Award No. 6108
Docket No. 5955
2-GTW-EW-'71

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Jesse Simons when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 92, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Electrical Workers)

GRAND TRUNK WESTERN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Grand Trunk Western Railroad Company unjustly and improperly awarded J. A. Watson, Division Lineman, Communications Department, the position of Communications Inspector (Outside Plant), in violation of Rule 103½ of the current Agreement.

2. That accordingly, the Carrier be ordered to compensate Cable Splicer E. Bennett the difference in wages of Cable Splicer and that of Communications Inspector (Outside Plant) from May 11, 1969 until such time as Mr. Bennett is properly placed in the position in question for which he was senior applicant.

EMPLOYES' STATEMENT OF FACTS: The Grand Trunk Western Railroad Company, hereinafter referred to as the carrier, employed E. Bennett, hereinafter referred to as the claimant, as a cable splicer in the communications department on March 8, 1948. The claimant is currently rendering service, as assigned, in the communications department of the carrier.

On April 18, 1969, Superintendent of Communications J. D. Chase issued Bulletin No. 3 accepting bids:

". . . for position of Communications Inspector, Outside Plant, with headquarters at Battle Creek, Michigan. . . ."

At the time of the bulletin, and as of this date, the claimant held a position of cable splicer, with headquarters at Battle Creek, Michigan. The last sentence of the bulletin carried with it the requirement that the successful applicant ". . . be required to reside at or in close proximity to assigned headquarters." As stated above, Claimant Bennett was, and is currently, residing in Battle Creek, Michigan.

Pursuant to the aforementioned bulletin and the current agreement, the claimant submitted his bid for the advertised position on April 19, 1969. See Exhibit B. Rule 103½, paragraph (e), reads:

It should also be pointed out that the general chairman has submitted letters (included as Carrier's Attachment No. 1) from fellow employes objecting to the carrier's appointment of J. A. Watson over E. Bennett to the position of communications inspector. These letters were signed individually or jointly by ten communications department employes, including Mr. Bennett. It is interesting to note, however, that only one of the ten employes cited qualifications as a reason for objecting to Mr. Bennett not having received the position in question. The other nine persons merely cited seniority as the reason why they felt Mr. Bennett should have received the position in question. Also, it should be noted that not one of Cable Splicer Bennett's supervisors (scheduled or non-scheduled) submitted one of the letters of objection.

Carrier submits that no violation of paragraph (e) of Rule 103½ has occurred in this case and that even if paragraph 1(b) of Rule 29 (Time Limit Rule) had not been violated by the employes in this case, the instant claim would **not** have been merited.

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.

This is a claim that in violation of the Agreement, J. A. Watson was assigned to the position of Communications Inspector (outside plant) on May 11, 1969, and that instead cable splicer E. Bennett should have been so assigned.

Initially, the Board must dispose of Carrier's contention that the instant claim is not properly before the Board, because of failure to fulfill the requirements of 1 (b) of Rule 29, which states in part that unless "a disallowed claim or grievance" is appealed in writing, "within 60 days of receipt of notice of disallowance . . . the matter shall be considered closed."

Review of the record reveals that on April 18, 1969, the Carrier in a communication opened bids for the position of communication inspector, outside plant; on April 19th, 1969, E. Bennett, in writing, bid for the job; on May 6th, 1969, J. Watson was declared the successful bidder, and was to be appointed May 11th, 1969; on May 10th, 1969, in a letter to Communications Superintendent Chase, E. Bennett sought reconsideration of the appointment of Watson, and advanced the claim of E. Bennett; on May 12, 1969, E. Bennett, Systems General Chairman, in behalf of the Organization, wrote Communications Superintendent Chase alleging that Watson's appointment was in violation of the contract; on May 14th, 1969, Systems General Chairman E. Bennett, by letter to Communications Superintendent Chase withdrew protest regarding appointment of Watson and submitted a claim that E. Bennett should have been appointed; on May 15th, 1969, Communications Superintendent Case, in a letter to E. Bennett, Systems General Chairman, denied the alleged violation; on June 24th, 1969, Communications Superintendent Chase, in a letter to Systems General Chairman E. Bennett denied the claim asserted

in behalf of E. Bennett set forth in Systems General Chairman Bennett's letter of May 14th, 1969; on July 12th, 1969, Systems General Chairman Bennett, by letter to Communications Superintendent Chase, appealed Carrier's decision to deny claim asserted in behalf of E. Bennett.

Carrier asserts that the above July 12th, 1969 letter was not received, and thus the conditions requisite for the timely filing of an appeal were not met. Carrier so informed the organization of its position on timeliness in a letter dated August 26, 1969.

Upon due consideration of all the facts and arguments, the Board finds that the very promptness of the exchanges in correspondence between the parties, and the position that the Claimant occupies in the Organization, are persuasive that in fact the letter of July 12, 1969, appealing Carrier's decision was actually sent, but that through advertence was not received.

In subsequent correspondence, not cited here because it is so copious, between the Carrier and the Organization with respect to the instant claim, the Carrier, though engaging in exchanges in writing and participating in discussions at meetings regarding the merits of the grievance, did not continue to state that the Organization's claim was defective because of timeliness. This omission, when added to the persuasive findings previously referred to, justify the conclusion that Carrier's contention that the instant grievance is not properly before the Board is without foundation, and the Board holds that the grievance is properly before it.

In disposing of this claim, the Board necessarily must interpret and apply the governing paragraph E — of Amended Rule 103½, effective December 21, 1966, which reads as follows:

> "(E) Employes may bid to positions in any class; however, should more than one employe bid to a position in a class where neither holds seniority, the employe with the earlier seniority date in the Communications Department, ability being equal, will have the preference."

From the record it is clear that both employes did not possess seniority in the class of work for which they bid, that it is also clear that Bennett had some 8 months more service than Watson.

Rule 103½ provides that the most senior bidder will receive preference, "ability being equal." No previous Award construing this particular language having been presented, the Board perforce must address itself to its meaning and its application in the particular dispute before it.

As it is highly unlikely that as among any pair or group of employes otherwise qualified under Rule 103½ as amended, that in fact there could be equality of ability in the sense that each man's qualifications, experience, etc., were identical or congruent with each other man's, the parties obviously could not have meant that one bidder's ability and experience was to be measured and evaluated against that of another, or other bidders.

Similarly, it is equally unlikely that there exists either a man or a method or a standard by which, as between two men, or a group of men, a determination could be made as to whether there was equality of ability as measured by test or experience. Thus, the Board concludes that the parties

obviously could not have meant that seniority would only prevail in appointments, when in fact such a state of equality of ability could be said to exist.

The Board, having concluded that **equality** of ability, as between and among bidders as being either improbable of existence, detection or measurement has concluded that the phrase "ability being equal" was intended to mean, and means, relatively equal ability to perform the class of work for which two or more bids have been made, and that when such relatively equal ability to perform the work is said to be present among two or more bidders, seniority shall prevail.

Thus the Board concludes that Rule 103½ permits seniority to prevail when among bidders there are two or more whose ability to perform are more or less equal, or are nearly equal, or close to equal, or clearly not unequal or disparate. Any other interpretation would render a nullity of Rule 103½, which sets forth the time-honored and widespread principle that as among a group of bidders for a job, all other factors of ability or experience to perform the work having been found similar or nearly equal, the most senior employe is to be promoted.

The Carrier has made a judgment, and in the record has set forth the grounds for it, namely, that Watson possessed certain abilities which were derived from, and the existence of which he had proved during his experiences in the service of the Carrier. This ability and experience the Carrier believed were requisite for the position of Communications Inspector, and justified selection of Watson as against Bennett.

Carrier further states that the disparities between the abilities of these two men, based on their respective bodies of experience, was so great as to be a bar to the implementation of the seniority preference facet of Rule 103½.

Organization has contested that judgment, and has advanced a considerable body of evidence and argument designed to prove that little if any disparity in ability existed as between these two bidders.

The Board in numerous prior awards has enunciated the precept that it would not set aside a Carrier's judgment as to ability or relative ability — absent proof of arbitrariness or capriciousness by the Carrier, or absent proof that such judgment was exercised so as to circumvent the Agreement.

The record is barren of any proof that Carrier exercised such arbitrariness or capriciousness, or that it engaged in a willful attempt to circumvent the Agreement. Thus, on these counts the Board has no grounds for intervening to set aside Carrier's judgment.

The Board has also enunciated the precept that absent substantial probative evidence that a Claimant possessed ability to perform a class of work, it would not intervene to set aside Carrier's judgment regarding that ability.

In the instant case, there is substantial evidence in the record that Claimant possessed the ability to do the work. However, Carrier concluded that Watson had greater ability, arising out of and based on specific and appropriately allocated experience, and therefore was more able, and was sufficiently so much more able to justify designation.

Thus, while evidence was submitted as to Claimant's ability and experience, which seemed of considerable weight, the Board does not possess the capability to evaluate and weigh the relative ability of each bidder, and therefore is without the ability to render its own independent judgment as to relative equality of ability.

Thus, the Board is dismissing the complaint on the grounds that it cannot itself evaluate and weigh the ability or the experience of the two bidders, and because it is satisfied that the Carrier exercised its judgment without capriciousness or arbitrariness, or out of a desire to circumvent the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 21st day of April, 1971.

Keenan Printing Co Chicago, Ill. Printed in U.S.A.