

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36278
Docket No. SG-35898
02-3-99-3-915

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad Co. (former Southern Pacific):

Continuous claim on behalf of H.C. Steele for reinstatement to the position of Signal Foreman and for payment for all services rendered at the Foreman's rate of pay commencing on October 22, 1998 and continuing until the violation ceases. Straight time should be paid for all time worked during regularly assigned hours and overtime should be paid for all time worked outside of regular hours. Account Carrier violated the current Signalmen's Agreement, particularly Rules 53, 42, and 43, when it did not provide the Claimant with an investigation and assessed discipline against him without meeting the burden of proving the charges in connection with Carrier's disqualification of Mr. H. C. Steele on October 21, 1998. Carrier's File No. 1166001. General Chairman's File No. SWGC-1892. BRS File Case No. 11075-SP.”

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 facts in this case are clear and undisputed. The Claimant was employed as a Signal Foreman on the Los Angeles Division. He had been employed in this classification with a seniority date as Foreman of March 2, 1997, when, by letter dated October 21, 1998, he was notified that he was disqualified as a Signal Foreman. Following this action by the Carrier, the Organization on November 17, 1998, presented the claim as outlined in the STATEMENT OF CLAIM supra. The claim as presented was handled in accordance with the established grievance procedures at all levels on the property without resolution of the dispute. The case is therefore properly before the Board for a final and binding decision.

Throughout the handling of the dispute, the Organization took the position that the disqualification of the Claimant constituted an act of discipline in violation of the provisions of Rules 42, 43, and 53 of the Agreement. The pertinent language of these three Rules reads as follows:

"Rule 42 - PROMOTIONS TO HIGHER CLASS

- (a) Promotions shall be based on ability and seniority. Ability being sufficient, seniority shall prevail.
- (b) An employee accepting promotion will be granted thirty (30) working days in which to qualify.

Rule 43 - FAILURE TO QUALIFY

An employee failing to qualify within thirty (30) working days, may exercise his seniority in the seniority class from which promoted and displace the junior employee (if his junior) in such class. If there is no employee his junior in that class, he may displace the junior employee (if his junior) in the next lower seniority class in which his seniority will permit him to work.

Rule 53 - INVESTIGATIONS, DISCIPLINE AND APPEALS

- (a) An employee who has been in service more than ninety (90) calendar days, or whose application has been formally approved, shall not be disciplined or dismissed without a fair and impartial investigation, however, by mutual agreement with the Company, an employee may accept discipline proposed by the Company and waive, in writing, the right to a formal investigation.

* * *

- (e) In the event the charge is not sustained, it shall be stricken from the record and the employee reinstated if he has been removed from his position, and compensated for his net wage loss."

The Organization consistently argued that the Carrier had not provided any proof of its allegations, that the Claimant had not been disqualified within the time periods specified in Rules 42 and 43, and that the action of disqualification was arbitrary and capricious.

The Carrier's position is that none of the provisions of Rules 42, 43 or 53 are involved in this dispute. Rather, the Carrier argued that Rule 55 - UNJUST TREATMENT was the proper avenue to be followed if the disqualification was felt to be improper. The Carrier pointed out that no one ever requested a Hearing as provided for in Rule 55. The pertinent language of Rule 55 reads as follows:

"Rule 55 - UNJUST TREATMENT

An employee who considers himself unjustly treated, other than covered by these rules, shall have the right of conference with an officer of the department assisted by one or more duly accredited representatives, provided a written request setting forth his complaint is made to his immediate supervisor within sixty (60) days of the cause of complaint. Failing to dispose of the complaint in such conference, appeal may be taken in accordance with Rule 54."

The Carrier further argued that the Carrier alone has the right and responsibility to determine qualifications for a position and that the time periods specified in Rules 42 and 43 are not a bar to disqualification at any time that it becomes apparent that the employee is no longer qualified to properly function in a position. Such action, the Carrier insists, is not discipline subject to the provisions of Rule 53.

The issues involved in this case are not ones of first impression. See Second Division Awards 8550, 10948, 11064, 11528; Third Division Awards 20045, 21596, 24626, 29307, 31072, 34201, 36035, 36036; and Fourth Division Awards 3260 and 4542.

In an early decision found in Third Division Award 4687, we read:

“This Division has uniformly held that determination as to ability and fitness is exclusively a managerial function and will be sustained unless it appears that the decision of the Carrier was capricious or arbitrary; that the burden is on Claimant to establish that such was the case, and that if the decision of the Carrier is supported by substantial evidence it will not be disturbed.”

In fact, in the Organization’s Submission to the Board in this case, we read:

“It is well established that Carrier retains the fundamental right to determine fitness and ability for a particular position.”

and

“It is recognized that Carrier retains certain discretion in determining an employee’s continuing qualification for a position. . . .”

The record in this case contains more than substantial evidence to support the conclusion that the Carrier’s determination of the Claimant’s lack of qualifications to continue as a Signal Foreman was based on credible factual information. The October 21, 1998 letter of disqualification apprised the Claimant of eight specific examples of his malfeasance, misfeasance and nonfeasance as a Signal Foreman. The details of each failure or improper action were adequately outlined in the letter of disqualification. For reasons which are not apparent in the case record, neither the Claimant nor the

Organization chose to pursue this action within the specifically defined provisions of the Agreement, namely Rule 55 - UNJUST TREATMENT.

On the basis of the record as found in this case, it is the Board's conclusion that there has been no violation of Rules 42, 43 or 53 for the reason that those Rules are not applicable to the situation that exists here. Therefore, the claim is denied.

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 28th day of October 2002.