

The Second Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

Parties to Dispute: ( United Steelworkers of America,  
( AFL-CIO  
(  
( The Lake Terminal Railroad Company

Dispute: Claim of Employees:

- (1) That, under the controlling Agreement, employee J. Cruz, Car Repairman Helper was denied his right to promotion to Car Repairman on Bulletin # 26, which is in violation of Rule 30 (C) and (G).
- (2) That, accordingly the Carrier be ordered to compensate Mr. Cruz eight (8) hours pay at the Car Repairman's rate for each work day, in addition to all other earnings, beginning with July 29, 1975, up to and including August 15, 1975, as penalty for this violation.

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 employees 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.

On July 23, 1975, Carrier advertised a 3-week temporary position for a Car Repairman. Claimant herein (who was not a promoted Car Repairman), submitted the only bid for the position; which Carrier refused to honor.

Because no Car Repairmen submitted bids, Carrier assigned Messer (the Junior Car Repairman not holding a Car Repairman position) to the vacancy pursuant to Rule 16(z):

"(z) Effective December 1, 1974, car repairman vacancies, including vacation vacancies, filled by car repairman helpers promoted on a day-to-day basis for five (5) consecutive work days shall be advertised in accordance with applicable rules of the Schedule Agreement.

In the event no applications or bids are received for vacancies advertised in accordance with the above, the junior car repairman not holding a car repairman position shall be assigned thereto. In the event there are no car repairmen not holding a car repairman position, the junior qualified car repairman helper not holding a car repairman position shall be assigned thereto. Length of service and ability to perform the service required shall be used in determining qualification of car repairman helpers as car repairmen.

All rules, practices and/or understandings, written or otherwise, which conflict with the foregoing shall be amended to conform herewith."

The Claimant cites Rule 30(g) and (c) of the Agreement:

"(g) In all advertisements, any helper can place an application for the position which is being advertised and will be given consideration if he so qualifies."

"(c) When a vacancy, promotion, or new position is advertised by bulletin and no application is received, the junior qualified employee in the department in which the job was advertised will be required to accept such position."

The Organization concedes that Claimant had to qualify for the job, but it asserts that he was so qualified because "... carrier has seen fit on many occasions in the past to promote him on a day to day basis to perform welder's and car repairman's work." and it notes his length of service as being equivalent to Messer's.

Carrier, on the property, conceded that Claimant's bid was proper, but it states that it is Carrier's prerogative to determine an applicant's ability to perform the service required based on length of service and ability to perform such service. It concluded, "In the instant case, it was determined that Mr. Cruz was not qualified to perform the service required." Although the Organization, on the property, categorized the Carrier's conclusion of lack of qualification as "... merely assertions, unsupported by either fact or evidence.", we are unable to find any indication that Carrier set forth any asserted factual basis for its conclusion until it presented its Submission to this Board.

In its Submission (Page 8), Carrier states that Claimant's 15 months of service, and the fact that other employees have been promoted in approximately the same time does not "... per se qualify the claimant for promotion." Moreover, the fact that Carrier temporarily upgraded Claimant 48 days during the 15-month period does not, according to Carrier, prove qualification in other areas of car repairman work.

As we view the entire record (and note that Carrier conceded that Claimant's bid was proper), it seems fair to conclude that the prime factor which motivated Carrier not to honor the bid was "qualification." In this regard, Carrier has cited cases in support of its contention that it makes that determination. We agree, but the Awards of this Board have held that, although we do not substitute our judgment, the determination may be tested in this forum to consider if it may have been arbitrary, capricious, etc.

To be sure, the Carrier has made various factual assertions in its Submission to this Board which, if properly before us, could be said to have made a case in support of its conclusion. But, stated simply, those factual assertions are not appropriate to our consideration.

In numerous Awards, this Board has determined that a Claimant may not "prove" its case in the Submission. See, for example, Third Division Award 18964. Rather, factual assertions, for good reason, must be raised and considered while the matter is under consideration on the property so that the Carrier may contest those factual assertions. This Board has also held that the same basic consideration applies to a Carrier in defense of a claim.

If a Claimant presents factual assertions which can be argued to establish a prima facie case of qualification, a Carrier may not simply assert, on the property, a conclusion that the employee is not qualified, and then present its case in the Submission.

Accordingly, we will sustain the claim. We find that the same concept controls the question of damages. Carrier had ample opportunity to question the amount of damages claimed, on the property, but did not do so.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 5th day of April, 1977.