Award No. 18124
Docket No. SG-18507

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John B. Criswell, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

SOUTHERN PACIFIC COMPANY
(Pacific Lines)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Southern Pacific Company that:

(a) The Southern Pacific Company violated the Memorandum of Agreement between the Southern Pacific Company and its employes represented by the Brotherhood of Railroad Signalmen, effective September 1, 1965, which provides for a Training Program for Assistant Signalmen and Assistant Signal Maintainers, and particularly Sections 3 and 6(b) and Section 4 of amended Memorandum of July 3, 1967.

(b) Mr. R. L. Richardson be restored to his position of Assistant Signalman, with seniority and all rights restored, including lost wages, and that it be considered that he has passed Examination No. 3 as of June 17, 1968. (Carrier's File: SIG 133-16.)

EMPLOYES' STATEMENT OF FACTS: May 27, 1968, Assistant Signalman R. L. Richardson, who was working in the Sacramento, California signal shops, was given his third (3rd) progressive examination under provisions of an Assistant Signalman's training program which became effective September 1, 1965. Passing score on the examination was 70%. Mr. Richardson scored 68%, correctly answering 64 of the 94 questions making up the examination.

June 17, 1968, Mr. Richardson was re-examined as required by the Assistant training program, the pertinent parts of which read as follows:

"MEMORANDUM OF AGREEMENT
between
SOUTHERN PACIFIC COMPANY (PACIFIC LINES)
and its employes represented by the
BROTHERHOOD OF RAILROAD SIGNALMEN

* * * * * * * * *

IT IS AGREED THAT effective September 1, 1965, a training program will be established for assistant signalmen and assistant signal maintainers as follows:

denied same by letter dated November 6, 1968 (Carrier's Exhibit Q) as follows:

"As fully discussed with you in conference, the seniority of the claimant in this case was terminated, as required under paragraph 3 of the training program agreement applicable to assistant signalmen, upon his failure to pass a re-examination. The method used to grade said re-examination was the same method (i.e., to administer to the employes the entire examination for their additional educational benefit, but **grade them only on that portion previously failed)** that had been used to grade such re-examinations of assistant signalmen on the property for over two years, without protest from the Organization, and a method which was admittedly specifically discussed with the then-General Chairman of the Organization on May 18, 1966, prior to its being uniformly applied and thus without question well-known to the Organization. Prior to the submission of this claim, the Company had every right to believe that the Organization fully concurred in the manner in which re-examinations were being graded and the manner in which the agreement provisions in this respect were being interpreted.

During the time the training program agreement has been in effect, your Organization has been kept fully informed as to the manner in which it is being administered by the Company. You have been and are being furnished copies of records being kept by the Company as to the status of individual assistant signalmen under the program so that you may be fully informed. Since the program was established in 1965, a number of amendments and revisions have been made in the agreement at your informal request, to deal with problems that have arisen, including a revision of this agreement signed October 21, 1968, in which the provisions of paragraph 3 having to do with grading of re-examinations was, at your request, revised, effective November 1, 1968.

Every effort has been made and will continue to be made by the Company to administer this program in a fair and impartial manner within the framework of agreement provisions. The claim presented is without proper basis and is denied."

Copy of the General Chairman's reply to that letter, dated November 11, 1968, is attached as Carrier's Exhibit R.

(Exhibits not reproduced.)

OPINION OF BOARD: On Sept. 1, 1965, the parties signed a Memorandum of Agreement covering the training of assistant signalmen and assistant signal maintainers. It provides for a series of tests and Section 3 of the Memorandum says, in part:

". . . Assistants who fail to pass any of the progressive examinations **will be given** a **re-examination on the portion which they failed** within thirty (30) days from date of failure. . . ." (Emphasis ours.)

The Memorandum provides a passing score to be 70%. On his third examination, Claimant's score was 68%. He answered 64 of 94 questions correctly. Within the prescribed 30 days he was re-examined.

Upon re-examination, Claimant was required to answer all 94 questions. Only those sections which he failed before were considered in grading of the re-examination. This gave him a score of 53.4%. He was then dismissed from service of the Carrier.

It is the position of the Organization that the language of the Memorandum of Agreement of September 1 is clear and requires that trainees will be re-examined only on the material which they failed, and not the entire list of questions, no matter how the grading is accomplished.

It is the position of the Carrier that the addition of the entire list of questions on re-examinations is a "help" to the trainee, that it is an "ungraded refresher examination" — a position with which we cannot agree. The Memorandum provides only the failed portion will be "given", not "graded".

The parties amended the Agreement cited above subsequent to the filing of this claim. It now allows Carrier to give trainees entitled to re-examination the entire list of questions and have the entire list graded to determine the final score.

It is clear to this Board that the parties drafting the September 1 Memorandum intended clearly that trainees, on re-examination, would be questioned on "the portion" they had failed. These tests are not permissive with the Carrier, but tests given under the provisions of a fairly bargained Memorandum. Carrier had no right to give the additional "help" or "ungraded refresher examination", just as it had no right to deny a re-examination.

In reinstating the Claimant to service of Carrier, this Board places him in the position he found himself immediately before the incident at question occurred — as a trainee standing for re-examination of the third step under existing rules. This Board would not and could not move Claimant ahead in his training program. The safety factor, raised in presentation of the case, is not at issue. Claimant is simply reinstated to his former position and through the proper application of testing procedures will move to final full employment for regular assignment or fail.

Much is made of a so-called "oral agreement" between this Carrier and a former General Chairman. The parties are in substantial dispute about whether such an "oral agreement" existed, how it might have been applied. It is only clear that the Carrier, from time to time, graded tests as they did with the Claimant and at other times as we find they should under the Memorandum Agreement.

Carrier's representatives would have us believe there was an admitted "oral agreement" which was practiced system-wide and thus controlling. This is disputed to our satisfaction. We must base our findings on the written Memorandum and interpret what we find therein.

It has been held by this Board, in Interpretation to Award No. 9216 (Schedler), and other awards, that Carrier is "entitled to take credit for earnings of the Claimant in computing his net wage loss." Carrier argued this to apply in the case at hand, and we agree.

We sustain the claim to the extent outlined in the Opinion of Board.

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 to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1970.

CARRIER MEMBERS' DISSENT TO AWARDS 18124, 18125

(Referee Criswell)

As Award 18124 clearly shows on its face, the controlling agreement simply reserved to these Claimants a right to be re-examined within 30 days on the portions of the examination which they failed. It is frankly admitted that each one of the Claimants was in fact given a timely re-examination on all the parts of the examination he originally failed and that each of them again failed miserably. While the passing grade was 70%, Claimant Gish scored 48.4% on the re-examination; Claimant Williams scored only 61.6% on the re-examination; and Claimant Richardson scored only 53.4%.

The claims are partially allowed on the flimsy pretext that the Claimants' rights were violated by the mere fact that in addition to being given a graded re-examination on the portions of the examination which they originally failed, Claimants were given an ungraded refresher examination on the portions which they did not originally fail. There is no dispute about the fact that Claimants were all allowed ample time to answer all questions, both graded and ungraded. There is no showing that prejudice did result or could possibly have resulted from the answering of the ungraded questions. Through some oversight on two of Carrier's Divisions, the employes who were re-examined after failing the examination were only required to answer the questions previously failed, and there is no showing that the percentage of employes who passed the second examination on those two Divisions was significantly different from the percentage who passed on the majority of Divisions where all questions were answered. As a matter of fact, Petitioner has only mentioned a single employe who passed the second examination on those two Divisions.

The questions thus presented are simply whether any agreement right of the Claimants was violated by the mere fact that they were required by Carrier to take an ungraded refresher examination on portions of the examination which they originally answered correctly; and, if so, the damages properly allowable.

Significantly, the Employes cited no rule of the agreement that prohibits Carrier from giving an employe an ungraded refresher examination. In the absence of such an agreement restriction it is well established by the decisions of this Board that Carrier may require employes to take examinations.

These awards are palpably erroneous because no rule of the agreement prohibited the giving of the ungraded refresher examination. They are also erroneous because the precise procedure that was followed in giving the examination was discussed with the General Chairman and was admittedly acquiesced in by him and all employes affected during the years immediately following the adoption of the rules involved. Claimants themselves found nothing wrong with this procedure and neither they nor any other employe voiced an objection thereto until after these Claimants had failed their examination and the scent of an unjust monetary claim was in the air; Claimants should therefore be estopped from prosecuting the claims.

Finally, these awards are erroneous because Claimants failed to prove that taking the refresher in any way interfered with their efforts to achieve a passing grade on the graded questions. No causal relationship was ever established between the giving of the ungraded refresher and Claimants' failure to pass the graded portion of the examination. Hence, even if the giving of the refresher had been a violation of the agreement, it would have been a purely technical violation, which would not have caused any loss other than the actual time required to answer the ungraded questions.

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