

The Second Division consisted of the regular members and in addition Referee T. Page Sharp when award was rendered.

(International Association of Machinists and
(Aerospace Workers
Parties to Dispute: (
(Consolidated Rail Corporation

Dispute: Claim of Employees:

1. That the Consolidated Rail Corporation violated the Controlling Agreement, particularly Rule 2-A-1-A and 2A-4 of the Agreement entered into by and between the Consolidated Rail Corporation and the International Association of Machinists and Aerospace Workers, dated May 1, 1979 when they awarded Jobs #2904 and 2905 to Junior Employees, Mr. K. W. Bollinger and Mr. M. D. Estep.

2. That, accordingly, the Consolidated Rail Corporation be ordered to compensate R. E. Mitchell in the amount of eight (8) hours for the following days: Beginning August 2, 1982, and continuing until claim is settled.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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.

Carrier posted two positions in the Boiler House Department and Claimant bid on one of them. He was not awarded the bid, instead two junior employees were awarded the two jobs. As a result of the awarding of these bids, the Claimant was furloughed. Claimant filed his grievance alleging that Carrier violated the provisions of Rules 2-A-1-(a) and 2-A-4 of the Schedule Agreement.

The Carrier denied the grievance on the grounds that the posted positions were unique and time was of the essence for the annual boiler maintenance and that Claimant's background established that he was not qualified to hold either of the jobs.

The jobs were posted with a description of the duties which read:

"Repair, rebuild and set valves. Test all elect. & steam compressors, turbines, hydraulic, feed-water & sump pumps & any other mechanical equipment in Power Plant and Boilerhouse. Must be physically able to work above floor level."

Rule 2-A-1 reads:

"In the exercise of seniority, the senior employee shall, if sufficient ability is shown by trial be given preference to positions desirable to them."

The Claim turns on the meaning of Rule 2-A-1. It is undisputed that Claimant was not given any sort of trial to determine whether he was qualified to do the work.

It is the position of the Organization that Claimant should have been given a trial to determine his competence to do the work. By failing to do so, his seniority rights have been circumvented. It cited his past employment record which establishes comprehensive schooling and related experience.

The Carrier states that there was no need for the Claimant to have demonstrated his lack of ability. It contends that Claimant's past record demonstrates that he could not perform the work. In view of the critical nature of the boilers at the Plant, it contends that any training of Claimant would have been counterproductive. It does not read the Agreement as having to establish a bidder on the job and have him either prove or disprove that he can or cannot do the job.

The Carrier further contends that it is its province to establish whether or not an employee has the requisite fitness and ability. If it holds that this ability is lacking the burden is on the employee to establish that the Carrier acted in a capricious or arbitrary manner. It would hold that in this situation it has no obligation to go forward with any burden of proof.

A recent Award, Second Division No. 10309, concerning this Carrier considered the impact of Rule 2-A-1. A junior employee had been awarded a welding position. No trial had been given. The Board stated:

"The essential fact of this case is that the record contains no evidence the Claimant prior to his bidding showed that he had any ability whatsoever to become a qualified welder. Considering the duties involved in Position HM-149, we find no basis in the record to reverse Carrier's determination."

Thus, the Board found that under the circumstances it was unnecessary to waste time and effort in going through a test procedure. This decision is entirely consistent with the duties as posted which read:

"Inspect, test, and repair diesel electrical and electric locomotives. Must be qualified on acetylene and electric welding."

Since the record contained no shred of evidence that the Claimant knew how to weld, it was evident that he could not perform the job duties.

The Carrier is correct in that in the ordinary situation the determination of fitness and ability is for its judgment. However, the broad brush with which it paints this contract is not warranted by the contractual language or prior Awards. In Second Division Award No. 10434 Referee McAllister stated:

"Rule 2-A-1(a) does not require the employe to be fully qualified. But, he must by trial show sufficient ability to be awarded the position. The Carrier is vested by the Agreement with determining whether or not an employe has shown sufficient ability by trial to meet the criteria of a particular assignment. In the exercise of this right, management may not act in an arbitrary or capricious manner."

The aforementioned judgment of the Carrier is an "after the fact" exercise. After the trial the Carrier makes its determination and if it is in the negative the Claimant has the burden of showing that the judgment was an arbitrary or capricious action.

The clear upshot of the Awards interpreting the contractual language is that a bidder should be afforded a trial unless there is clear evidence that such a trial would inevitably yield negative results and as such would be a waste of resources. The nature of the trial is in the hands of the Carrier. The only requirement is that it be fair. In the past the Carrier has utilized interviews to ascertain qualifications and in some instances this method might suffice. The extent of the trial may vary to accommodate the qualifications, or lack thereof, of the applicant.

The Claimant had previously worked for a short period in the boiler room at Carrier's South Altoona Boiler House. The Carrier states that this work is not comparable to the work necessary for the awarded job. This Board is unable to say that the job description reflects extraordinary training. The description of the duties in the Carrier's Submission to this Board are more extensive than the descriptions in the posted job. Given the interpretation of the Carrier, it is likely that only the employees in the Boiler Department will ever be able to fill these jobs. However, the posted description is the conclusive description and the one raised on the property. It will necessarily be our guide.

The Claimant has supported his Claim with enough training and background information to raise the inference that he was qualified to perform the work in question. The Carrier has not met this inference with substantial evidence to rebut it. It has only stated that Claimant was not qualified to perform the job. If the Carrier only has to raise such a contention, the necessity of a trial as demanded by the Rule is aborted. If it cannot present conclusive evidence that a bidder's background establishes that without a doubt he cannot perform the work, then it must adhere to the Rule and establish some sort of trial. Because it did not establish a trial, it has not adhered to the provisions of the Rule.


The Carrier contends that on September 7, 1982, the jobs involved in the Claim were abolished. The Claimant contends that this action was a sham in that only the rest days of the positions were changed and, further, that the "new" positions were not posted in the proper manner demanded by the Agreement. Regardless of the manner of the posting, the change of rest days makes the disputed positions new. The grievance is sustained with payment of days the position worked to the date of September 7, 1982, the day of abolition of the jobs.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 18th day of February 1987.