Award No. 6265
Docket No. 6108
2-BN-MA-'72

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Irving R. Shapiro when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 7, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Machinists)

BURLINGTON NORTHERN RAILROAD

DISPUTE: CLAIM OF EMPLOYES:

"1. That the Carrier violated Rules 34 and 81 of the Shop Craft Agreement which became effective November 16, 1957 by the employment of Larry James Bainter as a Machinist in the diesel locomotive shop at Vancouver, Washington, on August 4, 1969.

2. That the Carrier be ordered to compensate each Machinist assigned to the overtime lists in the diesel locomotive shop at Vancouver, Washington as of August 4, 1969 in rotation eight hours at time and one-half rate on each day Larry James Bainter was employed as a Machinist commencing with August 4, 1969."

EMPLOYES' STATEMENT OF FACTS: A diesel locomotive shop is maintained at Vancouver, Washington by the carrier. Machinists are employed on each of the three shifts in this diesel locomotive shop. An overtime list, i.e., a list of Machinists desiring to work overtime, is maintained on each of the three shifts in the diesel locomotive shop pursuant to Rule 14 of the November 16, 1957 Shop Craft Agreement, reading:

"Rule 14. When it becomes necessary for employes to work overtime they shall not be laid off during regular working hours to equalize the time.

Foreman and Local Committee will cooperate with a view of distributing overtime, as far as consistent, among employes of the crafts involved."

A vacancy in a position of Machinist assigned to the third shift, working five day per week, occurred in the diesel locomotive shop, commencing with August 4, 1969. Larry James Bainter, who had no prior employment relationship with the Carrier, and who was not a qualified Machinist, was employed to fill this vacancy. Mr. Bainter continued to fill the position of Machinist up

were working at their regular assignments on a full time basis during the claim period. The organization has failed completely to meet the burden of proof in defining the extent of the alleged violations or how any employe was adversely affected. On the contrary, the carrier has repeatedly asserted that absent the employment of Mr. Bainter, no additional overtime would have been worked. In its Award No. 4974, Carmen v. Southern Ry., Referee Howard A. Johnson, this Division of the Adjustment Board correctly held that:

> "This Board has no injuctive or equitable powers and cannot direct the Carrier's further conduct of its business, nor exact penalties. It can merely decide whether the Carrier has violated the Agreement and if so determine from the record what pecuniary damage, if any, the Claimant has suffered, and order payment thereof. (Emphasis ours.)

The claim of the organization should be dismissed or denied for the following reasons:

1. The claim is barred by the Time Limit On Claims Rule, Rule 37, in that it was not timely filed within 60 days of the occurrence on which the claim is based.

2. The claim is procedurally defective in that it is wholly conjectural, fails to identify specifically the work it alleges was improperly performed, fails to name the persons claiming, and fails to set forth the amount of work in either time or money it contends was improperly performed.

3. The organization has failed to carry its burden of proving that the intensive training undergone by Mr. Bainter in qualifying as a diesel mechanic in the United States Air Force is not the equivalent of an apprenticeship as contemplated by Rule 81.

4. The organization has failed to carry its burden of proving that the Carrier violated any rule of the agreement when it employed Mr. Bainter on August 4, 1969, as a Diesel Electric Locomotive Mechanic based on the information and references furnished by the applicant at that time, as provided by Rule 42 of the Agreement.

5. The monetary relief claimed by the organization is excessive and penal in nature, not supported by the record, and contrary to law and precedent.

For the foregoing reasons, the Carrier respectfully requests that the claim of the employes be dismissed or denied.

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 employe 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 waived right of appearance at hearing thereon.

Petitioner is seeking payment by the Carrier to employes on the posted overtime list for Machinists, in rotation, for all days worked by one Larry Bainter as a machinist between August 4 and November 5, 1969, inclusive, at time and one half their regular rate of pay. It claims that employment of Mr. Bainter as a machinist during said period was a violation of Rules 34 and 81 of the Controlling Agreement between the parties. Said rules read:

> "Rule 34. Except as otherwise provided in the rules of this agreement, none but mechanics or their apprentices regularly employed as such, shall do mechanics' work as per special rules of each craft, * * *
>
> Rule 81. Any man who has served an apprenticeship or has had four (4) years' experience at the machinists' trade and who, by his skill and experience, is qualified and capable of laying out and fitting together the metal parts of any machine or locomotive, with or without drawings, and competent to do either sizing, shaping, turning, boring, planing, grinding, finishing or adjusting the metal parts of any machine or locomotive, shall constitute a machinist."

The Carrier, in denying the claim, alleges that Mr. Bainter was a qualified mechanic and that although he may not have actually completed four years of experience at the machinists' trade, he had received training in the United States Air Force and worked as a mechanic in such service to an extent comparable to that of at least an apprentice and therefore met the requirements of Rule 81. In addition, the Carrier raises two alleged defects of a procedural nature to defeat the claim.

There is no dispute that only mechanics or apprentices regularly employed as such, who have qualified in accordance with Rule 81, may be employed to perform the work of the classification and be paid the rates therefore as set forth in Rule 82 of the Controlling Agreement. The parties are at odds as to whether Mr. Bainter met this standard.

A careful study of the record discloses that Mr. Bainter commenced On-the-Job training for a Power Production Specialist in the Air Force on or about May 2, 1966. It would appear that such basic training was completed on or about December 28, 1966. Although not specifically so set forth in the service record, it may be inferred that from that date until his separation from active service on April 14, 1969, he performed the duties of a Power Production Specialist which may be of a nature comparable to that found in the machinists classification of work in Rule 82. This is a period of two and a third years of which it may be said that Mr. Bainter plied the trade. The Controlling Agreement requires that a mechanic shall have had at least four years of experience at the trade. Even adding the one month he worked as an automotive mechanic after his release from service, his work does not permit a finding that he met the four year requirement of the Rule. Carrier's satisfaction with the experience indicated on his application and his early performance on the job, does not permit it to unilaterally grant him mechanic's status. Nor are we empowered to change, modify or make exceptions from the clearly stated terms of the Agreement. No meaningful purpose would be served in a review of the rationale behind this qualification agreed to by the parties.

No effort was made by the Carrier to equate the training received by Mr. Bainter in the Air Force with that afforded apprentices pursuant to Rule 84 of the Controlling Agreement which provides:

"Where facilities will permit, regular apprentices will service six (6) periods and helper apprentices four (4) periods on machines and special jobs, and will not be required to work more than two-thirds (2/3) of one period or any one machine or special job. During the last year of their apprenticeship they will work on the floor, if practicable."

The mere assertion by the Carrier that it was equivalent is not probative evidence necessary to enable us to make an evaluation of the two programs and reach a valid conclusion. This is not a holding that training and experience elsewhere, including such outside of the railroad industry, is not qualifying for the mechanic's classification. When challenged, the Carrier has the burden of proving that the contractual standards have been met. This was not adequately done herein.

It therefore must be held that Rule 34 was violated when Carrier assigned Mr. Bainter to machinist mechanic's work and paid him the rate therefor.

The Carrier's contention that the Organization, in processing the claim, did not meet the time elements of Rule 37, is dismissed. The original claim was filed, in writing, long before the expiration of required time. The fact that the local chairman, appended to his notices of appeal letters repeating his original complaint of September 27, 1969 with language which appears to indicate that the claim was being initiated at the time, cannot be construed in the manner submitted by the Carrier.

The Carrier's argument that Petitioner's failure to bring the claim in the name of specific claimants must also be dismissed. Those entitled to restitution, if any, are readily identifiable from Carrier's own records, the overtime lists being in its possession. Only one employe could be afforded compensation for the alleged lost work opportunity for each day of the claimed violation of Rule 34. See Awards 1998, 2195, 3688 and Third Division Awards 9205, 10238, 10533, 10576 and 12388.

The argument that no compensation was due any machinist because no overtime work would have been assigned, non-essential work being deferrable, is defeated by Carrier's own statements of the urgency to protect the work as the key factor in its haste to place Mr. Bainter in the machinist mechanic's classification and assign him to the work.

It must be found, however, that the Carrier initially acted in good faith. It relied on information in Mr. Bainter's application which gave it reason to believe him qualified for the mechanic classification. When this judgment was first questioned by the Organization on September 12, 1969, it became incumbent upon it to carefully review and investigate the facts and be in a position to support its decision shortly thereafter. It must be held that the date the Carrier became aware of a possible violation of Rule 34 is the appropriate date that compensation for lost work opportunity should commence. The date of the written claim of September 27, 1969, is therefore a proper date on which the remedy is to take effect.

Our Awards have, for proper circumstances, limited compensation for time not worked because of a violation of a Rule by the employer, to pro-rata pay. Such circumstances prevail herein.

Therefore, we find that the Carrier violated Rule 34 and that machinists of the Vancouver, Washington overtime list, during the period commencing

September 27, 1969 and ending November 5, 1969, who should have been called to perform the work improperly assigned to Larry Bainter by the Carrier, shall be paid on a rotation basis at their pro-rata rate of pay, for the time they would have worked, if Carrier had called them in.

AWARD

Claim 1 sustained.

Claim 2 sustained to the extent set forth in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois this 20th day of March, 1972.

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