

The Second Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

(Robert B. Hopkins
Parties to Dispute: (
(Boston and Maine Corporation
(Guilford Transportation Industries)

Dispute: Claim of Employees:

Claimant alleges violation of Sections 703 and 704 of the Regional Rail Reorganization Act, as amended.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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 Railroad in the instant case is the Consolidated Guilford System. As of July 23, 1982, the Interstate Commerce Commission (ICC) authorized Guilford Transit Industries (GTI) to operate the Maine Central Railroad Company, the Boston and Maine Corporation and the Delaware and Hudson Railway Company as a consolidated carrier.

Claimant was employed as a Carman with the Penn Central/Conrail from November, 1970 to September, 1981. In September, 1981, Claimant states that he was furloughed and subsequently filed an employment application with Carrier at its North Billerica, Massachusetts facility on October 25, 1982.

There is no factual dispute that Carrier hired Delaware and Hudson Carman on various dates between October and November, 1982.

When Claimant became aware of the hirings, he contacted the Retirement Board to request an investigation on February 14, 1984. The Retirement Board issued a preliminary determination on October 22, 1984, that Carrier may have violated Claimant's right to be hired under Sections 703 and 704 of the Regional Rail Reorganization Act, as amended.

Claimant then contacted Carrier for the first time on December 24, 1984, by letter, with his complaint; and, subsequently filed a Notice of Intent to file an Ex Parte Submission on February 17, 1985.

Carrier denies there is any record of Claimant applying for employment at North Billerica on the dates claimed.

Carrier's position is three-fold. First, Carrier raises a procedural objection that the instant case is before this Board in clear violation of Section 3 of the Railway Labor Act, hereinafter the "ACT". Secondly, Claimant was ineligible for the preferential hiring provisions of Section 703 of the Northeast Rail Service Act (NERSA). Third, and without prejudice to its procedural objection, Carrier had permission and was obligated under the New York Dock Conditions imposed upon GTI by the ICC to fill Guilford System vacancies first with all Guilford System employees.

In support thereof, Carrier cites Section 703(a) of NERSA, which states in pertinent part:

"For purposes of this section, a railroad shall not be considered to be hiring new employees when it recalls any of its own furloughed employees."

Carrier argues that it did not file a vacancy notice with the Retirement Board under the provisions of 45 U.S.C. Section 797(c) with respect to the positions in question because it placed furloughed employees of sister Railroads involved in the merger under the provisions of Section 703 above.

After a careful review of the record, this Board finds it abundantly clear that Claimant did not observe or attempt to implement the usual grievance mechanism on the property as prescribed by the "ACT" before submitting the controversy to us.

There are numerous legal and arbitral precedents that have established the minimum requirements to which Carrier and employees must conform, Second Division Award No. 10921; Fourth Division Award No. 4419.

The jurisdiction and power of this Board is derived from the "ACT," Section 3, First (i), which states in pertinent part:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions including cases pending and unadjusted on June 21, 1934, shall be

handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." 45 U.S.C., 153, First (i).

Since the NRAB is empowered only with the authority to adjudicate claims that have been advanced in compliance with the "ACT", it is precluded from considering this Claim. Inasmuch as Claimant is a local union official, the Board reasons that he should have knowledge of his duty to file and handle the Claim on the property in the usual manner.

Without explanation, the Retirement Board took the position that the positions in question were not listed as required with the Retirement Board.

This Board will not speculate on the Retirement Board's basis for reaching its conclusion that Claimant's right of first hire may have been violated with respect to the vacancies at issue.

Assuming arguendo that the procedural defect was set aside, the Board is of the opinion that the six (6) furloughed Carmen had equity rights to vacant positions under Section 703 of NERSA, which override any preferential hiring rights to which the Claimant can point.

The ICC is required by Section 11347 of the Interstate Commerce Act to impose employee protection conditions on employees of all Carriers involved in mergers. Furthermore, Section 4 of the New York Dock Conditions requires that the interests of all employees be considered in effectuating transactions. Clearly, labor protective conditions were applicable to employees of all three Railroads under GTI control.

Facts in the record substantiate that as positions became available through attrition, furloughed employees from a sister Railroad involved in the merger were recalled to fill vacancies, thereby reducing Carrier's liability for protective benefits. There is no evidence in the record that Carrier was engaged in hiring new employees on the dates vacancies were filled.

Given these circumstances, Claimant is not entitled to preferential hiring rights under the law. Not only is such action permissible under Section 703(a) of NERSA, to do otherwise would place an unreasonable burden on Carrier's attempt to mitigate their ICC imposed protective obligations.

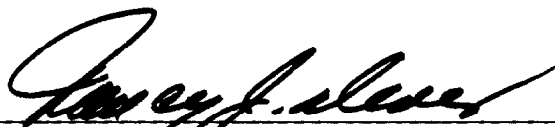
Therefore, the Board sees no reason to alter our decision under an identical factual situation.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of March 1987.