

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36836
Docket No. SG-36436
04-3-00-3-701

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Port Authority Trans-Hudson Corporation (PATH))

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Port Authority Trans-Hudson Corporation:

Claim on behalf of D. E. Davis for compensation at the Signal Trainee rate of pay beginning on September 1, 1999 and continuing, and for the Claimant to be allowed to participate in the Signal Trainee Program beginning in September of 1999, account Carrier violated the current Signalmen’s Agreement, particularly Article X, when it improperly placed the Claimant on probation without benefit of a fair and impartial hearing. BRS File Case No. 11240-PATH.”

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.

After Investigation on November 5 and by letter dated November 13, 1998, the Claimant was dismissed on the basis of charges that he operated a train past a stop signal. At the time, the Claimant (who was in train and engine service) was represented by the Brotherhood of Locomotive Engineers (BLE).

A letter dated December 28, 1998 shows that the Claimant was returned to service after his discharge. In addition to being signed by the Carrier, this letter was also signed by the BLE General Chairman on behalf of the BLE and on behalf of the Claimant on February 16, 1999. The December 28, 1998 letter reads, in relevant part, as follows:

"I have been advised by PATH staff that, based on your prior record and BLE General Chairman Dennis Henry's request, you have been furnished alternate employment with the Carrier (Assistant Signal Repairman - Step #1). You also agreed, in consideration of this accommodation, to accept full responsibility for the above violation and a discipline of fifty-seven (57) days suspension for duty without pay."

The Claimant started working in the Signal Department during the last week of December 1998.

The Claimant applied for a Signal Trainee position pursuant to a bulletin issued February 4, 1999. In pertinent part, the bulletin provided:

Performance Appraisal: An acceptable rating by the candidate's immediate supervisor including a critical review of the candidate's performance, disciplinary and attendance record. An unsatisfactory appraisal, attendance record and/or pending disciplinary record will disqualify candidate from this promotional opportunity."

The Claimant was notified by memo dated March 10, 1999 that he did not meet the requirements for the Signal Trainee position because of prior disciplinary

action. Therefore, the Claimant was denied the Signal Trainee position because of the prior disciplinary action taken against him when he was working in train and engine service and represented by the BLE.

Article VI-A, Qualification and Seniority, of the BRS Agreement provides:

“Requirements to qualify for classes of employment covered or which may become covered by this agreement and/or specific job titles, if any, which are now or may become encompassed within the said classes of employment shall be determined by PATH.”

Thus, in addition to the generally accepted concept that the Carrier has the right to determine qualifications of employees, that right exists by specific provisions in the involved Agreement. In addition to those general and contractual rights concerning who determines qualifications, the Signal Trainee bulletin stated that the Carrier was going to require “. . . a critical review of the candidate’s performance, disciplinary and attendance record” for the position.

Under the circumstances of this case, the Carrier’s determination that the Claimant’s prior disciplinary record (albeit one which was established while he was in another craft) disqualified him from the Signal Trainee position was not an arbitrary decision. The Claimant was discharged and, through what appears to be an act of leniency in response to the BLE’s request, the Carrier gave the Claimant another chance for employment with the Carrier - this time in the Signal craft. Given the timing of the Claimant’s discharge, his return to service and application for the Signal Trainee position, it was not arbitrary for the Carrier to want to see more of a demonstration from him concerning how he was going to work out before giving him promotional opportunities.

The fact that the December 28, 1998 letter concerning the Claimant’s discharge was not signed until after the incidents began to unfold in this case (it was signed by the BLE on February 16, 1999 and the job bulletin was posted on February 4, 1999) does not change the result. There is no dispute that the Claimant was discharged and was then given the opportunity to work in the Signal craft. Moreover, as the Claimant’s representative at the time of the events concerning the Claimant’s discharge and return to service, the BLE General Chairman who signed

that letter had full authority to sign and agree to its terms. The Claimant's asserted lack of knowledge of the contents or implications of the letter does not change the result. Indeed, it was through the BLE General Chairman's efforts that the Claimant was even given another opportunity to remain employed with the Carrier.

Thus, arguing that the Claimant was (or was not) placed on "probation" misses the point. The Carrier had the right to determine qualifications for the Signal Trainee position; it notified candidates that prior disciplinary records would be considered in determining qualification for the position; the Claimant had a prior disciplinary record (a recent discharge); and the Carrier determined in a non-arbitrary fashion that the Claimant was not qualified. The Organization's burden has not been carried.

Therefore, under the circumstances, we cannot concur with the Organization that the Claimant was entitled to an Unjust Treatment Hearing to ascertain whether he was in a "probationary" status. This was a qualifications case and not a disciplinary matter. Finally, in light of the result, the Carrier's timeliness argument is moot.

The claim will therefore be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s), _____, be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of January 2004.