

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20848
Docket Number MS-21025

Francis X. Quinn, Referee

PARTIES TO DISPUTE: (Angelo F. Garcia
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(Erie-Lackawanna Railway Company
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(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 intention 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 employe from military service, Mr. Brajuka.

Employe 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 Employe 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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulson
Executive Secretary

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