Award No. 2210
Docket No. 1991
2-PRR-TWUOA, CIO-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when the award was rendered.

PARTIES TO DISPUTE:

THE TRANSPORT WORKERS UNION OF AMERICA, C.I.O. —RAILROAD DIVISION

THE PENNSYLVANIA RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current Agreement the Carrier improperly awarded R. J. Clabaugh the position of Carman (Painter) advertised on Bulletin Number 3275, effective October 3, 1952.

2. That, accordingly the Carrier be ordered to compensate C. W. Woodring, the senior bidder, for all monies lost, due to this violation.

EMPLOYES' STATEMENT OF FACTS: There is an agreement betwen the parties hereto, dated July 1, 1949 and subsequent amendments, copies of which are on file with the Board and is, by reference hereto, made a part of this statement of facts.

At Altoona, Pennsylvania, Altoona Car Shops, Altoona Works, the Pennsylvania Railroad Company, hereinafter referred to as the carrier, employs a force of carmen.

C. W. Woodring is employed at the seniority point, as a carman, and will hereinafter be referred to as the claimant.

R. J. Clabaugh and Claimant C. W. Woodring were furloughed employes until August 25, 1952.

R. J. Clabaugh, carman, with seniority of August 13, 1940 was recalled to service August 25, 1952, as an unassigned employe.

C. W. Woodring, carman, with seniority of October 13, 1941, was recalled to service August 26, 1952, as an unassigned employe.

September 2, 1952 a bulletin was posted, at the seniority point, advertising fourteen (14) carmen (painter) positions, evidence of which is submitted as Exhibit A.

had full opportunity to question the correctness of his compensation rate at semi-monthly intervals from November 30, 1942, to February 21, 1944, and his failure so to do may well be considered as an acquiescence on his part with respect to the prevailing practices. We cannot say that this inaction did not prejudice the Carrier. Redress will therefore be limited to the period subsequent to the time the claim was first presented to the Carrier."

See also Award 6115, Third Division.

Although it is exceedingly clear that R. J. Clabaugh was considered a proper "bidder" under the agreed-upon interpretation of Regulation 2-A-1 (d) 1, which rule has proven to be somewhat ambiguous, and while it is equally clear that carrier acted in strict conformity with this interpretation, nevertheless, even assuming that the specific rule of the agreement was erroneously construed heretofore, the employes are estopped by their acquiescence in such construction from submitting a claim covering that period of time antedating the notice to carrier of the violation and in this particular case of a new interpretation reached in the course of discussion of this alleged violation.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Second Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Second Division, is required by the Railway Labor Act to give effect to the said agreement, which constitutes the applicable agreement between the parties, and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, Subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the agreement between the parties to it. To grant the claim of the organization in this case would require the Board to disregard the agreement between the parties, hereinbefore referred to, and impose upon the carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to the applicable agreement. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The carrier has shown that the applicable agreement has not been violated; that the carrier acted in strict compliance with the agreed-upon interpretation of Regulation 2-A-1 (d) 1 as it existed in the car shop of Altoona Works, prior to the circumstances giving rise to the instant claim and that as a consequence therefore, the claim of the employes is wholly without merit.

Therefore, the carrier respectfully submits that your Honorable Board should dismiss or deny the claim of the organization in this matter.

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.

The parties to said dispute were given due notice of hearing thereon.

Claimant submitted a bid for the position of Carman (Painter) Grade E. Carman R. J. Clabaugh made application for the position. The position was awarded to Clabaugh because he was senior to the claimant. The organization contends this was a violation of the rules and demands that claimant be paid for compensation lost.

On June 5, 1952, the car shop of carrier's Altoona Works at Altoona, Pennsylvania, was closed because of a nation-wide steel strike. The strike ended on July 24, 1952, and carrier proceeded to resume operations on July 30, 1952. Employes were recalled from furlough on a seniority basis and assigned in seniority order. This method of handling is not questioned.

On August 26, 1952, claimant was returned to service and assigned as a Grade E. Carman (Painter). On September 16, 1952, claimant bid for and was awarded Grade I Carman's position. Clabaugh was returned to duty on August 25, 1952, and was assigned to work as a Grade E Carman (Painter) in Passenger Shop No. 4. Clabaugh did not bid for nor was he awarded a bulletined position prior to the time he applied for the position here in question. The applicable rule is that part of Rule 2-A-1 (d) which provides:

> "(d) Advertised positions may be filled temporarily, pending an assignment. Only employes holding regular assignments in the class are privileged to bid for advertised positions as specified in paragraph (f) of this regulation (2-A-1). Others may file application.
>
> Subject to the provisions of Regulation 3-A-1, 3-B-1 and 3-B-3, new positions or vacancies advertised under the provisions of this regulation (2-A-1) will be awarded in the following manner:
>
> 1. Bids from employes holding regular assignments in the class in which the vacancy occurs will be given first consideration.
>
> In the event no bids are received, other employes will be considered in the following order, and the position will be awarded accordingly:
>
> 2. Furloughed employes with seniority in the class involved who are senior to applicants working in lower classes who have seniority in the class in which the vacancy exists.
>
> 3. Qualified applicants working in lower classes with seniority in the class in which the vacancy exists.
>
> 4. Qualified applicants working in the craft in the same seniority district who hold no seniority in the class involved."

When the carrier bulletined several positions of Carmen (Painter) Grade E, claimant submitted a bid. Clabaugh made application for one of the positions. Claimant occupied a regular bulletined position and Clabaugh did not. Under Rule 2-A-1 (d) 1, claimant was entitled to consideration over Clabaugh even though he was the junior man. The carrier violated the agreement in awarding the position to Clabaugh instead of the claimant.

Carrier asserts, however, that there was an agreed upon interpretation of Rule 2-A-1 whereby in mass recalls the applications of employes occupying non-bulletined positions would be treated the same as occupants of bulletined positions. No written evidence of such an agreed upon interpretation is shown in the record. It is denied by the International Representative who also states that if any such mutual interpretation was made it was with a local representative having no authority to make it.

The carrier points out that it entered into a subsequent understanding that the agreement would be applied in the manner which the organization contends for. On the basis of that understanding claimant was awarded the position on October 30, 1952. It now contends that the organization is demanding a retroactive application of this new understanding. We think the situation is governed by the reasoning of Award 1898 wherein it is said:

> "Consent and practice cannot be considered as an agreed interpretation of the rule, since the rule is too plain to require or permit such interpretation. It cannot be considered as a waiver since one may not waive a rule made for the benefit of a third party. It cannot be considered as a modification of the rule since these representatives were without authority to change it. Therefore we must find that the rule was violated."

The rule is plain in the case before us. It is not subject to construction. The carrier could have held itself harmless by complying with the plain wording of the rule when the organization first called it to its attention. Even if the language is ambiguous, the evidence in the record will not sustain a finding that there was an interpretation mutually agreed to. An affirmative award is required.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of August, 1956.