

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: (a) Claim of the Brotherhood that E. E. Kennedy, an employe of this Carrier, who was inducted into the military forces of the United States of America in accordance with provisions of the Selective Training and Service Act of 1940, and had established a seniority date prior to such induction, and who has completed such service in the military forces, be restored to his position with the Carrier, including rights to promotion to which his accumulated seniority entitles him, all in accordance with the existing rules of the schedule agreement, the same as if he had remained in the service of the Carrier and had not entered the land or naval forces of the United States of America.

(b) Claim of the Brotherhood that E. E. Kennedy now be assigned a seniority date of September 21, 1942, and rank No. 42, in Seniority Group 2.

EMPLOYEES' STATEMENT OF FACTS: Mr. E. E. Kennedy entered the service of this Carrier as a signal helper on June 24, 1940, was promoted to position of assistant signalman on October 10, 1941, entered military service of the United States on May 5, 1942, and was honorably discharged from military service on October 10, 1945.

On November 5, 1945, Mr. Kennedy advised the Carrier that he had been discharged from the army, and on November 8, the Superintendent Telegraph and Signals urged Mr. Kennedy to return to work at once on a position of leading signalman, a position which had been advertised in bulletin No. 148. Mr. Kennedy did return to work on November 16, 1945, and under date of November 21, 1945, was advised by "Mailgram" that he had been assigned to the position of leading signalman as advertised in bulletin No. 148. Mr. W. J. Crawford, now alleged to be senior to Kennedy in Group 2, with seniority date of February 28, 1945, also bid for this position. Subsequently, Mr. Kennedy bid for, and was assigned to, a position of signalman advertised in bulletin No. 153.

Mr. Kennedy is shown on the 1946 seniority roster under date of November 16, 1945, and rank No. 50, in the Leading Signalman, Leading Signal Maintainer, Signalman, Signal Maintainer and Signalman-Shop group; October 21, 1941, Rank No. 42, in the Assistant Signalman, Assistant Signal Maintainer group; and June 24, 1940, Rank No. 42, in the Helper group.

Inasmuch as the seniority date established by Mr. E. E. Kennedy prior to induction into military service was as assistant signalman of October 21, 1941, and this is the seniority preserved by the Selective Training and Service Act of 1940, we doubt Mr. Kennedy wishes to petition for return to this position as he had done in this case. (See paragraph (a) of claim).

As the promotion rights to be accorded Mr. Kennedy under the collective bargaining agreement give him a date of November 16, 1945, the Carrier respectfully requests that the Board confirm this date as the correct seniority date of Mr. Kennedy as signalman. The Carrier further requests that the Board show Mr. Kennedy's seniority as signalman in relation to the other signalman cited to appear in this case, and the seniority relation of these men to each other, namely Messrs. H. E. Wright, D. E. McGirk, C. F. Majors, H. A. Steel, J. F. Lewis, W. J. Crawford, F. W. Driggs, Z. R. Rannals.

OPINION OF BOARD: Claimant Kennedy entered the employ of the Carrier on June 24, 1940, as a signal helper. He was promoted to the position of Assistant Signalman on October 21, 1941. May 5, 1942 he was inducted into the military service of the United States. After his discharge from the military service on November 5, 1945 he re-entered the employ of the Carrier as a Leading Signalman. On the seniority roster posted by the Carrier as of January 1945 eight men were accorded seniority rights superior to Claimant in the class of Leading Signalmen, six of whom held seniority rights as Assistant Signalmen junior to Claimant's at the time he entered the military service. The other two were not in the employ of the Carrier at that time.

Invoking the provisions of the Selective Service and Training Act of 1940 and similar provisions of a Memorandum of Agreement entered into between the Carrier and the Organization, Claimant made demand upon the Carrier to accord him seniority rights over the eight men referred to. The Carrier declined to comply with the demand.

The provisions of the Selective Service Act and the Memorandum of Agreement are clear in this: That Claimant, upon re-employment by the Carrier, was entitled to the same seniority rights—no greater and no less—than he would in all reasonable probability have acquired had he remained in the employ of the Carrier all the while. This is the substance of all of the decisions, to which our attention has been called, by courts which have been called upon to construe provisions of the Act.

Although dealing with a very different contention than that presented here, the Supreme Court of the United States, in *Fishgold vs. Sullivan Dry Dock Co. et al*, said:

"He shall be 'restored without loss of seniority' and be considered 'as having been on furlough or leave of absence' during the period of his service for his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence. Section 8(c). Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."

In *Freeman vs. Gateway Baking Company*, decided September 14, 1946 in the U. S. District Court for the Western District of Arkansas the following observation was made which is highly pertinent, under the applicable rules, to the facts presented to us:

"There is a very high probability that had plaintiff remained on duty with the defendant instead of being inducted into the armed forces, he would have been promoted to the position of regular foreman."

The Agreement in force at the time Claimant was inducted into military service contained the following provisions:

"ARTICLE 1—CLASSIFICATION

"Section 3. A man in training for the position of signalman or signal maintainer, and under the direction of a signalman or signal maintainer, performing work generally recognized as signal work, shall be classified as assistant signalman or assistant signal maintainer.

"The number of assistant signalmen and assistant signal maintainers on a seniority district shall be consistent with the requirements of the service and the signal apparatus to be installed or maintained.

"The men assigned to these positions shall be promoted from helpers; ability being sufficient, seniority will govern. They will be continued in such position for a period of four years, except that:

* * * *

"A man may be promoted to the position of signalman or signal maintainer if a position to which he is entitled is open and he has qualified in less than four years to perform the work, provided a qualified and satisfactory signalman or signal maintainer is not available at the time the promotion is made. If a man so promoted fails to meet the requirements of the position he will be restored to the position of assistant signalman or assistant signal maintainer to which he is entitled." (Emphasis supplied).

An Agreement effective April 1, 1943, entered into by the Carrier and the Organization, dealt with the same subject. Insofar as pertinent to our discussion it provides:

"Rule 36 (b). Assistant signalman or assistant signal maintainers on a seniority district shall be promoted in the order of their seniority to signalmen or signal maintainers, if a position is open and they have qualified in less than four years; providing there are no four-year men available. If a man so promoted fails to meet the requirements of the position within three months, he will, . . . be restored to a position of assistant signalman. . . ." (Emphasis supplied).

While the provision in the later agreement is more specific in terms we think it does not enlarge the promotional rights of assistant signalmen as conferred by the earlier agreement.

Now, viewing the facts presented by this record, we think it is clear that "there is a very high probability that had (Claimant) remained on duty with the (Carrier) instead of being inducted into the armed forces, he would have been promoted to the position of (Leading Signalman, etc.)" on September 21, 1942. For, on that date H. E. Wright (junior to Claimant in seniority rights) having served less than four years as an assistant signalman, was promoted to the position of Leading Signalman, etc. The other seven men, likewise, were promoted or assigned to positions as Signalmen without having served four years as Assistant Signalmen.

It seems to us that if the provisions of the Selective Service and Training Act and the Memorandum Agreement are to have any effective force in protecting the seniority rights of employees who have been absent on account of military service, Claimant's demand for correction of the seniority roster must be sustained. While he has had less than four years service as an Assistant Signalman, he has established his qualifications for the higher position—and that to the satisfaction of the Carrier. And we think there is a very high probability that he would have established his qualifications to such position as of September 21, 1942, had he been on duty and had he, instead of Wright, received the promotion to which he was then entitled.

The Carrier contends that the claim is barred by laches. Section 7, Article 3 of the earlier agreement provides that seniority rosters are subject to correction within 60 days after they are posted. The later agreement provides that the name and seniority date of an employee appearing on a seniority roster shall be "considered permanently established" if not protested within 60 days. To apply these provisions would defeat the purpose of the Selective Service and Training Act. It is well established that provisions of contracts which run counter to enactments of Congress, pursuant to its war powers, have no force nor effect. Claimant made his protest promptly after returning to the service of the Carrier. This was all he was required to do. Obviously he had no opportunity to protest while he was in the armed forces.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 22nd day of January, 1947.