

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Missouri Pacific Railroad Company)

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

(1) The Carrier violated the Agreement when, on November 8, 1986, it revoked the assistant foreman seniority of Mr. F. W. Jones and demoted him from the assistant foreman position to which he was assigned on System Rail Gang 6803 (Carrier's File 860233).

(2) As a consequence of the aforesaid violation, Mr. F. W. Jones' seniority as an assistant foreman shall be restored and he shall be allowed the:

'... difference in pay between Assistant Foreman and Trackman's rate of pay for eight (8) hours each work day, including any holidays falling therein and any overtime worked by the employee filling Mr. Jones' position as Assistant Foreman, beginning November 8, 1986, continuing until Mr. Jones is restored to position of Assistant Foreman on System Rail Gang 6803.'

FINDINGS:

The Third 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.

The Claimant established seniority as an Assistant Foreman on November 1, 1984. He was dismissed from service on a disciplinary basis on March 1, 1985. As a result of Special Board of Adjustment No. 279, Award No. 243, he was reinstated to service "with all rights unimpaired."

On November 6, 1986, approximately two months after return to service, the Claimant was notified that he was "disqualified" as Assistant Foreman. As stated in the Carrier's Submission, this was "due to his failure to demonstrate sufficient ability to perform the functions of an Assistant Foreman." He was demoted to a position as Trackman. There was no investigative hearing prior to his demotion.

The situation here does not concern the right of the Carrier to determine if an employee has failed to become qualified for a position, or even if the employee has the "ability and merit" (as referenced in Rule 10(a), Promotion) to be granted a new position in preference to another employee. Here, the Claimant was in the position of Assistant Foreman since 1984. The Board concurs with the Carrier that it may reasonably judge whether or not an employee can continue to meet the qualifications of a position. However, when an employee is removed from a position on such basis, such clearly affects the employee's seniority rights.

The Organization argues that the Claimant was disciplined for his work performance and thus became entitled to an investigative hearing prior to action being taken against him. The Carrier asserts the right to disqualify an employee based on inability to perform his assigned responsibilities and argues that this is not a disciplinary matter requiring an investigative hearing.

In the Board's view, the Carrier assumes rights exceeding the requirements of the Schedule Agreement. The Claimant held the position of Assistant Foreman for two years. His failure to continue to perform his responsibilities certainly would sanction corrective action by the Carrier, disqualification being one such option. To suggest, however, that an employee may simply be "disqualified" and removed from a position after two years, without supportive evidence provided through an investigation, would infer that any employee may be removed from any position without review.

Whether the Claimant's removal from his Assistant Foreman's position was disciplinary in nature or simply an exercise of the Carrier's judgment of his performance, the Agreement nevertheless offers specific protection.

Rule 12, Discipline and Investigations, reads in pertinent part as follows:

"Section 1. (a) An employee who has been in service more than sixty (60) days shall not be disciplined or dismissed without investigation. He may, however, be held out of service pending such investigation which will be held within a reasonable time.

. . .

(f) No demoted employee will be allowed to exercise his seniority in a lower classification except by agreement between the management and the local and/or General Chairman."

The reference to demotion in Subsection (f) in the disciplinary Rule must be given attention. Thus, the Carrier is free to demote or otherwise affect an employee where failure to perform satisfactorily is alleged, but this must be pursued through the investigation process specified in Rule 12, Section 1(a).

Here, it must be noted that the record indicates the Claimant was simply advised orally he was "disqualified," without being provided with any documentation. The only account of the event in the record is a memorandum prepared January 26, 1987, more than two months after the action taken against the Claimant.

Entirely in point here is Third Division Award 24267, which also concerned the disqualification of an Assistant Foreman. That Award stated as follows:

"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."

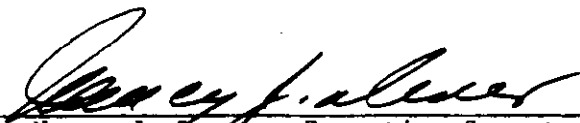
The Claim here has merit, not because the Board reaches any judgment as to the Claimant's continuing ability to perform as Assistant Foreman, but because his removal from the position was not sanctioned absent a Rule 12 investigation.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of March 1991.