

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

(James E. Murray  
Parties to Dispute: (  
(Boston and Maine Corporation

Dispute: Claim of Employees:

1. That the Boston and Maine Corporation (hereinafter referred to as the Carrier) violated Sections 703 and 704 of the Regional Rail Reorganization Act, as amended (45 USCS S S 797b through 797c) by denying the first right of hire to James E. Murray (hereinafter referred to as the Petitioner) in October and November 1982. Boston and Maine Corporation subsequently hired persons to fill these vacancies in violation of Sections 703 and 704 of the Regional Rail Reorganization Act, as amended.

2. That accordingly, the Carrier be ordered to hire the Petitioner as a Car Inspector with a seniority standing of October or November 1982, and to make the Petitioner whole for all lost wages, including overtime, vacation credit and retirement credit, the amount to be determined upon the date of the award.

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 were given due notice of hearing thereon.

The Carrier 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 on July 8, 1974. Beginning May 25, 1982, 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 Carmen on various dates between October and November, 1982.

The record reflects that the Railroad Retirement Board, hereinafter Retirement Board, was unsure as to the exact employment status of the Claimant in October and November 1982, when Carrier's hiring actions allegedly violated his first right of hire for any vacancies with any railroad hiring employees in his craft.

Based on correspondence between the Retirement Board and Carrier, Claimant was furloughed in May 1982; recalled and employed from June through December 1982; and was again furloughed.

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 denied 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 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 provision of 45 U.S.C.S. 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.S., 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.

Notwithstanding the procedural violation, the Board would have dismissed the Claim on an evidentiary basis, absent any proof that Claimant was furloughed and/or receiving unemployment benefits at the time that hiring actions occurred.

Although there was ample opportunity to support his alleged employment status, Claimant does not present any evidence other than this Claim to refute that he was actively employed on the dates in question.

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 and evidentiary defects were 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 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.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:   
Nancy J. Decker - Executive Secretary

Dated at Chicago, Illinois, this 11th day of March 1987.