Award No. 16285
Docket No. TE-17157

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

SOUTHERN PACIFIC COMPANY
(Pacific Lines)

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Southern Pacific Company (Pacific Lines), that:

1. Carrier acted improperly and without just cause when effective May 9, 1967 it dismissed M. S. Schumacher, regular occupant of the first shift towerman's position, College Park Tower, San Jose, California, from its service.

2. Carrier shall restore M. S. Schumacher to its service with all rights unimpaired for compensation lost.

OPINION OF BOARD: On April 18, 1967, Claimant was removed from service and charged with insubordination for his alleged refusal to comply with Assistant Superintendent's instructions to copy train orders at College Park Tower, San Jose, California. Following investigation held on May 2, Claimant was dismissed from service.

We have reviewed the entire record and find that Carrier has not established a clear-cut case of insubordination against Claimant.

Claimant entered service of Carrier as assistant signalman in 1940. He transferred to position of towerman on January 5, 1942. In 1944 he became the regular occupant of a leverman position at College Park Tower, and continued in that capacity for 23 years until removed from service. Train orders were not handled at the tower during these years.

On April 11, 1967, due to a change in operations, Carrier reclassified the three leverman positions at College Park Tower to towerman-telegrapher-clerk, and made the handling of train orders a part of their assigned duties. In anticipation of this change, Carrier had previously installed train order equipment. Carrier then notified the occupants that they would be afforded ample opportunity to qualify themselves as train order operators. There is no evidence that Claimant objected to the proposed change. He accepted the assistance offered by Carrier and made every effort to qualify himself prior to reclassification. However, Claimant was then sixty-two years old and had

no prior training whatever in handling train orders. Despite all efforts to qualify, he became convinced that the added duties were beyond his capacity.

Although Claimant was removed from service on April 18, Terminal Agent Conner was questioned at the investigation about what happened during Claimant's tour of duty on April 13. He was preparing to copy his first train order from the train dispatcher. The Terminal Agent made the following statement:

> "We had considerable conversation over the matter. I was with Mr. Schumacher prior to the time he contacted the dispatcher for train orders. I went over the procedure of copying them and repeating them. He said he felt that he could handle the copying of a train order and got on the telephone and called the dispatcher for the required orders. The dispatcher started to give him the train order. He copied the train order number and engine number and threw up his hands and said he couldn't possibly copy the train order, that he was too nervous."

Claimant then became so upset and sick that the Terminal Agent granted him permission to go home. He remained off duty until April 18, when the Assistant Superintendent and the Terminal Agent came to the tower and were unsuccessful in their efforts to have Claimant copy train orders. The disastrous results of his first train order attempt with one officer present were too fresh in his memory for an encore in the presence of two officers. The Assistant Superintendent testified that Claimant said his health came first and he just couldn't copy orders.

It is clear that Claimant did not possess the necessary qualifications, fitness and ability to handle train orders on the date his leverman position was reclassified. In fact, it was Petitioner's position at the investigation and in all subsequent handling that Claimant was incompetent to perform the train order duties and should have been disqualified. By failing to disqualify him, Carrier deprived Claimant of his rights to exercise his seniority under Rule 14 (f) which provides:

> "If an assigned employe proves incompetent he shall revert to the extra list, retaining his seniority except an employe disqualified following reclassification of a position to which assigned shall be privileged to exercise seniority under Rule 21."

Based on all the facts, we hold that Claimant's dismissal from service was improper and that carrier violated the plain terms of Rule 19 (f). The Carrier is ordered to reinstate Claimant, with seniority rights unimpaired, and with compensation for time lost on position that he could have acquired in exercise of his seniority under Rules 19 and 21, less any earnings he made in other employment.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of May 1968.

CARRIER MEMBERS' DISSENT TO AWARD 16285, DOCKET TE-17157 (Referee Devine)

Carrier gives us the following analysis of Claimant's probable ability to do the thing which he refused to do:

> ". . . The claimant's alleged incompetency to reduce to writing on April 18, 1967, Train Order No. 154, reading, 'ENG 3447 RUN EXTRA SAN JOSE YARD TO WARM SPRINGS' is absurd on its face and his refusal to do so or even attempt to do so when instructed by proper authority was purely insubordinate.
>
> While the petitioner suggests that carrier had the alternative of disqualifying claimant, **his voluntary incompetency was not grounds for disqualification** and the penalty for insubordination is clearly stated in carrier's rule." (Emphasis ours.)

All parties agree that an employe must be able to demonstrate that he is fully qualified for a position. The Employes tell us in their Statement of Facts:

> ". . . **Carrier, of course, demands demonstration of fitness and** ability, and we may add, **should be satisfied with nothing less. . . .**" (Emphasis ours.)

It is also agreed that an employe has no right to disqualify himself from a position he has come to dislike by falsely pretending that he cannot do a simple act which he clearly can do. The real issue in this case was whether Claimant was pretending.

If Carrier's analysis is wrong and Claimant was not pretending but rather was so completely lacking in ability and composure that he could not attempt, with the aid of supervisors, to copy a simple ten word order on this occasion, then it is inconceivable that he has sufficient composure and ability to qualify for any position coming under the agreement with the Telegraphers.

Unless Claimant can demonstrate his complete ability to fill another position, he is entitled to nothing under the Award. In fairness to other employes who will be affected and to Carrier, when Claimant now attempts to prove his qualification for another position, he should be estopped from claiming greater ability than that which he professed in seeking disqualification from the position he held.

Claimant was dismissed for refusing to attempt to copy a simple ten word order in the presence of supervisors, and thereby demonstrate to them his actual ability, or lack of it. Claimant's supervisors were entitled to require such a demonstration and the above-quoted statement of the Employes clearly admits this right. It seems unbelievable to us that Claimant did not have sufficient ability to participate in this demonstration and write down ten short words as they were clearly pronounced and spelled out by the dispatcher, yet that is the decision of the Referee and Labor Members in this case. Having placed this low estimate on Claimant's ability, we wonder how they can now suggest that he might qualify for any position coming under the agreement with Telegraphers!

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