

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39379
Docket No. SG-38721
08-3-NRAB-00003-050034
(05-3-34)

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

PARTIES TO DISPUTE: (**Brotherhood of Railroad Signalmen**
(**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 E. E. Colon, for compensation for lost wages including overtime and to be returned to his Signal Maintenance Foreman’s position, account Carrier violated the current Signalmen’s Agreement, particularly Rules 68 and 70, when it failed to provide the Claimant or his representative with a copy of the transcripts of the proceedings and failed to give any reason for the Claimant’s disqualification as a result of an unjust treatment hearing held on September 30, 2003, in Spring, Texas. Carrier’s File No. 1387664. General Chairman’s File No. S-68, 70-442. BRS File Case No. 13022-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 events giving rise to the instant dispute are as follows.

By letter dated September 1, 2003, the Carrier advised the Claimant as follows:

“This is to notify you of disqualification as Signal Maintenance Foreman effective September 2, 2003.”

By letter dated September 2, the Claimant made a formal request for an Unjust Treatment Hearing. On September 11, 2003, the Carrier faxed to the Organization a detailed letter explaining the reasons underlying the Claimant’s disqualification. The reasons were provided by C. J. Jacobson, the Claimant’s manager and immediate supervisor.

Following the Unjust Treatment Hearing held on September 30, 2003, the Claimant’s disqualification was upheld and communicated to the Claimant by letter dated October 8, 2003. A series of communications took place between the Carrier and the Organization relative to the Claimant’s disqualification wherein the Organization maintained that the method and manner in which the Carrier disqualified the Claimant violated Rules 68 (Investigations, Discipline and Appeals) and 70 (Unjust Treatment). The Carrier denied that it violated either Rule. More specifically, it is the Organization’s claim that:

- The Carrier failed to provide the Claimant with a copy of the transcript of the Unjust Treatment Hearing proceedings until after the time for his appeal had expired.
- The Claimant was not provided the specific reasons underlying the Carrier’s decision to disqualify him from the position of Signal Maintenance Foreman prior to the Unjust Treatment Hearing.
- The Carrier’s decision to disqualify the Claimant was arbitrary and capricious.

Following a careful review of the record and for the reasons that follow, the instant claim will be sustained in part and denied in part.

Relative to its position regarding Rule 68, it is the Organization's position that the Claimant is due a transcript of the Unjust Treatment Hearing proceedings. The Carrier disagrees, maintaining that its only obligation to furnish a copy of a transcript lies when a claimant is involved in a disciplinary proceeding. In this regard, the Carrier asserts that a disqualification proceeding is different from a disciplinary proceeding and accordingly, it has no contractual obligation to provide a transcript in this disqualification proceeding. Established case precedent supports the Carrier's position that disqualification does not constitute discipline. (See, e.g., Third Division Awards 33903, 33917, and 34201 together with cases referenced therein.) That does not end the inquiry however. Rule 70 provides, in relevant part, that "[a]n employee who considers himself unjustly treated . . . will have the same right of hearing and appeal as provided in Rule 68(B) if written request is made to his immediate supervisor within ten (10) calendar days of cause of complaint." Rule 68(B) provides in relevant part:

"In cases wherein the Claimant is being held out of service, a decision will be rendered and the employee notified within fifteen (15) calendar days after the completion of the investigation. If discipline is to be assessed, a transcript of the testimony taken at the investigation will be furnished to the employee under charge and his representative within fifteen (15) calendar days after the close of the investigation. In cases where the Claimant is not being held out of service, a decision will be rendered and the employee notified within thirty (30) calendar days after the completion of the investigation. If discipline is to be assessed, a transcript of the testimony taken at the investigation will be furnished to the employee under charge and his representative within thirty (30) calendar days after the close of the investigation."

While it is reasonable to conclude that because a disqualification is not considered discipline, ipso facto, the Carrier is not obligated to furnish a copy of the transcript of the proceedings to the Claimant, there is a practical side to Rule 68(B) that bodes in favor of the Claimant. In this regard, it is clear that Rule 68(B) in providing the Claimant's right to a copy of the transcript anticipated the realistic possibility that an appeal could be taken from the Carrier's decision in disciplinary matters. Where any such appeal may be taken, the transcript provides a first-hand review of the proceedings and provides the basis for a more efficient process where neither side is disadvantaged. In the instant matter, where, as here, the Claimant opts to appeal the Carrier's decision as is his right under Rule 70, the Carrier's refusal to

furnish him with a copy of the transcript places the Claimant at a distinct disadvantage and does not do justice to the process. Accordingly, the Board concludes that where the Claimant and/or his representative provides the Carrier with written notice of intent to appeal, the Carrier is obligated to furnish a copy of the transcript to the Claimant or his representative no later than 30 calendar days following the completion of the Investigation.

The Organization's claim regarding the lack of specific reasons and its claim that the Carrier's decision to disqualify the Claimant was arbitrary and capricious can be reviewed together.

While well established arbitration precedent provides the Carrier with a wide degree of discretion in its evaluation of employees, it is also well established that such discretion is not unfettered. Perhaps best stated by the Board in Second Division Award 11633:

"The Board has consistently recognized that Carriers retain what Fourth Division Award 756 calls 'reasonable . . . bounds of discretion . . . (to) . . . determine qualifications for a particular position' when employees bid on positions, and that it is hesitant to substitute its judgment about 'adequate skills.' (See Second Division Award 8550; Fourth Division Award 756; also Second Division Awards 7263, 7415, 8166). At the same time, however, the Board has also held that such discretionary decisions by management, in conjunction with contractual seniority provisions, cannot be done in an arbitrary or capricious manner. In Claims such as this the burden of proof lies with the Organization as moving party. (Third Division Awards 15670, 25575; Fourth Division Awards 3379, 3482; PLB 3696, Award 1)."

Using the foregoing Award as guidance, in order for the Carrier's position to be upheld, there must be credible evidence in the record which provides a reasonable basis for the Carrier's decision to disqualify the Claimant. As an initial matter, the Board notes that pursuant to Rules 68 and 70, the Claimant must be provided with the specific allegations upon which the Carrier will rely in its move to disqualify the Claimant in advance of the Unjust Treatment Hearing proceedings so that both the Carrier and the Organization have a basis upon which to prepare for the Hearing, or, in the alternative, to accept the Carrier's decision and forego the hearing process. This obligation on the Carrier will provide for a more just and efficient process.

In reviewing the transcript of the Unjust Treatment Hearing, while the Board has no intention of substituting its judgment for that of the Carrier relative to the qualifications for any position, it is noteworthy that while the Claimant held the Signal Maintenance Foreman position for two years and during such time worked under the direction of Manager Signal Maintenance C. J. Jacobsen, there was not one iota of evidence demonstrating that prior to the move to disqualify the Claimant, that the Claimant was put on notice of any deficiencies. Without more, therefore, the Board could reasonably conclude that the Carrier viewed the Claimant's performance as satisfactory during this time period. However, we recognize the listing of concerns registered by Mr. Jacobsen, and we also note the Claimant's response to those concerns as contained in the transcript of the proceedings. Following our review of the transcript, it is painfully apparent to the Board that at best, the Claimant was not clearly apprised of the qualifications for his position. Accordingly, we find that an appropriate remedy in the instant matter is one that restores the Claimant to the position of Signal Maintenance Foreman within 30 days of the adoption of this Award, but with no backpay. The Carrier shall be obligated to provide the Claimant with the reasonable expectations/qualifications for his position, and shall be further obligated to provide the Claimant with a reasonable period of time to determine if he has performed the qualifications of his position in a satisfactory manner.

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 8th day of December 2008.

**CARRIER MEMBER'S DISSENT
TO
THIRD DIVISION AWARD 39379; DOCKET SG-38721**

(Referee Dennis J. Campagna)

In rendering its decision, the Majority exceeded its authority granted pursuant to the Railway Labor Act. The Majority took it upon itself to essentially write new contract language, which purports to require the Carrier to furnish a transcript within 30 days after an Unjust Treatment Hearing granted pursuant to Agreement Rule 70. The referenced language, which appears at Page 4 of the Award, reads as follows:

“Accordingly, the Board concludes that where the Claimant and/or his representative provides the Carrier with written notice of intent to appeal, the Carrier is obligated to furnish a copy of the transcript to the Claimant or his representative no later than 30 calendar days following the completion of the Investigation.”

No language in the parties' Agreement requires the Carrier to furnish an Unjust Treatment Hearing transcript by “. . . no later than 30 calendar days following the completion of the Investigation.” Restrictions such as this are to be negotiated by the parties rather than imposed by a Section 3 tribunal. As the Board stated in Third Division Award 20956:

“It is quite obvious that the clear purpose and intent of Rule 51 is to set forth standards and periods of time during which sick leave pay will be allowed. However, we see no provision or language to that effect, in Rule 51 which establishes an exception to Rule 6 on prompt bulletining of vacancies. Nor are we authorized to insert such provision where none exists. Prior Awards of this Board are legion on the established principle that the Agreement must be applied and interpreted as written and as negotiated between the principals.”

Thus, that portion of Award 39379 which purports to add a time limit provision to the parties' Agreement via arbitral fiat exceeds the Board's authority. Because the above-quoted portion of the Award lacks enforceability, this Dissent is mandated.

Michael C. Lesnik

Michael C. Lesnik, Carrier Member

January 22, 2009