

Award No. 11673

Docket No. MW-10985

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Jim A. Rinehart, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when it did not permit Thomas L. Smith to occupy the position of Assistant Discer Operator which was awarded to him by Bulletin dated September 3, 1957.

(2) In addition to other compensation received, Mr. Thomas Smith now be allowed pay at the Assistant Discer Operator's rate for a number of hours equal to that allowed the employe or employes who filled the Assistant Discer Operator's position during the period the discer was in service after September 4, 1957.

EMPLOYEES' STATEMENT OF FACTS: In August of 1957, the Claimant, who was then employed as a Track Laborer, was assigned to the operation of an On-Track Mower on the Carrier's Iron Range Division.

Under date of August 22, 1957, the Carrier issued the following bulletin:

"DULUTH, MISSABE AND IRON RANGE RAILWAY CO.

BULLETIN NO. 82

Two Harbors, Minn.

August 22, 1957

ALL TRACK DEPT. EMPLOYEES:

The temporary position of Asst. Discer Operator with headquarters at Two Harbors is hereby bulletined and same is open for bids.

Rate of pay is \$2.015 per hour (plus cost of living adj)

This provision contemplates that such suits "shall proceed in all respects as other civil suits" with the exception that the findings of the Adjustment Board as to the stated facts will be accepted as prima facie evidence thereof. It is clear that this provision contemplates the application of the same rule of damages and the same rule against penalties in enforcing contracts as are applied in civil suits generally. An award contrary to these principles would be unenforceable as a matter of law. It is respectfully submitted that your Board may not properly enter such an award.

In Award 1638, Second Division, Referee Carter, the foregoing principles are sustained in the following language:

"The foregoing is in conformity with the common law rule. It is in accord with the rulings of the state courts of the country. And, lastly, the Supreme Court of the United States recognizes the rule. See *Republic Steel Corp. v. Labor Board*, 311 U.S. 7; *National Labor Relations Board v. Seven-Up Bottling Co.*; 73 S. Ct. 287. Making the employee whole simply means he shall suffer no loss. Consequently, the measure of damages for the breach of a collective employment contract is the amount an employee would have earned if he had not been wrongfully discharged, less what he did earn during the period of the breach. This conforms to the rule that the employee should be made whole and, at the same time, eliminates punitive damages which are not favored in law. It conforms to the legal holding that the purposes of the Board are remedial and not punitive; that its purpose is to enforce agreements as made, and does not include the assessing of penalties in accordance with its own notions to secure what it may conceive to be adequate deterrents against future violations. The power to inflict penalties when they appear to be just carries with it the power to do so when they are unjust. The dangers of the latter are sufficient basis for denying the former."

For the reasons above stated, the Carrier respectfully requests that the claim of the Employees in this docket be denied in its entirety.

It is hereby affirmed that all data submitted by the Carrier in support of its position in this case has been discussed with the Employees or their representatives, or is known or available to them.

(Exhibits not reproduced.)

OPINION OF BOARD: After Carrier had awarded to senior applicant Thomas L. Smith the position of Assistant Discer Operator, it became aware that an examination the previous November 30, 1956, disclosed he was color blind. Accordingly, Carrier did not assign Mr. Smith to the position it had awarded him.

Under Rule 32 of the effective Agreement, physical and visual examinations were required of employees once a year. On September 3, 1957 when the position was awarded to Mr. Smith, the Carrier had in its files a written report of its Ophthalmic Surgeon, setting forth Claimant's color blindness.

Claimant, in effect, says since the Carrier had that knowledge when it awarded him the position, it must have waived or disregarded it.

Claimant also contends that color blindness was not a disqualification for Assistant Discer Operator, and that it was the duty of others working with the machine to determine color and meaning of signals.

Carrier was, in our opinion, wrong in assigning Mr. Smith to the position in the first instance, with knowledge in its files of his visual deficiency. However, having made that mistake it was not bound or justified in persisting in it. The discer was an on-track self-propelled machine. He may or may not have been called on to drive the machine; at the least, he was a fellow servant with others in its operation. The Carrier owed an absolute nondelegable duty to those other employes to furnish them with sufficient number of competent, qualified fellow servants. This Board has consistently held that the Carrier has the right to determine the qualifications of its employes and this Board will not overrule its decision unless it's shown to be arbitrary and capricious. Award 11121 (Dolnick) and awards therein cited. We have found no evidence that Carrier's action was arbitrary or biased.

Claimant did not request another examination after Carrier determined his ability lacking or make proof of his qualification. That burden then rested on Claimant. See Award 10,000 (Webster) and Award 9947 (Rose).

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 Employes involved in this dispute are respectively Carrier and Employes 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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of August 1963.