permanently when an employee is accepted subject to a trial period to show his ability. Once an employee applies for a position his seniority rights control. His rights then are subject to his demonstrating his ability in the new job. * * *."

This statement is grossly incorrect in that it implies that an award to a bulletined position is automatically effective upon submission of a bid by the employee. Nothing could be further from the truth. In this case, the effective date of the award was clearly shown on Bulletin No. 44A dated October 15, 1974 as being October 20, 1974. The position would have been "filled permanently" on and after October 20, 1974 - but not before.

The author of this Award goes on to say:


"* * * In the absence of his personal injury lawsuit the Claimant clearly would have established his seniority rights to the job. * * *."

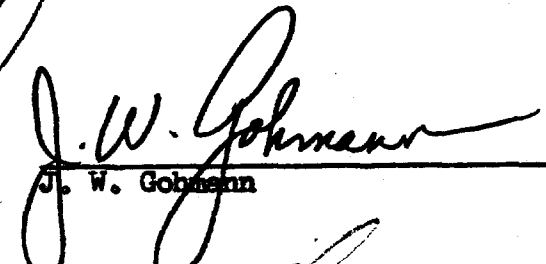
This is truly a miraculous conclusion. It has absolutely no basis either in fact or in the record which was presented to this Board. In the handling of this case before our Board the Organization correctly acknowledged in their Ex Parte Submission that "it is management's prerogative to determine the amount of positions needed on the wreck car list". (Underscore ours)

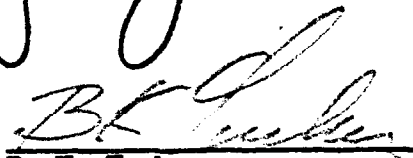
Yet, when Carrier made that type of managerial determination and cancelled the unneeded position before the award to the bulletin became effective, the author of this erroneous Award through some type of legerdemain known only to him has concluded that an error occurred and that Carrier did not have the right to cancel the unneeded position before it became effective.


This Board simply does not have the authority or jurisdiction to put restrictions on the Carrier over and above those which the negotiated Rules Agreement has imposed or to expand the provisions of a negotiated Rule beyond that agreed upon by the parties to the contract. That is exactly what this erroneous Award is attempting to do.

For these reasons, we vigorously dissent to this palpably erroneous Award.


J. E. Mason


J. W. Gohmann


B. K. Tucker


G. H. Vernon