

## NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award No. 30119

Docket No. SG-29864

94-3-91-3-237

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen  
(  
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Norfolk and Western Railway Company (N&W):

On behalf of Mr. R.A. Driscoll, Signal Foreman, Signal Gang #663, Eastern Region; assigned work days Mondays through Saturday's rest days Sundays, that:

- A. Carrier violated the rules of the Signalmen's Agreement, in particular Rule 504(a), when, on March 8, 1990, Carrier disqualified Mr. Driscoll as Signal Foreman after he had actually worked as Signal Foreman on Signal Gang #663 a total of only fifteen days.

Mr. Driscoll was promoted to Signal Foreman, Signal Gang #663, on Eastern Regional Bulletin #278, effective February 5, 1990. Mr. Driscoll actually worked supervising Signal Gang #663 on February 5, 12, 13, 14, 15, 20, 21, 22, 26, 27, 28, and March 5, 6, 7, 8, 1990, a total of only fifteen days actually worked when Carrier disqualified him in a letter dated March 8, 1990, which was hand delivered to him on March 6, 1990.

Rule 504(a) provides for disqualification at the expiration of thirty days actually worked. Rule 504(a) was violated when Carrier disqualified Mr. Driscoll after he had actually worked only fifteen days as Signal Foreman on Signal Gang #663.

- B. Carrier should now reinstate Mr. Driscoll to the position of Signal Foreman, Signal Gang #663, and make him whole for all wages, expenses, and benefits lost, commencing Saturday, March 9, 1990, and continuing until the violation cited in Part A is corrected. Carrier file SG-ROAN-90-3. BRS Case No. 8353.N&W."

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 waived right of appearance at hearing thereon.

Effective February 5, 1990, Claimant was assigned by Bulletin #278 as Foreman on Gant #663 at Norfolk, Virginia. Subsequently, by letter dated March 8, 1990, Claimant was informed that effective at the close of work on March 8, 1990, he was disqualified as Signal Foreman "based on our observation of your performance during the past thirty days." During the period from February 5, 1990, to and including March 8, 1990, Claimant actually worked as Signal Foreman a total of 15 days. The Organization claimed that under the provisions of Rule 504(a) of the Agreement, Claimant was entitled to "thirty days actually worked" before he could be disqualified from the Signal Foreman assignment.

Rule 504(a) reads as follows:

"Rule 504

- (a) An employee accepting promotion to a position under the scope of this agreement and failing to qualify at the expiration of thirty days actually worked will forfeit seniority in the class and in any lower class or classes in which he established seniority by reason of his promotion, and may exercise a displacement in accordance with this agreement."

The Board has consistently held that the Carrier alone has the right and prerogative to determine the fitness, ability and qualifications of an applicant for a position and that such determination will not be set aside by the Board unless it can be shown by probative evidence that the determination was made in an arbitrary or capricious manner. The Board has also held that fitness and ability are not tantamount to qualification. Under the Rule here being considered, the Carrier has the right to determine the employee's qualifications within a period of thirty days. Once that determination has been made by the Carrier, the burden of

proof to come forward with positive evidence to support the contention that Carrier's decision was arbitrary or capricious shifts to the Organization.

The Organization in this case argues that Rule 504(a) somehow creates a demand right that the employee must be allowed to actually work on the assignment for a full thirty days before he/she may be disqualified. The Board does not read Rule 504(a) as a guarantee that the employee must be permitted to remain on the assignment for a full thirty days before being disqualified. This position was lucidly set forth in Third Division Award 13471 almost thirty years ago when it was ruled as follows:

"The Claimant in this case worked 4 full days on this new position and was declared disqualified on the 5th day. The Carrier, as was stated previously, has 30 days within which to make a decision; depending on the facts in a given case, the arbitrary and capricious concept is counter balanced by the reasonable concept. It is quite conceivable that in a particular situation, one day might be considered reasonable, whereas in another it might be 5 or 15 days. From a consideration of the facts in this case, it is our judgment that Carrier has been reasonable in the handling of this case. The Organization has failed in its burden of proof to convince us that Carrier's action was arbitrary and capricious. We will deny the claim."

This principle was repeated and supported by Third Division Awards 23870, 24516 and 25008.

Therefore, it is the conclusion of the Board in this case, on the basis of the evidence, that Carrier's determination of disqualification of the Claimant was not arbitrary, capricious or in violation of the requirements of Rule 504(a).

A W A R D

Claim denied.

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NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Catherine Loughrin / lw  
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 4th day of April 1994.