

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34054
Docket No. SG-33993
00-3-97-3-327**

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(The Long Island Railroad Company**

STATEMENT OF CLAIM:

"Claim of behalf of the General Committee of the Brotherhood of Railroad Signalmen of the Long Island Rail Road (LI):

Claim on behalf of K.E. Hall to require that he be allowed to exercise his seniority in the Assistant Foreman class and made whole for all compensation lost as a result of not being allowed to exercise his seniority in that class, beginning July 6, 1995, account Carrier violated the current Signalmen's agreement, particularly Rules 40, 47, 56 and 63, when it did not allow the Claimant to exercise his seniority onto an Assistant Foreman position. Carrier's File No. SG-17-95. BRS File Case No. 10193-LI."

FINDINGS:

The Third 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.

The Claimant has 23 years of service with the Carrier. In 1989, he was promoted to the position of Assistant Foreman. In November 1994, the Claimant incurred an injury that

prevented him from working until July 1995. On July 6, 1995, he attempted to displace a junior employee holding an Assistant Foreman's position in the construction area of the Signal Department.

Two Signal Construction Supervisors questioned the Claimant's ability to function as an Assistant Foreman in the Signal Department. Therefore, a meeting was held with the Claimant and his General Chairman on July 10, 1995, to discuss his abilities as an Assistant Foreman. At that meeting, it was agreed that the Claimant would participate in a 30-day period of retraining to refresh his knowledge of the Carrier's signal system. He actually participated in 20 days of retraining due to a vacation he had in July and August.

On August 17, 1995, the Carrier scheduled an examination for the Claimant. However, for a variety of reasons, he refused to take the reexamination. As a result, the Carrier refused to allow him to displace a junior Assistant Foreman. The Claimant therefore exercised his rights to a Signal Inspector's position at the mechanic's rate of pay.

On October 11, 1995, the Organization filed a claim on behalf of the Claimant contending that the Carrier acted in an arbitrary and capricious manner when it refused to allow him to displace the Hicksville Assistant Foreman on or about July 6, 1995.

Inasmuch as the Claimant had worked as an Assistant Foreman for five years, the Organization contends that there could be no reasonable doubt about his qualifications and the Carrier therefore had no right to require him to re-qualify for a position for which he had been deemed qualified for five years. The Organization requests that the Claimant be made whole for his lost earnings including two hours of overtime each day that he does not report for the Hicksville Construction Assistant Foreman position.

Rule 56 of the parties' Schedule Agreement is entitled Examinations Other Than Physical. Paragraph (d) of Rule 56 provides that in the event of a reasonable doubt as to an employee's qualifications the Carrier may require the employee to demonstrate his or her ability by a reasonable and practical test.

Inasmuch as two signal Construction Supervisors had questioned the Claimant's ability to function as an Assistant Foreman, the Carrier had "reasonable doubt" regarding his qualifications. There is no evidence that the concerns registered by the two Supervisors who had worked with the Claimant were totally groundless. Nor is there any evidence that they harbored any animus toward him. Therefore, the Carrier had the right to invoke Rule

56 and require the Claimant to demonstrate his ability as an Assistant Foreman by a reasonable and practical test.

Notwithstanding the Organization's assertion, the Board does not find that the Carrier acted arbitrarily or capriciously when it invoked its rights under Rule 56. The Claimant raised several objections to the examination scheduled for August 17, 1995, and the Carrier acceded to his objections. For instance, it agreed to remove certain individuals from participating in the reexamination whose presence the Claimant objected to. Moreover, as noted above, the Carrier gave the Claimant a 30-day period of retraining to enable him to refresh his knowledge of the Carrier's signal systems because he had been away from his Assistant Foreman's duties for approximately eight months. Also, the Claimant was only going to be tested in areas where the Carrier had questions about his fitness and ability as an Assistant Foreman.

For all the foregoing reasons, it is the considered opinion of the Board that the Carrier did not act in an arbitrary or capricious manner when it refused to allow the Claimant to displace into an Assistant Foreman's position until he demonstrated his ability as an Assistant Foreman by a reasonable and practical test. The claim is denied as a result.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of May, 2000.

LABOR MEMBERS DISSENT
To
THIRD DIVISION AWARD 34054
(Docket No: SG-33993)

REFEREE: ROBERT M. O'BRIEN

This dispute involved the disqualification of the Claimant when he attempted to exercise his seniority onto an Assistant Foreman's position. The question before the Board was straightforward – did the Carrier act in an arbitrary or capricious manner when it refused to allow the Claimant to exercise his seniority to obtain an Assistant Foreman's position that he had previously held?

In rendering its decision the majority mistakenly overlooked numerous important facts that should have resulted in a contrary finding.

The record of handling revealed that in November of 1994 the Claimant suffered an injury that prevented him from working as an Assistant Foreman. In July 1995, the Carrier refused to allow the Claimant to return to his former position based on the allegation that the Claimant had failed to "function as a competent Assistant Foreman." Carrier's position was based on some incidents that allegedly occurred in 1989, 1993 and 1994.

Agreement Rule 47 (I) specifically states that letters of warning will be expunged after two years. While carrier acknowledged this fact, it stated that, "The 1989 warning letter is no longer in Mr. Hall's department file, however, it was introduced as evidence of his past difficulty in performing supervisory duties."

As noted in Award 34054 the Board noted that the Claimant participated in a retraining program with four different supervisors for a period of 20 days during July and August. The record, however, is void of any exception to Claimant's work performance during this period of time.

Following this retraining program, the Claimant was scheduled for a follow-up test. Upon arriving at the headquarters, he was confronted by three supervisors (one of which had filed an adverse opinion against the Claimant) a Signal Engineer and a Labor Relations Officer. In the center of the table they had placed a tape recorder. The Claimant, along with his Union Representative, took exception to the intimidating nature of the test and refused to participate. As noted in the record, the General Chairman related a statement made by a supervisor that, "It will be a miracle if he passed the test." The General Chairman noted that in all of his 23 years of service he had never known qualification test to be conducted in such a manner.

While the Carrier argued in its submission before the Board that they had no secret agenda – the facts prove otherwise. As noted they scheduled his retraining during his vacation, then took exception to his inflexibility by not rescheduling his vacation to accommodate their retraining program. Carrier stated that this “...demonstrated a lack of sincerity on his part for retraining...” Carrier also took exception to the Claimant being off work due to an injury. It is obvious that Carrier’s inflexibility and demeanor did in fact lead to a conclusion that there was a secret agenda.

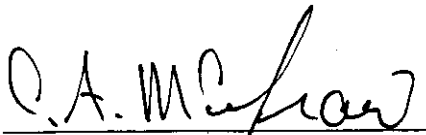
Carrier’s entire case rested on a statement made by a supervisor in 1995, wherein, he thought he remembered taking exception to Claimant’s work performance in 1993. Notwithstanding the obvious time limit arguments, the record is void of any action ever being taken to any 1993 incident. The record does reveal that Claimant received a notice in 1989, wherein, he was advised that he needed to improve his job performance. The record indicated that no further action was ever taken, therefore, one would logically conclude that Carrier’s warning letter accomplished its objective. The Carrier further acknowledged that the Claimant had, at various times, been assigned to fill vacation vacancies in the Assistant Foreman’s class. It is obvious that the Claimant was considered qualified when it suited Carrier’s needs.

As previously stated, the question before the Board was straightforward - was the Carrier arbitrary or capricious when it refused to allow the Claimant to exercise his seniority onto an Assistant Foreman’s position?

It is the Organization’s position that Carrier laid in waiting – hiding behind the log – in an attempt to compile an anecdotal record to justify its actions. The Board made a grievous error when it sanctioned such action.

Based on the foregoing, Third Division Award 34054 should be considered flawed and lacking authority in future disputes.

Therefore a Dissenting Opinion is appropriate,

A handwritten signature in cursive script, appearing to read "C.A. McGraw".

C.A. McGraw, Labor Member
National Railroad Adjustment Board