

The Fourth Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

(The American Railway & Airway Supervisors Association/
(A Division of TCU

PARTIES TO DISPUTE:

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(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

It is the Claim and request of the Petitioning Organization that:

1. Carrier has violated the Agreement, and in particular Rules 2 and 21 and an established past practice when they awarded the position of Chief On-Board Services, Seattle Base to a junior employee (P. Clements) and in so doing denied the application of Claimant who is nearly two years his senior.
2. Claimant be allowed to displace Mr. Clements as Chief at the Seattle Base and Mr. Clements be allowed to return to his former position at Oakland.

FINDINGS:

The Fourth 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 employes 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.

Claimant entered the Carrier's service on November 12, 1973, and was appointed to the position of ARASA Chief on June 13, 1983. At the time of this Claim, Claimant was working out of the Los Angeles Crew Base as a Chief, which is an on-board Supervisor.

In January 1990, Carrier posted a notice of a vacancy on an ARASA Chief position at the Seattle, Washington Crew Base. Claimant applied for this position, as did ARASA Chief Paul Clements, whose seniority date as a

Chief is April 1, 1985. After interviewing both employees, Carrier appointed Clements to the vacancy. Because Claimant has greater seniority than Clements, the Organization asserts Carrier has violated Rules 2 and 21 of the Agreement, which provide, in pertinent part, as follows:

"RULE 2 - SENIORITY

* * *

(b) Supervisors' positions shall be filled by the appointment of the best qualified individual, based on ability, merit, fitness and seniority.

Applicants for an advertised position which is awarded to a Supervisor with lesser seniority will be advised of the reasons therefor.

A Supervisor holding a regular position may not be disqualified therefrom without a formal investigation under Rule 19.

(c) Subject to the provisions of the first paragraph of Rule 2(b), Supervisors will be permitted to exercise seniority only under any of the following conditions:

- 1) When a new position is created or a permanent vacancy occurs.
- 2) When their position is abolished.
- 3) When displaced by a senior Supervisor."

"RULE 21 - UNJUST TREATMENT

A Supervisor who believes that he has been unjustly dealt with in respect to the application of these Rules of Agreement shall file complaint in writing, as provided in Rule 20."

The Organization argues that both employees had sufficient fitness, ability and merit to perform the position in question. Accordingly, it is the position of the Organization that the vacancy must be filled on the basis of seniority.

Carrier first argues Rule 21 has not been violated because Claimant has been allowed to file and progress this Claim, which is what the Rule provides. With respect to Rule 2, Carrier submits it is not applicable to this job because of Letter Agreement No. 5 of the current Agreement. Paragraph 2(a) of Letter No. 5 (dated April 28, 1983) provides as follows:

"The position of Chief, On Board Services, which will be filled by appointment, will be subject to all rules of the Schedule Agreement except those provisions of Rules 2 and 3 relating to promotion, assignment, displacement and disqualification."

Carrier has explained it created these positions on long distance trains to supervise the on-board employees, as well as to perform passenger relations functions. Because the requirements are different from one route to the next, Carrier wished to have the right to move Chiefs between routes. Carrier avers it agreed to place these jobs within the scope of the Agreement, but only if it could have the right to appoint employees.

In the alternative, Carrier argues Rule 2 permits it to make determinations as to fitness, ability and merit, and to select the best qualified employee. The only limitation, according to Carrier, is that it may not be arbitrary, capricious or discriminatory in its determination. In this regard, Carrier relies upon Fourth Division Award 3881 between these parties. There, Carrier denied a senior Supervisor the right to displace under Rule 2 of the Agreement because he was not better qualified than the employee whom he attempted to displace. In denying the Claim the Board held:

". . . Thus, seniority is not the sole governing factor in determining appointment to supervisory positions. Indeed, the proper construction of Rule 2(b) is that a supervisor must be the best qualified based upon ability, merit, fitness and seniority. Without requisite ability, merit and fitness seniority cannot prevail."

In response, the Organization says Letter No. 5 gave Carrier appointive rights only in the granting of seniority as a Chief. Once employees have such seniority, according to the Organization, they are entitled to positions based solely upon their seniority, if fitness, ability and merit are sufficient. The Organization further asserts Letter No. 5 is not applicable as this Claim involves the "awarding" of an advertised position, which is not one of the four categories listed in the letter.

First, we do not find a violation of Rule 21 of the Agreement. That Rule merely gives an aggrieved employee the right to file a Claim, which Claimant has done in this case.

Second, we find Letter No. 5 to be controlling in this case. In every respect, the language of Paragraph 2(a) supports the Carrier's position. When the parties agreed to the phrase "the position of Chief On Board Services, which will be filled by appointment," they were referring to each position, and not to the entire class of positions. The word "appointment" in this context has a common meaning in this industry. It refers to the Carrier exercising discretion over whom it places upon a job. The word is used to contrast this method of filling jobs from the strict exercise of seniority.

By exempting coverage of these positions from "those provisions of Rules 2 and 3 relating to promotion, assignment, displacement and disqualification," the parties agreed Carrier is free to determine, by its own criteria and without regard to seniority, which employees are entitled to be promoted to Chief, who will work specific Chief assignments and under what conditions incumbents will be removed from such assignments. The parties did not include the term "awarding" because that term is generally not used when the Carrier has the discretion as to whom it places upon a position.

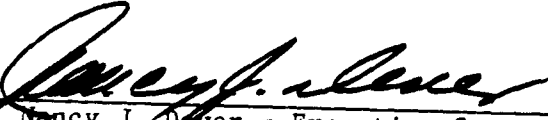
Because the appointment to the position in question was exempt from the provisions of Rule 2(b), and there is no evidence Carrier abused its discretion, we find there was no violation of the Rule. Because the Rule is not applicable, we need not address Carrier's alternative argument.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1992.