

The Second Division consisted of the regular members and in addition Referee James F. Searce when award was rendered.

Parties to Dispute: { International Brotherhood of Electrical Workers
{ Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That the Southern Pacific Company (T&L) violated the current agreement when they unjustly dismissed Radio Equipment Installer K. P. Blount from service on May 16, 1979, at the end of his tour of duty.
2. That accordingly the Southern Pacific Company (T&L) be ordered to restore Mr. K. P. Blount to service as a Radio Equipment Installer with seniority rights unimpaired and compensated for all wages and benefits lost, including future wage increases.

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 employee 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 were given due notice of hearing thereon.

By date of April 5, 1981, Award 8682 was adopted by this Board on the basis of the record presented in Docket 8636 involving the dismissal of the Claimant, K. P. Blount, from service on May 16, 1979. This Board ordered the return to duty of the Claimant to the position of Radio Equipment Installer; a make-whole order was included. Unavailable to the Board at the time of its decision in this case was the results of a prior award (8550) by this Board involving the same Claimant, same Carrier and an important aspect of what this Board considered part and parcel of the case before it -- the question of the Claimant's qualification to fill the Radio Equipment Installer position. In Award 8550, that Board determined that the Carrier was within its rights to disqualify the Claimant from the Radio Equipment Installer position. It is important to note that this Board concluded that the Claimant was qualified to fill such position generally. As heretofore indicated, this Board was unaware of the decision in 8550, because it was not issued until after this Board's deliberations. Another important -- and arguably the principle -- issue before this Board was the Carrier's discharge of the Claimant for his refusal to present himself for a different position. It was the consensus of this Board that while the Claimant had an obligation to perform service as assigned, the Carrier was in error in the first instance in its disqualification from the Installer position and that for the Claimant to comply

with the Carrier's directive to return to duty in a different classification would have worked an unreasonable hardship on him.

Faced with the obviously contradictory positions presented in Award 8682 and Award 8550 regarding Claimant's qualification for the Installer position, the Carrier moved to reinstate the Claimant in the position of "Lineman" -- an offer the Claimant refused then and continues to refuse. The dispute made its way into the court of proper jurisdiction. That deliberative body refused the Carrier's move to vacate this Board's decision but remanded this matter back to this Board "...so that it may resolve inconsistencies" with Award 8550; we do so via the remainder of this document.

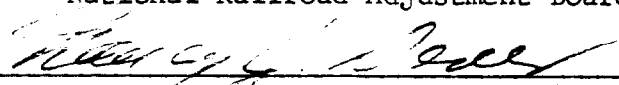
We are compelled to note, at the outset, that the fact that related aspects of the same incident can be grieved and progressed independently to differently comprised Boards of Adjustment contributes considerably to the potential that different results may issue which conflict with each other. This is particularly true where, as here, the results of one such Board are not available to Boards subsequently convened to hear such related ones. Having so stated, however, we look to the Court's Order for guidance here. By its directive to this Board to "resolve inconsistencies", with Award 8550, the Court clearly instructs this Board that the decision in 8550, insofar as the Claimant's qualifications as Radio Equipment Installer, is controlling; restated, we are obliged to defer to 8550 on this matter. Thus, we are obliged to proceed from the premise that the Claimant was not qualified as above. This being the case, the Claimant was not entitled to be returned to the Installer position or entitled to back pay as ordered in Award 8682; likewise, the execution of Award 8550 impels the conclusion that the Claimant had no mitigating circumstances for refusing to report for the Lineman position. Nonetheless, we continue to hold that the opportunity should be available to the Claimant to accept an opportunity to return to duty as a Lineman given the confusion and inconsistencies generated by the preceding events. No back pay is deemed appropriate but the Claimant is entitled to his seniority. The Carrier may elect to require a medical examination to ensure the Claimant's physical qualifications and it may require a demonstration of work qualifications. The Claimant's absence for the period involved shall be shown as an absence from duty without pay and not as discipline. The Claimant is to report not later than thirty (30) days from receipt of such notice; failure to do so represents a forfeit of any and all rights to employment.

A W A R D

This Board defers to Award 8550 as directed by the Court, but directs that an opportunity for the Claimant to return to duty shall be as set out in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board



Nancy J. Dever Executive Secretary

Dated at Chicago, Illinois, this 27th day of July, 1983

Second Division Labor Members

Dissent to Award No. 9579

Docket No. 8636

RECEIVED

Aug 24 1984

A. J. Wagon

The Majority in their findings are grievously in error and totally unresponsive to the dispute and claim of the Employees and the Court's remand as properly before this Division of the National Railroad Adjustment Board as they completely changed Award 8682 and replaced it with Award 9579 which Award exceeded the Court's remand and violated the Railway Labor Act and the rules of the National Railroad Adjustment Board.

The Southern Pacific Transportation Company (T&L Lines) refused to apply Award 8682 and on August 14, 1981 the International Brotherhood of Electrical Workers filed a complaint and petition for enforcement in the U.S. District Court for the Northern District of California.

The Southern Pacific Transportation Company (T&L Lines) filed a motion for Summary Judgment seeking to set aside or modify Award 8682. However, on December 30, 1981 the District Court ordered that the Southern Pacific motion be denied.

The Court remanded Award 8682 to the National Railroad Adjustment Board for clarification stating that, "Award 8682 issued subsequently to Award 8550, reached a different conclusion on the March 1979 disqualification of Employee Kenneth Blount". However it is clearly noted that Award 8550 only dis-

qualified Mr. Blount from position number 37.

On page 1 of their findings the Majority clearly and unequivocally state and we quote:

"By date of April 5, 1981, Award 8682 was adopted by this Board on the basis of the record presented in Docket 8636 involving the dismissal of the Claimant K. P. Blount, from service on May 16, 1979."

(Emphasis added)

In view of the above underscored language the Majority acknowledged the fact that the case must be decided on the record as presented.

In Second Division Award 9110 (Bender) the Board stated:

"...it is axiomatic that the cases here must be decided based on the record as presented."

(Emphasis added)

In Third Division Award No. 5469 (Carter) the basic principle adopted by the Board regarding deciding case on the record as presented was enunciated.

"Parties to disputes before this Board will not be permitted to mend their holds after they reach the Board on appeal, and thereby create variances in the issues from what they were on the property."

However, at the hearing on April 22, 1983 the Majority completely ignored the Board's notification letter of April 8, 1983 which clearly stated in pertinent part as follows:

"The hearing is for the purpose of orally reviewing the Courts Order for clarification of the Award as previously rendered and is not for the purpose of rearguing the original dispute or to present evidence not previously presented." (Copy of the Board's notice letter is attached as Exhibit "A".)"

The parties were so advised again prior to the hearing by the Chairman of the Second Division as he clearly quoted from the Board's letter of April 8, 1983 which was also ignored by the Majority.


During the panel discussion held after the hearing the Carrier Member presented new evidence to the Referee which was accepted by him. Copy of this new evidence is attached hereto and identified as Exhibit "B".

Upon the Majority accepting such new evidence the Electrical Workers Labor Member responded to the Referee regarding the new evidence presented. Copy of such response is attached hereto as Exhibit "C".

However, it is evident from the findings in Award 9579 that the Majority followed the Carrier's newly presented evidence in rendering their decision -- a decision which is, in our opinion, a blatant disregard of the policies of the Second Division of the National Railroad Adjustment Board and the Order of the Court.

The Majority is well aware that Award No. 8550 dealt only with Mr. Blount's disqualification on Radio Equipment Installer position No. 37 and not on any other position of Radio Equipment Installer.

In view of the above and the attached, this Award cannot be given any force or effect, thus we vigoursly dissent.


N. D. Schwitalla, Labor Member

In addition we must point out that the Board further states on page 1 that:

"Unavailable to the Board at the time of its decision in this case was the results of a prior Award (8550) by this Board involving the same Claimant, same Carrier and an important aspect of what this Board considered part and parcel of the case before it — the question of the Claimants qualification to fill the Radio Equipment Installer position."
(Emphasis added)

Contrary to the Majority's attempt this Board was and had been aware of Award 8550 dated December 17, 1980 approximately five (5) months prior to its decision in Award 8682 dated April 15, 1981. In addition the same Board is fully aware that the dispute of claim in each case was clearly definable and each case should have been decided on its own merits. However, the Majority erroneously decided the case defined in Award 9579 on new evidence presented as well as the merits of its Award 8550.

The Majority further exceeded its jurisdiction in Award 9579 as it held:

"The Carrier may elect to require a medical examination to ensure the Claimants physical qualifications and it may require a demonstration of work qualifications."

The Majority is well aware that medical examination referred to is a new finding not based on the record of the case before the Board and is a finding inconsistent with the Court's Order.

NATIONAL RAILROAD ADJUSTMENT BOARD

10 WEST JACKSON BOULEVARD
SECOND FLOOR
CHICAGO, ILLINOIS 60604

April 8, 1983

RECEIVED

APR 11 1983

I. B. E. W.
TENTH DISTRICT

Mr. W. L. Cowan, Manager
of Labor Relations
Southern Pacific Transportation Co.
913 Franklin Avenue, P.O. Box 1319
Houston, Texas 77251

Mr. A. M. Ripp, Intl. Vice Pres.
Intl. Brotherhood of Electrical Workers
O'Hare Office Bldg. 1, Suite 720
10400 West Higgins Road
Rosemont, Illinois 60018

Hearing: Request for Clarification of Award
No. 8682, Docket No. 8636
Referee James F. Searce
10:00 AM, Friday, April 22, 1983

Gentlemen:

Please accept this as formal notification that in accordance with request, hearing is scheduled before the Second Division as set forth above, with the referee as indicated sitting with the Division as a member thereof.

The hearing is for the purpose of orally reviewing the Court's order for clarification of the award as previously rendered and is not for the purpose of re-arguing the original dispute, or to present evidence not previously presented.

Will the parties kindly acknowledge receipt hereof and advise if they expect to have representation.

Very truly yours,

Acting Executive Secretary
National Railroad Adjustment Board
By Order of Second Division

By Rosemarie Brasch
Rosemarie Brasch
Administrative Assistant

cc: Referee James F. Searce

cal

EXHIBIT "A"

SUPPLEMENTAL BRIEF

SOUTHERN PACIFIC TRANSPORTATION COMPANY (EASTERN LINES)

IN RE: SECOND DIVISION AWARD NO. 8682

REMAND FROM UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

On April 15, 1981, the Second Division, NRAB, with Referee Searce rendered Award No. 8682, sustaining the following claim filed by Petitioner, International Brotherhood of Electrical Workers:

1. That the Southern Pacific Company (T&L) violated the current agreement when they unjustly dismissed Radio Equipment Installer K. P. Blount from service on May 16, 1979, at the end of his tour of duty.
2. That accordingly, the Southern Pacific Company (T&L) be ordered to restore Mr. K. P. Blount to service as a Radio Equipment Installer with seniority rights unimpaired and compensated for all wages and benefits lost, including future wage increases.

At the time Award 8682 was rendered, Southern Pacific Transportation Company (hereinafter also referred to as the Company) had already received an Award from the Second Division No. 8550, which involved Claimant Blount's disqualification from the position of Radio Equipment Installer and which determined that Blount was wholly unfit and was properly disqualified from the position of Radio Equipment Installer. Award No. 8550 was rendered on December 17, 1980.

Thus, on April 15, 1981, Southern Pacific was confronted with Award No. 8682 ordering reinstatement of Blount to a position of Radio Equipment Installer and at the same time was in possession of Award No. 8550 upholding Blount's previous disqualification from that position. By letter dated May 28, 1981, the Company attempted to resolve the inconsistency between Award No. 8682 and Award No. 8550 by offering Blount immediate reinstatement (in accord with Award No. 8682) but at the classification just below that of Radio Equipment Installer (in accord with Award No. 8550) in the position of Class A Lineman*.

* Class A Lineman and Radio Equipment Installer have the same rate of pay.

Claimant Blount refused the Company's offer of reinstatement, refused to take a physical examination prior to any reinstatement and continues to withhold himself from the service of the Southern Pacific Transportation Company.

Attached as Exhibit "A" is a copy of the Company's May 28, 1981 letter addressed to Mr. K. P. Blount reinstating him to service in the capacity of Lineman.

On August 14, 1981, the International Brotherhood of Electrical Workers filed a "Complaint and Petition for Enforcement" in the U. S. District Court for the Northern District of California seeking to enforce Second Division Award No. 8682. In its Petition, Plaintiff IBEW, stated:

"On April 15, 1981, the National Railroad Adjustment Board issued Order and Award No. 8682 in Docket No. 8636 which sustained a claim of the IBEW that Radio Equipment Installer K. P. Blount was disqualified from his new position without a 'fair trial' in violation of the collective bargaining agreement, and ordered the carrier to reinstate Blount to the position of Radio Equipment Installer with full seniority and compensation at the appropriate straight-time rate from the date of his suspension and removal. The carrier was ordered to make this award effective by reinstating Blount and paying him his back pay on or before May 26, 1981.

(Carrier's emphasis)

Southern Pacific answered IBEW's Complaint and filed a Motion for Summary Judgment seeking to set aside or modify Award No. 8682.

On December 30, 1981, the District Court entered its Order vacating Plaintiff's Motion for Summary Judgment and remanding Award No. 8682 to the National Railroad Adjustment Board for clarification. In its December 30, 1981 Order, the Court stated:

"However, this Court is unable to determine whether defendant is within compliance with the various awards of the Board for the reason that those awards appear to be inconsistent. Award No. 8682, issued subsequent to Award No. 8550, reaches a different conclusion on the March, 1979 disqualification of employee Kenneth Blount from position No. 37. However, the second award fails to reconcile the earlier result. It is appropriate where clarification is required to remand to the Board so that it may resolve inconsistencies. . .

"Since this Court has determined for the reasons stated above that the matter should be remanded to the Board, it is apparent that the Award is not enforceable as it stands."

Thereafter, Plaintiff IBEW moved to amend the Order to clarify the scope of the remand and the specific referee to which it was directed. Accordingly, by stipulation, the Court amended its Order to read in pertinent part as follows:

"This matter is remanded to the National Railroad Adjustment Board (James F. Searce, Referee) for clarification of Award 8682 insofar as it appears to be inconsistent with Award No. 8550. . . ."

SEQUENCE OF EVENTS

In order to appreciate the unusual circumstances surrounding the Court's Remand, it is important for the Board to have a clear understanding of the series of disputes involving Claimant K. P. Blount, which resulted in the issuance of four separate awards by the Second Division. Mr. Blount was first employed by Southern Pacific on October 23, 1972. Between 1972 and 1979, Blount established seniority on various positions in accordance with the collective bargaining agreements between IBEW and SPTCo. On January 29, 1979, Blount began work on a Radio Equipment Installer position, No. 80, at Valentine, Texas. Position No. 80 required greater technical skill and understanding than possessed by Mr. Blount and because Blount proved unfit for position No. 80, he was disqualified on February 2, 1979.

Thereafter, from February 5, 1979 to February 24, 1979, Blount temporarily filled a position of Radio Equipment Installer at El Paso, Texas. Blount held the El Paso job until the incumbent returned to service. Blount next held position No. 37 as Equipment Installer until again disqualified by the

Company on March 13, 1979. Thereafter, Blount absented himself from work beginning on March 14, 1979 and as a result was suspended following a formal investigation, for a period of 21 working days through to April 30, 1979. He was instructed by letter dated April 2, 1979 that following the suspension period he was to report for duty on either one of two (2) positions as a Lineman. Blount's failure to report for duty as directed and his being absent from employment without proper authority from May 1, 1979 resulted in discharge from service, following a formal investigation held on May 15, 1979. Thus far, it has been seen that K. P. Blount was involved in four separate incidents which subsequently resulted in separate grievances being progressed by the IBEW and ultimately presented to the Second Division, National Railroad Adjustment Board. The results of those cases and the dates of the Division's Awards are as follows:

1. July 23, 1980, Referee Higdon C. Roberts, Jr. rendered Award No. 8418 reducing Blount's 21 day suspension to 10 days on the basis that "what emerges from the evidence is a serious failure to communicate on the part of both the claimant and the carrier."
2. October 1, 1980, Referee John J. Mikrut, Jr. rendered Award No. 8449 covering the disqualification of Blount from the position of Radio Equipment Installer at Valentine, Texas, holding in pertinent part:

"In this instant case, this Board is convinced that the Carrier has not violated any of the specific terms of the parties' agreement, nor has Carrier violated any past practice as can be determined by the record. The matter of the fairness and reasonableness of the Carrier's actions, however, is an altogether proposition and because of this, the Board is compelled to support claimant's position in the instant matter."

The Board then went on to state:

"Admittedly, what claimant offers as proof of his qualification is somewhat sparse; and, moreover, claimant may, in fact, be unqualified as alleged by Carrier. Be that as it may, however, claimant's

demonstrated quantum of proof is decidedly more superior than Carrier's mere assertions since Carrier has offered no factual evidence whatsoever in support of its contention."

Referee Mikrut then directed the Company to offer Blount a second trial to demonstrate his ability to perform the duties required of the Radio Equipment Installer.

3. December 17, 1980, Referee George S. Roukis rendered Award No. 8550 covering Blount's disqualification from a position of Radio Equipment Installer at Houston, Texas. The claim filed by IBEW alleged a violation of the collective bargaining agreement and requested:

"That accordingly Carrier be ordered to return Radio Equipment Installer K. P. Blount to position No. 37 and to compensate him for eight (8) hours each day for all wages lost commencing with March 14, 1979, and to be continued until claimant is restored to his position."

Referee Roukis found that Blount was "plainly unqualified" and that the Board could find "no evidence that he was prejudicially denied this job."

4. April 15, 1981, Award No. 8682 was rendered in connection with Claimant Blount's dismissal from service on May 16, 1979. This case was heard by the Second Division on December 2, 1980. At the time, Referee Roukis' Award No. 8550 had not been adopted and, therefore, was not in evidence before Referee Searce.**

In light of the prior award (8550) covering claimant's disqualification from service, the District Court recognized that Award 8682 had to be remanded to the Second Division for the purpose of clarifying (and inferentially removing any cumulative affect which the Company's actions in the prior disqualification cases add on the review of the assessment of discipline for Blount's dismissal for insubordination) - Award 8682.

** Although the Roukis Award had not yet been rendered, IBEW's submission to the Board in Blount's dismissal case contained the following advice:

"In the case of being unjustly disqualified on the position at Valentine, Texas and the position at Houston, Texas and further the suspension of claimant for twenty-one (21) days; these disputes are being handled under separate and individual claims to your honorable Board. This now brings us to the case and claim involved herein."

CLARIFICATIONS BEING SOUGHT BY THE COMPANY

It is the Company position that Award 8682 must be clarified in the following areas:

1. Given the fact that the Roukis Award (8550) held that the Company had properly disqualified claimant from the position of Radio Equipment Installer, any reference to the prior disqualification cases (save and except for sequential reference) including threshold findings which may have attached themselves to the dismissal issue, should be removed from Award 8682.
2. Given the fact that the Board concluded that Claimant was qualified to work as a Radio Equipment Installer (page 2 - "This Board finds error on the part of the Carrier in its disqualifying action; it also finds error by the claimant thereafter."), Award 8682 should be clarified to address only the issue of insubordination and make an independent determination as to claimant's guilt in connection therewith.
3. Given the fact that the Roukis Award clearly upheld the Company's disqualification of claimant as a Radio Equipment Installer, Award 8682 should be clarified, in the event that reinstatement to service is warranted in connection with the insubordination issue, to reflect that the Company's offer of immediate reinstatement to the next highest position, that of Lineman, constituted full compliance.

REASONS SUPPORTING COMPANY'S REQUESTS FOR CLARIFICATION

Clarification on the issue of Blount's disqualification:

The record clearly reflects that the claim before the Board in Award 8682 involved only the issue of claimant's dismissal from service for insubordination. At the time the case was heard by the Board, it is possible that there was some misunderstanding concerning the action being taken in the prior disqualification cases. The Company's discussion of those prior disqualifications in its submission covering insubordination case concerned its argument that if the claimant felt that his disqualification and the Company's instructions with

regard to placing himself on a position as Lineman were in error, the proper recourse would have been to comply with Company's instructions and await the outcome of the cases being progressed to the NRAB involving his disqualification. This Board, in its findings, properly noted that claimant was in error by not pursuing that course. It is the Company's opinion that had this Board clearly understood Referee Roukis had jurisdiction to decide claimant's disqualification as a Radio Equipment Installer that it would not have made any independent findings on that subject. Had the Roukis Award (8550) been in evidence at the Board's hearing, any confusion regarding the disqualification issue would have been resolved. It is clear from the text of Award 8682 that the Board considered the Company's actions in disqualifying claimant to be improper. It also appears the Board's conclusion that the Company's "error" in disqualifying claimant had a significant bearing on its view of the dismissal for insubordination. In support of this reasoning, we refer the Board to its own language as follows:

"As noted heretofore, we find reason to conclude that the Carrier violated Rule 13 when it disqualified the claimant from position no. 80. At such, it was an error ab initio and from that point forward."

Having made this threshold finding, in conflict with Referee Roukis' findings, the Board then went on to state it found:

"... an unusual circumstance which mitigates discipline for an offense which is obviously a serious one for which removal is usually justified."

Given the existence of Award 8550, it remains the Company's position that there was nothing unusual insofar as the insubordination issue was concerned. There are numerous awards rendered by both the National Railroad Adjustment Board and various Special Boards of Adjustment which address the proposition that an employee who considers himself to be aggrieved has the duty

and the obligation to comply with the employer's instructions and seek redress through the grievance process. On that point, Award 8682 is consistent in its finding that insubordination is a ssrious offense "for which removal is usually justified." Once the cloudy circumstances of the disqualification issue are removed from Award 8682, the remaining issue, the only one which was actually before this Board, does fall in the category of "obey now and grieve later".

Accordingly, the Company submits that, on remand, Award 8682 should be clarified by removing any threshold findings relating to the disqualification issue and its findings should be limited to the specific issue at hand, that of dismissal for insubordination.

MONETARY ASPECT OF AWARD 8682

In its initial form, Award 8682 directed that Blount be compensated at the appropriate straight-time rate from his date of suspension and removal, until his return to duty to a location which cannot unreasonably be refused by him, less any and all compensation he may have earned.

Following receipt of the Award, the Company reinstated Blount. In light of Award 8550, the reinstatement, of necessity, could not have been to a position as radio equipment installer. Had Blount returned to work to the lineman's position he was offered, he would have received a rate of pay equal to that of radio equipment installer. He chose not to do so and continues to withhold himself from service.

Regarding the period from May 16, 1979, date of Blount's dismissal, to April 15, 1981, the date Award 8682 was rendered, the issue of money due Blount was previously decided by Award 8550.

On December 17, 1980, the NRAB entered its Award 8550, which specifically held that Southern Pacific had no obligation to pay Blount as a Radio Equipment Installer from March 14, 1979 onward.

Under the principle of res judicata, having once "litigated" the issue of monies due Blount in Award 8550, the IBEW could not re-litigate the same issue in Award 8682. The legal principles governing res judicata must apply to arbitral awards if NRAB proceedings are to have any meaning. Otherwise, labor organizations could besiege the NRAB with identical claims until receiving favorable rulings on all issues. In effect, this is what the IBEW's conduct amounts to with Mr. Blount's four NRAB cases. Award 8682 represents a ruling favorable to the IBEW on the issue of reinstatement. However, to let stand the monetary aspect of the last Award, 8682, when the same parties and beneficiaries were already bound by Award 8550, which denied an identical claim for monies, denies Southern Pacific the due process right to rely on the finality of Award 8550. Further, to sustain Award 8682's money award would defy the principle of res judicata. Baldwin v. Iowa State Traveling Men's Ass'n., 283 U.S. 522 (1931). Having lost a claim for money in Award 8550, res judicata precludes the IBEW from reaping the fruits of having re-litigated that claim in Award 8682.

Further, on the issue of damages, if any, as a result of Award 8550, the company met in conference with IBEW representatives and thoroughly discussed this matter in December 1980. In that connection, a letter was written to the General Chairman, dated December 31, 1980, reviewing all of the aspects of monies due Blount in connection with Award 8550 and Awards 8418 and 8449.

In sum, the company concluded at that time there were no further damages accruing to Claimant Blount and that the prior awards had been fully satisfied. IBEW has never sought to challenge that letter or the company's application of Award 8550.

A copy of the December 31, 1980 letter is attached as Exhibit "B".

May 28, 1981
117-Blount, K. P.

Mr. K. P. Blount
213 Ringgold
West Columbia, TX 77486

Dear Mr. Blount:

This is to advise that effective June 1, 1981, you are reinstated to the service of this company in the capacity of Class A, B, or C Lineman.

You should arrange to contact Mr. L. L. Curry in my office at (713) 223-6166, or report to my office in Room 723, 913 Franklin Avenue, Houston, Texas, not later than 9:00 AM, June 1, 1981, to arrange for a return to work physical and to place yourself on a lineman's position in accordance with Rule 13 of the current agreement.

Yours truly,

D. M. Sorensen

bcc: Dr. H. E. Hyder - Please arrange for above physical account out of service in excess of two years.

L.L.C.

EXHIBIT "B" page 12

MAY 29 1981

CARRIER'S EXHIBIT A

Transportation Company

913 Franklin Ave. • P.O. Box 1319 • Houston, Texas 77001 • (713) 223-6000

INDUSTRIAL RELATIONS

WILLIAM R. DENTON
VICE PRESIDENT

L. M. FOX
ASSISTANT VICE PRESIDENT
LABOR RELATIONS

C. B. COYNE
C. H. HORNSBY

E. S. LOHRKE
J. W. MASSIE

LABOR RELATIONS OFFICERS

W. L. COLMAN
MANAGER OF LABOR RELATIONS
M. A. CHIVER
ASST. MANAGER OF LABOR RELATIONS

December 31, 1980

249-75-A

Claim of IBEW and Electrician K. P. Blount for an arbitrary and penalty payment of eight hours each day, commencing February 3, 1979 and continuing until returned to Position No. 80, Valentine, plus expense, plus 10% of amount of claim:

Mr. E. A. Winter
General Chairman, IBEW
222 Langford Place
San Antonio, Texas 78221

Dear Sir:

Reference your letter of November 5, 1980 and December 22, 1980 regarding claim as captioned above and Second Division Award No. 8449 which calls for "Back Pay and restoration of seniority as well as the restoration of all other normally accrued benefits -- in the event that Claimant has suffered such losses during the period of his disqualification from February 2, 1979 to date of issuance of this Award".

As stated previously the record indicates that Mr. Blount performed service on an equipment installer's job at El Paso 2-5-79 and worked that position through 2-24-79. Mr. D. C. Williams returned to El Paso displacing Mr. Blount at end of tour of duty 2-26-80.

Mr. Blount protected Job No. 37 on 3-1-79 and worked that position until 3-13-79 at which time Mr. Blount was disqualified as a radio equipment installer. Mr. Blount suffered no loss of pay at equipment installer rate during this period.

The application of this Award can only be from time of his disqualification on Job No. 20 at Valentine, Texas on February 2, 1979, which is the basis of claim in this instant case until he was disqualified from job no. 37 at Houston, Texas.

Second Division Award No. 8550 resolved the issue of Mr. Blount's subsequent disqualification from job no. 37 beginning March 14, 1979.

The issue to be decided by the Board in that claim was:

"That accordingly Carrier be ordered to return Radio Equipment Installer K. P. Blount to position no. 37 and to compensate him for eight (8) hours each day for all wages lost commencing with March 14, 1979, and to be continued until Claimant is restored to his position."

Referee George S. Roukis denied the claim of the Organization and held in his findings:

"In our review of this case, we recognize the significance of Claimant's assertions that a junior employee was awarded this position, but we do not find that the selection was an abuse of managerial discretion. Admittedly, Claimant was not disqualified while working at the El Paso situs, but the evaluative reports and competency judgments supplied by his supervisors before his qualifying assignment began at Houston, Texas, persuasively demonstrates that he was not sufficiently qualified to perform the work of Position No. 37. This is further supported by the type of work he performed at Nacogdoches, which did include equipment installer duties. The evidence relative to his knowledge and skill fitness qualifications shows that he was unqualified to perform the technical tasks of Position No. 37 and we will not substitute our judgment of what constitutes adequate skills qualifications in lieu of Carrier's determination."

"The railroad industry, by definition is vested with a unique public interest responsibility that requires, at a basic minimum, that employees are equipped with the requisite technical skills, to perform the myriad of jobs attendant to rail operations. Carrier is thus entrusted with discretionary authority to hire and promote individuals who meet its specified selection standards, subject of course to its collective bargaining agreements restrictions and limitations.

In the instant case, Claimant was plainly unqualified to fill Position No. 37 and we find no evidence that he was prejudicially denied this job. In Second Division Award 7376, which we believe is applicable to this case, we held in part that:

'Determination of an employee's qualifications relates to a candidate's present qualifications at the time a vacancy exists and applicants bid or are entitled to consideration for such vacancy. 'Qualified' as used in Rule 23 does not mean ability to qualify after further learning or experience on the job or after a trial period; it means possessing the required knowledge, skill or experience at the time the applicant bids for the job or is entitled to be considered for it. A trial period is not to enable a senior employee to become qualified, or at least to prove his contention that is qualified *** unless the Agreement specifically so provides.'

We find this decision at point with the essential facts herein and we will reject the claim."

Therefore the question of his receiving a second trial to demonstrate his ability has been resolved by Second Division Award 8550.

The record indicates that Mr. Blount was suspended from service on April 2, 1979 for violation of Rule 810. Mr. Blount's suspension ended April 30, 1979 and Mr. Blount was instructed to report for duty May 1, 1979.

The question of pay for time lost April 2, 1979 to April 30, 1979 was resolved by Second Division Award 8418 wherein Referee Higdon C. Roberts held that Mr. Blount was guilty as charged, but due to mitigating circumstances, reduced the suspension to 10 working days and ordered the Carrier to compensate Mr. Blount for additional lost time. Payment in the amount of \$592.61 for 88 hours at straight time rate was made to Mr. Blount on August 15, 1980. Therefore, the issue of pay for period April 2 to April 30, 1979 has been resolved.

Mr. Blount was dismissed for failing to report to duty on May 1, 1979 and being absent without proper authority May 1, 1979 through May 3, 1979. The claim for reinstatement to his former position with pay for time lost, etc. is currently before the Second Division and is docketed as Case No. 8635. Based on the award issued by the Board in that case, the question of whether Mr. Blount will return to service and if Mr. Blount is to receive compensation from May 1, 1979 will be resolved.

Therefore there is no further action required by the Carrier in compliance with this Award.

Yours very truly,


W. L. Cowan

CBG/ljt

April 27, 1983

Hearing: Request for clarification
of Award No. 8682,
Docket No. 8636
10:00 A. M. Friday,
April 22, 1983

Mr. James F. Searce
Suite 607 - Landmark
215 Piedmont Avenue
Atlanta, Georgia 30308

Dear Sir:

I have reviewed Carrier's Brief submitted by the Carrier Member during our panel discussion in connection with the above briefly captioned subject and find said Brief not to be in keeping with the Court's Order dated February 4, 1982 and also the National Railroad Adjustment Board's letter of April 8, 1983. The National Railroad Adjustment Board in its aforementioned letter clearly and unequivocally advised the parties, as did the Chairman of the Board prior to hearing, as follows:

"The hearing is for the purpose of orally reviewing the Court's Order for clarification of the award as previously rendered and is not for the purpose of rearguing the original dispute or to present evidence not previously presented."

(Emphasis added)

As Carrier's Supplemental Brief is nothing more than a re-argument of the original dispute and contains evidence not previously presented such Brief should be ignored in its entirety.

As was presented to you the Court's Order dated December 30, 1981 clearly held:

"This Court concludes that the Board had the power to reach all the questions upon which its decision in Award No. 8682 was based."

(Emphasis added)

Further, the Court held in its Order:

"The Board did not exceed its jurisdiction in considering and determining the underlying disqualification issue..."

Further, the Board's findings is not without

foundation in reason or fact... Therefore, this Court finds that when the Board made Award No. 8682 it did not exceed its jurisdiction."

(Emphasis added)

At this point your attention is directed to the following language taken from page 2 of the Court's Order which clearly sets forth the only inconsistency between Award No. 8550 and Award No. 8682.

"Award No. 8682, issued subsequent to Award No. 8550, reached a different conclusion on the March 1979 disqualification of employee Kenneth Blount fails to reconcile the earlier result."

(Emphasis added)

As was pointed out to you at the hearing Carrier's motion for summary judgment was denied by the Court and the only inconsistency appearing between Awards 8550 and 8682 of the National Railroad Adjustment Board was regarding Radio Equipment Installer Position No. 37. With the insertion of the exception for Position No. 37 into Award 8682 all inconsistency as stated in the Court's Order of December 30, 1981 would be corrected.

It is further our position that Carrier's liability continues until Claimant is reinstated to any Radio Equipment Installer's position except Position No. 37.

It is very clear the Carrier could have allowed Claimant to return to work (except for Position No. 37) within thirty (30) days from the date of your Award 8682. This the Carrier did not do and it did so at its own peril.

Yours truly,

T. V. Neihoff
Labor Member

TVN/g