Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 10909
SECOND DIVISION Docket No. 10453
2-D&RGW-CM-'86

The Second Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(The Denver and Rio Grande Western Railroad Company

Dispute: Claim of Employes:

1. That the Denver and Rio Grande Western Railroad Company violated the provisions of the Controlling Agreement, when it refused to all Carman D. G. Howe the right to exercise his seniority when his position was abolished.

2. That Carman Howe had previous experience as the driver of a wheel change truck, which was the position he desired to place himself on.

3. That by refusing to allow Mr. Howe to displace Carman D. D. Frank, the driver of the wheel change truck, he was denied the overtime which accompanied this position.

4. That accordingly, the Denver and Rio Grande Western Railroad Company be ordered to allow Carman D. Howe the right to displace Carman D. Frank, who is junior in seniority and compensate his (sic) for all pay lost until this grievance is satisfactorily settled.

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 employes 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.

The Carrier maintains and operates a railroad facility located in Denver, Colorado. On January 8, 1982, the position held by the Claimant Carman was abolished. The Claimant attempted to displace Carman D. D. Howe, a junior employee who held the position of first driver of the Wheel Change Truck. The Carrier refused to allow the Claimant to displace Carman Frank, thus prompting the instant Claim.

Contrary to the Organization's contention, Rule 15(a) was not violated by the Carrier. Rule 15(a) is applicable to new positions or vacancies. The position of driver of the Wheel Change and Rerailing Truck was not bulletined as a new position or vacancy. The Claimant attempted to displace a junior employee rather than fill a new position or vacancy. Thus, Rule 15 is not applicable to this case.

The Organization relies upon Rule 15(c) to support its position. This Rule is also not applicable to the instant case since the Claimant was not "permitted to displace * * the youngest employee in his craft" because of an Agreement he executed in 1974 which shall be elaborated upon later in this discussion.

Rule 23(a) which is also relied upon by the Organization is inapplicable because no force reduction was involved in this case. Furthermore Rule 27 does not apply to the instant facts because the qualified junior employee takes precedence over the more senior Claimant who was disqualified.

After carefully examining the record, the Board concludes that the Claimant disqualified himself from the position in question by reason of an Agreement he entered into with the Carrier in 1974. The record discloses that on September 27, 1974 notice of two (2) separate formal investigations were issued concerning incidents involving the Claimant. One Notice charged the Claimant with responsibility for falsifying his time card and the other Notice charged him with responsibility for damage to power pole when on September 24,1 974 Wheel Change Truck No. 1111 collided with the pole causing serious damage to it.

On October 1, 1974 Master Mechanic Allen, Division Car Foreman Armbrust, the Organization's Local Chairman Glasscock and the Claimant met in conference concerning the two (2) episodes. It was agreed that if Master Mechanic Allen would "pull down" the two (2) Notices of Formal Investigation against the Claimant, the Organization and the Claimant would agree that the Claimant would resign from all duties as driver on the Wheel Change and Rerailing Truck and forevermore would not be available for such service. The Claimant signed a statement addressed to the persons in attendance at the conference on October 1, whereby he resigned from his duties as driver on the Wheel Change and Rerailing Truck and stating that he had "no further intention to be available for services as a driver for unit 1111".

As a result of the Grievant disqualifying himself from further service in the Wheel Change and Rerailing Truck position the Carrier cancelled both Investigations. By signing the October 1, 1974 document, the Claimant indicated that he had no further intention to be available for service as a driver of the Wheel Change and Rerailing Truck position. The October 1, 1974 Agreement was valid and binding upon the parties. The Claimant unconditionally promised not to be available for service in the position. In exchange

for the Claimant's promise, the Carrier cancelled the two (2) Investigations. The Claimant's unconditional promise was given for a valid consideration and relied upon by the Carrier. Both parties are bound by the express terms of their Agreement. Thus, neither party may unilaterally add to, change or modify these terms.

The Board cannot be indifferent to the contention that to bar the Claimant from ever holding the position of driver of the Wheel Change and Rerailing Truck is an extremely severe limitation on the exercise of his seniority rights. Indeed such a permanent restriction on the Claimant's seniority may be disproportionate to the offenses the Carrier alleged that the Claimant committed in 1974. At the same time the Board cannot conclude that the bargain struck by the parties in 1974 that by 1982 a sufficient time had elapsed, for the Claimant to exercise his seniority rights with respect to the position in question. Whether a sufficient time has elapsed, will have to be resolved by the parties.

It may very well be true that other drivers have been involved in accidents without restriction and penalty that has been assessed against the Claimant. By failing to permit the Claimant to displace the junior employee as the driver of the Wheel Change Truck, the Organization contends that the Carrier discriminated against the Claimant. There is nothing in the record to indicate that other drivers involved in accidents entered into Agreements such as the Agreement entered into by the Claimant on October 1, 1974 given the offenses which the Carrier alleged the Claimant committed at that time. Accordingly, since the Board cannot conclude that the other drivers involved in accidents and the Claimant are similarly situated, the Carrier did not discriminate against the Claimant.

Turning to another consideration, since October 1, 1974, there have been instances when the Claimant has been assigned to drive the Wheel Change Truck. As a result, the Organization contends that the Claimant is qualified for the position in question. The dispute between the parties is not over whether on some occasions the Claimant is unable to drive the truck. The focus of the dispute is whether the Claimant disqualified himself from filling the position of regular driver of the Wheel Change Truck by displacement or bid under a mutually binding Agreement. Based upon the record, the answer is clear. He did so.

In conclusion, since the Claimant was "not sufficiently qualified to do the work" of the Wheel Change Truck Driver in the sense that he would be filling the position on a permanent basis. Accordingly, consistent with Rule 15(d), the Carrier properly filled the position by assigning a junior employee qualified to do the work.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of July 1986.