

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39005
Docket No. SG-38481
08-3-NRAB-00003-040438
(04-3-438)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers 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:

Claim on behalf of M. A. Toal, for reinstatement to his Signal Foreman's position and compensation for the difference in pay between the Signalman's rate he was receiving and the Signal Foreman's rate he should have received, account Carrier violated the current Signalman's Agreement, particularly Rules 68, 69 and 70, when it disqualified the Claimant from his Signal Foreman's position without just cause and failed to attend the Unjust Treatment Hearing. Carrier's File No. 1374447. General Chairman's File No. S-68, 69, 70-424. BRS Case File No. 12968-UP."

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 Organization initially contends that the Carrier violated the parties' Agreement when it disqualified the Claimant from his Signal Foreman position as a result of the Claimant's alleged responsibility in an activation failure that occurred on an unspecified date and without providing any detailed explanation as to why the Claimant was disqualified. The Organization asserts that it requested an Unjust Treatment Hearing, but the Carrier failed to attend. The Organization argues that because the Carrier failed to offer any proof of its allegations that the Claimant was not qualified, the Carrier should be required to reinstate the Claimant to his Signal Foreman's position and compensate him for lost wages.

The Organization maintains that because the Carrier failed to show up for the Unjust Treatment Hearing on the date agreed upon by the parties, it failed to justify why the Claimant should have been disqualified from his position as a Signal Foreman. The Claimant was not afforded an Unjust Treatment Hearing, so the Claimant never was given the opportunity to demonstrate his qualifications or defend himself against the allegation that he was responsible for an activation failure. The Organization emphasizes that the Carrier's failure to conduct the Unjust Treatment Hearing within the time limits set forth in Rule 68 violated the Agreement, resulting in unjust discipline without an investigation.

The Organization points out that the record establishes that Carrier representative Martin and the Organization's representative McArthur agreed to postpone and reschedule the Unjust Treatment Hearing to July 22, 2003. The record further shows that both of the Carrier representatives, Martin and James, were aware of this rescheduling, but one said that he forgot about the Hearing and the other blamed the Organization for failing to advise him of the change. The Organization notes that it was not the Organization's responsibility to notify the Carrier representative James of the rescheduling. In fact, the record shows that Martin notified James of the postponement and rescheduling. The Organization asserts that the Carrier went beyond Rule 68's time limits for conducting such a hearing, so the Organization progressed this matter under Rule 70, in accordance with Rule 69.

The Organization contends that the Board consistently has held that when an investigation does not meet the time requirements, the claim must be allowed as

presented under agreement provisions such as those cited in Rule 68. The Organization insists that because the Carrier failed to comply with Rule 68's procedure requirements, the Carrier forfeited its prerogative to impose discipline, such as arbitrary disqualification, on the Claimant. The Organization maintains that it was not sufficient for the Carrier to disqualify the Claimant based on allegations, and the Carrier's failure to meet this threshold requirement effectively nullified the Carrier's right to proceed. The Organization argues that because the Carrier clearly failed to comply with Rule 68's time requirements, it must be held that the Carrier forfeited its right to discipline the Claimant.

Addressing the Carrier's position that there was no violation of the time limits because the parties agreed to postpone and reschedule the Hearing, the Organization asserts that the fact that the Carrier did not show up on July 22, 2003, for the rescheduled Hearing, and the fact that the Carrier held the Hearing on October 28, 2003, establishes the Carrier's violation of the time limits. The Organization contends that the Carrier is misguided in its interpretation of the time limit rules, and its argument should be dismissed.

As for the Carrier's argument that the instant claim is moot because there was a Hearing on October 28, 2003, and as a result, the Claimant properly was disqualified from his position as Signal Foreman, the Organization insists that the claim is not moot. The Organization points out that the only evidence presented in this case was a statement from the Claimant and the other employees on his gang explaining what work they performed at Scully Road crossing. The Organization emphasizes that the gang's work primarily was all outside the signal bungalow, and there were no failures during operating tests watching north and south trains through the crossing. The Organization argues that the Carrier did not dispute any part of this statement, asserting only that the statement was improperly presented and self-serving.

The Organization asserts that the Carrier never identified what caused the alleged activation failure or what caused the Carrier to conclude that the Claimant was at fault for whatever happened. The Organization notes that the crossing was put into service on May 22 and the Carrier disqualified the Claimant on June 9, 2003. The Carrier failed to present any evidence that would indicate that any of the work that the Claimant and his gang performed on May 22 would have caused an activation failure.

The Organization insists that the Carrier had ample opportunity to present evidence in support of its disqualification of the Carrier, but it failed to do so. The Organization argues that the Carrier improperly disqualified the Claimant. The Organization emphasizes that before any determination of guilt or innocence may be made, the Claimant certainly is entitled to know what caused the Carrier to take such harsh action.

The Organization acknowledges that the Carrier has the prerogative to determine an employee's qualifications to perform the duties of certain positions. The Organization insists, however, that this prerogative does not encompass actions such as the disqualification of an employee without reason. The Organization points out that the Claimant already established that he is qualified for the position of Signal Foreman, and his disqualification without benefit of a proper explanation constitutes an arbitrary and capricious act. The Organization emphasizes that the Board repeatedly has held that a carrier is required to support its decision to disqualify an employee with specific reasons, and that arbitrary actions of this nature violate the rights of the affected employee. The Organization maintains that because the Carrier did not provide any evidence to support its position that the Claimant was not qualified to hold the Signal Foreman's position, it can only be concluded that the Carrier's decision was arbitrary and capricious.

The Carrier initially contends that the Organization has not argued the merits of the Unjust Treatment Hearing, nor has the Organization denied the fact that such a Hearing was held. Instead, the Organization is asking the Board to overturn the Claimant's disqualification as Signal Foreman regardless of the merits, based on the Organization's attempt to impose time limits for holding the Unjust Treatment Hearing when none exists in the controlling rule, Rule 70.

The Carrier argues that the only time limits contained in Rule 70 involve the question of whether the Claimant requested such a Hearing within ten calendar days of the cause of the complaint. The Carrier points out that this time limit is not in dispute. The Carrier asserts that there also is no dispute that the Claimant had the same right of hearing and appeal as provided in Rule 68 once the Claimant attended the Unjust Treatment Hearing on October 28, 2003. The Carrier asserts that the governing contractual provisions allow the Claimant an opportunity to have his day in

court on matters not otherwise covered in the Agreement and as to which the individual considers himself "unjustly treated."

The Carrier emphasizes that Rule 70 provides for an appeal process should the outcome of the Hearing fail to dispose of the complaint. The Carrier contends, however, that the Organization never appealed the decision from the Claimant's October 28, 2003 Hearing that sustained the disputed disqualification.

The Carrier insists that by alleging that Rule 68's time limits for holding a disciplinary hearing must also apply to a Rule 70 Unjust Treatment Hearing, the Organization has attempted to expand the Claimant's contractual rights and the Carrier's contractual obligations beyond what is set forth in the contractual language. The Carrier contends that the contractual language does not substantiate the Organization's position. The Carrier contends that because the Claimant was not charged with an alleged disciplinary infraction, Rule 68's time limits could not possibly apply to the Claimant's Unjust Treatment Hearing.

The Carrier argues that the Organization's failure to appeal the decision from the October 28, 2003 Unjust Treatment Hearing speaks volumes as to the veracity of the instant claim. The Carrier asserts that although the Organization cited Rule 69 as allegedly having been violated, the Organization has not demonstrated that Rule 69 was violated or that it even came into play. The Carrier contends that the only way in which Rule 69 might apply is through Rule 70's reference that a failure to dispose of a complaint through an Unjust Treatment Hearing may be appealed in accordance with Rule 69. The Carrier points out that the Organization did not appeal the decision from the Unjust Treatment Hearing, apparently abandoning such an appeal of the merits in favor of the procedural argument now before the Board. The Carrier contends that because the Organization failed to make any such appeal within 60 days of the Unjust Treatment Hearing, the Organization cannot now cry "foul" for its own failure to utilize the claims/grievance process of Rule 69 with regard to the Claimant's disqualification. The Carrier maintains that Rule 69 could not have been violated as the Organization apparently is alleging.

The Carrier points out that it is incumbent upon the Organization to demonstrate how the various Rules that it cited support its allegation of an Agreement violation. The Organization must establish how the cited Rules have been violated and

how the time limits for holding a disciplinary hearing apply to this "Unjust Treatment Hearing" case. The Carrier emphasizes that the Board consistently has held that the party who alleges an Agreement violation must show proof of the claim and prove a definite violation of the Agreement. Mere unsupported allegations do not constitute proof. The Carrier insists that by merely citing various Rules and contending that such Rules were violated, without any support whatsoever, the Organization failed to establish any basis to sustain the claim, and the claim therefore must be denied or dismissed in its entirety.

The Carrier argues that applying a disciplinary hearing time limit to an Unjust Treatment Hearing would yield the absurd result of having the Claimant reinstated to a position from which he properly had been disqualified. Such an absurd result would be tantamount to the Board rewriting the parties' Agreement, which the Board is not empowered to do. The Carrier asserts that the Organization is attempting to reinstate the Claimant to the position from which he was disqualified based on an alleged procedural defect when, obviously, none exists. The Carrier emphasizes that the Organization is attempting to achieve through arbitral fiat what it was unable to achieve through arms-length negotiations pursuant to the Railway Labor Act. The Carrier argues, moreover, that the Organization's failure to appeal from the October 28, 2003 Unjust Treatment Hearing demonstrates the fact that the Carrier correctly concluded that the Claimant properly had been disqualified.

The Board reviewed the record in this case, and finds that the Organization failed to meet its burden of proof that the Claimant was not properly disqualified from his position as Foreman. The record reveals that a Hearing was finally held on October 28, 2003, at which time the Claimant was then properly disqualified from his position as Foreman. Therefore, the Organization's claim that the Claimant was not properly disqualified because he was not afforded an Unjust Treatment Hearing pursuant to Rule 70 is without basis in evidence.

Nevertheless, the record reveals that this whole matter actually began with an incident that took place on May 22, 2003. The Organization timely requested an Unjust Treatment Hearing on June 13 and it was originally scheduled for July 1. The date of the Unjust Treatment Hearing was postponed from July 1 until July 22. The record reveals that Carrier representatives forgot about that Hearing on July 22 and failed to show up. The Organization filed a claim contending that the Carrier failed to

provide an Unjust Treatment Hearing and seeking that the Claimant not be disqualified from his previous position. The Carrier finally held the Unjust Treatment Hearing on October 28, 2003.

The Organization takes the position that the Claimant was subject to discipline in this case and, therefore, the Carrier had the responsibility of complying with Rule 68 in scheduling the Hearing within those time limits. However, the record is clear that what occurred in this case was not discipline but was a disqualification of the employee because the Carrier believed that he did not meet the requirements of the job. Nevertheless, that disqualification Hearing was originally scheduled for July 1 and then continued by agreement to July 22, 2003. The Carrier failed to show up for the July 22 Hearing, the date that was agreed to by the parties; and then the Carrier, on its own, scheduled the Hearing for October 28. At that time, the Carrier presented the evidence to support its disqualification of the Claimant.

Although there are no time limits set forth in Rule 70 with respect to the scheduling of an Unjust Treatment Hearing, other than the time limit as to when a written request must be made to the immediate supervisor, the Board believes that the Claimant's rights were violated by the failure of the Carrier to show up for the Hearing on the agreed-upon date of July 22 and then for the Carrier to not actually set forth the evidence as to why it disqualified the Claimant until October 28, 2003. That three-month delay between July 22 and October 28 was inexcusable. The Board finds that it is fundamental that Rules 68, 69, and 70 contemplate a timely Unjust Treatment Hearing so that the employee can be made aware of the reasons for his disqualification from his position and given an opportunity to file a claim challenging the decision of the Carrier. The Board finds that the delay from July 22 to October 28 was unreasonable and, therefore, the Claimant should be paid the difference in his pay from the amount that he was receiving in his Signal Foreman's position and the Signalman's rate that he had been reduced to after his immediate disqualification in June. Because neither the Organization nor the Claimant filed a claim challenging the results of the Unjust Treatment Hearing that took place on October 28, the Board cannot award any relief to the Claimant after that date.

Consequently, the Board finds that the claim is allowed in part and denied in part. The Board finds that the Carrier properly held an Unjust Treatment Hearing which found that the Claimant was properly disqualified from his Signal Foreman's

position. The Claimant's claim asking to be returned to the Signal Foreman's position is denied. The Board also finds that the Carrier delayed the holding of that Unjust Treatment Hearing for an unreasonable length of time, when it should have been held as scheduled by the parties on July 22, 2003. Therefore, the Board orders that the Claimant receive backpay in the amount of the difference between the Signal Foreman's rate of pay and the Signaller's rate of pay for the period July 22 through October 28, 2003.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of March 2008.