

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
(
(Penn Central Transportation Company

Dispute: Claim of Employees:

That the Carrier violated the rules of the Controlling Agreement, especially Rule 2-A-3(a), when Machinist P. A. Berry was denied an advertised position in the Juniata Class "A" Vehicle Garage for which he properly bid and was the senior qualified bidder. This is a continuing claim from August 12, 1974 until settled.

RELIEF REQUESTED:

That accordingly, Machinist P. A. Berry be awarded the position in the Juniata Highway Vehicle Garage and be compensated three (3) additional hours pay at the applicable rate of pay for a Grade "C" Machinist for each and every day he is deprived of the position in the Juniata Highway Vehicle Garage.

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.

A number of tangential matters require resolution before the merits of this claim are addressed:

1. Carrier alleges that the claim is limited to violation of Rule 2-A-3(a), which deals with rights of an employe after he has been placed in a new position and then leaves it or is disqualified. The Board finds the claim is not so limited. The original claim states, "This is violation of the controlling agreement, especially 2-A-3 of said agreement." This clearly highlights a section of the Agreement, but does not limit the claim thereto.

Further, the entire thrust of the claim, from start to finish, is the Claimant's allegation that he was wrongfully denied the position in question -- a contention that the Carrier was fully aware of and addressed itself to throughout the processing of claim.

As to appropriateness of considering the agreement as a whole, see Award No. 4130 (Anrod) and Third Division Awards No. 11677 (Webster) and 20183 (Lieberman).

2. The Organization alleges that the November 21, 1974, reply of the Carrier's Superintendent, Labor Relations is insufficient and therefore contrary to the required procedure in that it fails to provide the Claimant "in writing with the reasons" for his reply (Rule 4-0-1). The Board finds that the form letter which is to "confirm oral advice" and specifies that "no rule in the applicable agreement was violated" is sufficient. Failure to elaborate in such letter is not a fatal defect requiring concession to the Claimant's position.

3. The Board will give no weight nor consideration to an alleged request by the Carrier to the Organization to make an offer of settlement. In any event, the Carrier claims no such request for a settlement offer was made.

Claimant, a Machinist in a Grade E position, bid on a bulletined Grade C position. He was denied the position, which was awarded to a less senior Laborer. His claim is to be placed on the job, with appropriate monetary remedy.

The governing rule for selection of employees for positions is as follows:

"2-A-1. (Effective 10-15-60) (a) When new positions are created or vacancies occur in the respective crafts, the senior employee in the seniority district in which the position is advertised shall, if sufficient ability is shown by trial, be given preference in filling such new positions or vacancies that may be desirable to them. ..."

The Bulletin in question read as follows under the heading, "Major Duty":

"Make State Inspection of commercial vehicles. Qualify to test drive over approved route. Qualified to repair all classes of industrial & commercial trucks & tractors; inspect, test & repair tractors, trucks, derricks, snow brooms, gasoline motors & be familiar with the gas electric generator power units. Must be able to grease & oil trucks. Must have necessary tools."

The Carrier justifies its selection of the junior Laborer for the position on the basis that he possessed a certification from the Commonwealth of Pennsylvania needed for state inspection of vehicles, while the Claimant did not have such a certification. No other basis was given for selection of the junior.

employee. The Carrier alleges that possession of the certification is necessary to "Make State Inspection of commercial vehicles". Without such certification at the time of going on the job, the Claimant lacked the qualification for the job, according to the Carrier.

The Organization argues that making a state inspection means the actual mechanical work involved, not simply the affixing of a state sticker, which must be done by a certified employee. At the Vehicle Garage, there was a sufficient number of certified employees available at all times for this limited purpose. Further, the Organization claims, another employee had been selected for the job under the identical requirements a year earlier, without possessing state certification; this successful bidder did not receive certification until 16 months after going on the job. The Organization also points out that state regulations require that an applicant for certification be "employed and actively engaged as a mechanic at an Official Inspection station, for at least a twelve (12) month period, at time of application." The Claimant's situation was, therefore, of the "Catch 22" variety; only by serving in the job for a year could he have become eligible for certification.

The principal question is whether "Make Inspection of Commercial vehicles" is entirely synonymous with the possession of state certification. This Board could be persuaded to this effect, except that the Carrier a year earlier acted to the contrary; that is, it placed another employee without current certification in the identical position. This lends credence to the Organization's position that there is a substantive difference between the qualification to perform the work, on the one hand, and the legal authority to place a sticker on inspected vehicles, on the other hand. The Carrier did not argue that it lacked for certified mechanics in the Vehicle Garage to perform the latter duty.

It cannot be overlooked that the "major duty" of the bulletined job did not specifically include reference to state certification. Several Awards relied upon by the Carrier can be differentiated in that they did have such specific requirement. As examples, Award No. 5924 (Zumas) refers to a bulletin specifying, "Occupant of this position must possess F.C.C. Second Class Radio Telephone Operator license"; Third Division Award No. 12970 (Hamilton) is based on using "employees holding licenses issued by the City of Wichita Falls."

This Board concurs with many past Awards upholding the management prerogative of determining the fitness and ability of applicants. But in this instance, it appears the Carrier, in 1973, chose to select an employee without certification, and then, in 1974, declined to accept a senior bidder also without certification. There is, in effect, no firm showing in this instance that prior certification was uniformly required.

This Board will find that the Carrier acted arbitrarily in contradiction of Rule 2-A-1 (a) when it denied the Grade C position to the Claimant.

As a remedy the Claimant seeks payment of three hours pay per day under Rule 2-A-1 (a) which reads in part:

"An employe transferring from one position to another position on the same shift, by award, shall receive an additional three hours' pay at the straight time rate of the position he was awarded for each day he is required to work on his former position subsequent to twelve (12) calendar days from effective date of award."

This penalty is designed to compensate employes awarded a new position but withheld from moving to it promptly. This is not the case here. The proper remedy is for the Claimant to receive the difference in pay for straight time hours only he would have worked had he been placed in the Grade C position on August 22, 1974, compared to his actual earnings for straight time hours since that date.

A W A R D

1. Provided his seniority still entitles him to the position, Claimant shall be awarded the claimed position in the Juniata Highway Vehicle Garage.
2. Claim is denied for three hours pay per day as requested, but shall be determined and granted as specified in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 17th day of May, 1977.