

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20848  
Docket Number MS-21025

Francis X. Quinn, Referee

PARTIES TO DISPUTE: (Angelo F. Garcia  
(Erie-Lackawanna Railway Company  
(  
(Brotherhood of Maintenance of Way Employees

**STATEMENT OF CLAIM:** This is to ~~serve~~ notice, as required by the rules of the National Railroad Adjustment Board, of my ~~inten-~~tion to file an ~~ex parte~~ submission on November 3, 1974, covering an ~~unad-~~justed dispute between Angelo F. Garcia and the Erie Lackawanna Railroad Company and the Brotherhood of Maintenance of Way Employees, Erie Lackawanna Federation, involving the question:

Whether Mr. Garcia was unjustly "bumped" from his Class 5 position (Welder's Helper) to a Class 1 position (Trackman) by a returning veteran who had seniority over him in Class 1 but who had no seniority over him in the Class 5 position for which he applied and was selected during the time the veteran was engaged in military service?

**OPINION OF BOARD:** The Claimant established seniority as ~~trackman~~ (Group 1) on May 4, 1970. On October 17, 1972, he was awarded position of welder helper (Group 5) and after establishing his qualifications for the position under the contract (Rule 7), was given a seniority date of October 17, 1972. In the meantime, Claimant was displaced by the return of the regular incumbent of the position. On February 12, 1973, Claimant made application for another welder helper position and it was awarded to him on that date. He was subsequently removed from that position by the return of another employee from military service, Mr. Brajuka.

Employee Brajuka established seniority as a trackman (Group 1) on June 11, 1969. He was drafted into the Armed Services on November 10, 1971, was given a leave of absence pursuant to Rule 13 of the contract and Section 9 of the Universal Military Training Act, and honorably discharged on November 2, 1973.

Following his discharge he made application for the position previously awarded to the Claimant and after establishing his qualifications for the position (Rule 7), he was given a seniority date ahead of Claimant. The instant claim followed.

The Petitioner contends the Supreme Court's decision in the McKinney v. Missouri-Kansas-Texas Railroad Company (357 US 265) supports its position that Employee Brajuka was not entitled to the Group 5 position he was awarded. The Carrier and the Union (Third Party Intervenor) assert the Supreme Court's decision in Tilton v. Missouri Pacific Railroad Company

(376 US 169) rendered subsequent to "**McKINNEY**", clarified the principles applicable herein and moreover, it carefully pointed out that **in McKINNEY** the case "turned **upon** the fact that the collective bargaining agreement there **in** issue made the exercise of management discretion a prerequisite to **promotion**."

In the present case, Rule 2 provides for the right of **employees** to make application for positions of higher rank **and Rule 6** gives them the right of promotion if their fitness **and** ability is sufficient. Under Rule 7, they have a right to a "fair chance to **demonstrate**" their ability. **Rule 13(d)** gives them displacement rights **on** positions advertised while they are **on** leave of absence. There is no **limitation**, as suggested by Petitioner, to exercise of seniority to positions within a class. The Court in **TILTON** pointed out that its **McKINNEY** decision was not intended to establish a requirement of absolute foreseeability. It held the right to advancement under the Universal Military Training Act is met if, "as a matter of foresight, it was reasonably certain that the advancement would have occurred and if, as a matter of hindsight, it did in fact occur."

**Employe Brajuka's** advancement or **promotion** did **in** fact occur pursuant to the rules listed above, **and** would, as a reasonably foreseeable matter, have occurred had he not been drafted **into** the Military Service.

Under the particular facts, circumstances **and** rules involved **in** this case, the Carrier's actions **in** allowing **Employe Brajuka** to displace on Claimant's position were **in** compliance with the agreement rules **and** with the Supreme Court's decisions under the Universal Military Training Act.

**FINDINGS:** The Third **Division** of the Adjustment Board, upon the whole **record** and all the evidence, **finds** and holds:

That the parties waived oral hearing;

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

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That the Agreement was oot violated.

A W A R D

Claim **denied**.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: *A. W. Poulos*  
Executive Secretary

Dated at Chicago, Illinois, **this** 24th **day** of October 1975.