

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24267
Docket Number M-24221

Martin F. Scheinman, Referee

PARTIES TO DISPUTE: { **Brotherhood of Maintenance of Way Employees**
(Seaboard Coast Line Railroad Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier's disqualification of Assistant Foreman Larry Alexander as assistant foreman on Extra Force 9226 at the close of work on October 5, 1979 was improper, without just, sufficient or reasonable cause and in violation of the Agreement (System File 37-SCL-79-99).

(2) The Carrier shall return the claimant to the position of assistant foreman on Extra Force 9226 and shall compensate him at the assistant extra gang foreman's rate beginning October 6, 1979 until he is restored to the position of assistant foreman on Extra Force 9226."

OPINION OF BOARD: Claimant, L. Alexander, was initially employed by Carrier as a trackman, effective January 22, 1971. In October 1976, Claimant was promoted to the rank of Apprentice Foreman. According to Carrier, Claimant bid on an Assistant Foreman's position on Extra Gang 9226 in August 1977, but disqualified himself and exercised seniority as a Trackman.

The Organization contends, however, that Claimant successfully bid on the Assistant Foreman's position in August 1977 and occupied it for over two years prior to the date this claim arose. In either case, both parties agree that from at least December 19, 1977 to May 15, 1978, Claimant worked as an Assistant Foreman on Extra Gang 9226. At that time, Claimant bid on the Foreman's position on Section Force 5661. That position was abolished on November 11, 1978 and Claimant returned to the position of Trackman.

On April 2, 1979, Claimant bid on a Foreman's position of Extra Gang 9226, but was disqualified on May 11, 1979. He was subsequently reassigned as Assistant Foreman to Extra Gang 9226. However, by letter dated October 2, 1979, Carrier disqualified Claimant from that position, effective October 5, 1979.

The Organization contends that Carrier's disqualification of Claimant from the position of Assistant Foreman to Extra Gang 9226 in October 1979 violated the Agreement, particularly Rule 6, Section 2 and Rule 12, Sections 1 and 4. Those rules read, in relevant part:

"RULE 6
ESTABLISHMENT OF SENIORITY

SECTION 2

Employees upon promotion to a higher rank will establish seniority in the higher rank as of the day assigned to such

bulletined position, in accordance with Rule 8, Section I, and Rule 12, Section 4."

**"RULE 12
PROMOTION**

SECTION I

A promotion **is** an advancement from a lower **rank** to a higher rank.

SECTION 4

Employees accepting promotion **will** be given a fair chance to demonstrate their ability to meet the **requirements** of the position; if failing to so qualify **within** sixty (60) calendar days the position **will** be declared vacant, and the employee may return to his former rank **in** accordance with Rule 13, Section 3."

The Organization **maintains** that **Claimant** was **promoted** to the position of Assistant Foreman on August 1, 1977. Thus, **Carrier** had **sixty** days from that date in which to disqualify **Claimant**. This **Carrier** **did** not do. Therefore, in the Organization's view, **Carrier** failed to **timely** disqualify **Claimant** when it notified **him** **in** October 1979, some twenty-six **months** after he established seniority as an Assistant Foreman, that **he was** being disqualified from that **position**.

In addition, the Organization notes that seniority rights in the Track Subdepartment are defined by rank. Rank 2 is "Assistant **Foreman**". There **is** no additional delineation of that title - e.g. - "Assistant Foreman - **Extra Gang**". Thus, the **Organization** argues that the **Claimant** successfully filled the position of Assistant Foreman for over two years without **complaint**. Therefore, according to the **Organization**, **Carrier** may not **now simply** disqualify **Claimant** from his position as an Assistant Foreman on Extra Gang 9226 without providing **him** with a f-1 notice of charges and hearing in accordance **with** Rule 39 of the Agreement.

Carrier, on the other hand, contends that **it** acted reasonably and in conformity with the Agreement when it disqualified **Claimant** from the Assistant Foreman position on Extra Gang 9226 in October 1979. **First**, **Carrier** asserts that the duties of an Extra Gang Assistant Foreman are much greater and more complex than those of an **Assistant** Foreman on Section forces. For example, an extra gang frequently **is** scheduled to perform heavy construction work not required of section forces. In **Carrier's** view, while **Claimant** may have performed satisfactorily as an Assistant Foreman in certain instances, he did not perform satisfactorily as an Assistant Foreman on Extra Gang 9226. His unsatisfactory performance was noted by several supervisors.

In addition, according to **Carrier**, **Claimant** was given a reasonable period of **time** to learn all the phases of this job, but he failed to do so. Thus, **Carrier** contends that **it** acted neither arbitrarily nor capriciously when **it** disqualified **Claimant** from the position of Extra Gang Assistant Foreman in October 1979.

Carrier also **maintains** that **if** Claimant had felt unjustly treated by its **actions**, he should **have** sought a hearing **within** ten days of Carrier's **disqualification** protesting its **unfairness**. This **Claimant** failed to do. Thus, **in** Carrier's view, even **if** Carrier was obligated to issue a notice of discipline **in** this case, **Claimant's** failure to request a **hearing within** the appropriate **time limits** invalidated his later **claim**. In all, Carrier asks that the **claim** be dismissed.

It **is** true, as Carrier argues, **that** it must be given wide latitude **in** determining whether its **employees** perform their jobs satisfactorily. It **is** equally true that Carrier's determination, **in** October 1979, that **Claimant** was **unfit** for the position of Assistant Foreman on Extra Gang 9226 was neither arbitrary nor capricious. **However**, the central issue before us **is** whether Carrier had the right, under the Agreement, to disqualify **Claimant** from that position at that **time**, without the benefit of a formal notice of discipline. We believe that it did not.

The record evidence reveals that when Claimant **first** began service as an Assistant Foreman, he received a promotion in accordance with Rule 12. It is equally clear that **Claimant** was the successful bidder for the position of Assistant Foreman and that he occupied that position for more than **sixty** days. Thus, pursuant to Rule 12, **Claimant** qualified for the position and could not be removed except by notice of discipline and **hearing pursuant** to Rule 39.

Carrier argued that the responsibilities of an Extra Gang Assistant Foreman were far more **demanding** than those of an Assistant Foreman on section forces; **This** may well be so. **However**, Rule 5 does not distinguish between different types of Assistant Foremen. Thus, an **employee** who occupies the position for more than **sixty** days, regardless of whether it **is** in the section forces or on an **Extra Gang**, must be deemed to have qualified for it.

In addition, the record evidence reveals that Claimant did **in** fact occupy the specific position of **Assistant Foreman** on Extra Gang 9226 from December 1977 until May 1978. Therefore, **Claimant** occupied the **specific** position from which he was later disqualified for more than **sixty** days. Accordingly, even **if** **Claimant** had to **qualify** for that **specific** job, he did so by occupying it from December 1977 to May 1978.

Finally, we note that **Claimant** did not invalidate his **claim** by failing to ask for a hearing within ten days from the **time** it disqualified him. Carrier improperly disqualified **Claimant**. It did not discipline him. Had it done so, he would have had to **timely** request a hearing. **However**, Carrier's actions violated Rules 6 and 12 of the Agreement, not Rule 39 - Discipline. Claimant **timely** filed a **claim** as to those violations. Accordingly, **Claimant** did not forfeit his right to relief by not requesting a hearing.

FINDINGS: The **Third** Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the **parties** waived oral hearing;

That the **Carrier** and the **Employees** involved in this dispute are respectively Carrier and **Employees within** the meaning of the Railway **Labor** Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the **Agreement** was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: **Acting** Executive Secretary
National Railroad **Adjustment** Board

By *Rosemarie Brasch*
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 23rd day of March 1983.

