

PUBLIC LAW BOARD NO. 526

PARTIES	}	BROTHERHOOD OF RAILROAD SIGNALMEN
TO		VS.
DISPUTE		THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT
OF CLAIM

- a) The Western Pacific Railroad Company violated the Current Signalmen's Agreement dated September 1, 1949 (Reprinted July 1, 1961), and particularly Rule 71.
- b) That Mr. Howard be reinstated to his former position of Signal Test Foreman, Sacramento Signal Shop, with full Seniority and all rights restored.
- c) That Mr. Howard be compensated for all time lost at his former Foreman's rate of pay from October 15, 1969 until he is rightfully restored to his former position.

OPINION OF THE BOARD

The claimant in this case, Mr. L. W. Howard, was first employed by the Carrier on January 29, 1957, and held positions of Signalman, Lead Signalman and Signal Maintainer up to October 1, 1962, at which time he was assigned to the position of TCS Maintainer at the Carrier's headquarters at Franklin, California. On November 11, 1964, following an investigation, the claimant was discharged because of his failure to devote himself to his duties and to maintain properly his district. However, on December 7, 1964, the claimant was reinstated to service as a Signalman in the Sacramento Shop Signal Gang on a leniency basis, subject to the condi-

tion that he would be restricted to positions in which he would be under the direct supervision of a Foreman or other supervisor as directed.

On July 15, 1966, the claimant was assigned to the position of General TCS Maintainer in the Sacramento Signal Office. It would appear from the record that he had difficulties while in this position due to his lack of knowledge of the TCS machines, circuitry, and basic electrical principles required to perform his work satisfactorily. The claimant was advised by the Carrier to secure a position more compatible with his capabilities; otherwise, the claimant would be removed from his position for lack of qualifications. The matter of the claimant's qualifications was rendered moot, however, when on April 1, 1969, the claimant was displaced from his position of General TCS Maintainer. Upon such displacement, the claimant was permitted to displace on the position of Signal Test Foreman in the Sacramento Shops.

The Carrier asserts that the claimant's work performance as Signal Test Foreman appeared to be satisfactory for a short period of time, but, beginning in the summer months of 1969, his work performance started to deteriorate and became progressively worse. Consequently, on October 14, 1969, the Carrier called a meeting with the claimant and representatives of the Organization, and presented the following letter to the claimant:

"Sacramento - October 14, 1969

A - PR 3069

Mr. L. W. Howard
Signal Test Foreman
Sacramento Signal Shop
Sacramento, California

Dear Mr. Howard:

When you were re-instated on a leniency basis December 9, 1964 three conditions were accepted by you and representatives of The Brotherhood of Railroad Signalmen. One of these conditions required you to confine your employment to positions under the supervision of a Foreman or Supervisor. When you were displaced by Mr. J. E. Vlasak from the position of General TCS Maintainer April 11, 1969 you displaced Signal Test Foreman, D. H. Larsen. I allowed that displacement in the hope the time since your reinstatement had enabled you to discipline your personal activities sufficiently for you to succeed on a Test Foreman position.

Events since then have shown that such was not the case. You have failed to properly supervise the activities of men placed under you, and an informal investigation made by Mr. E. A. Thompson and Mr. R. R. Gifford disclosed the unrest and dissatisfaction your men have built up. Furthermore, you have disregarded direct instructions. You were told to dispose of an unsafe ladder. On Friday, October 10, 1969 I personally saw that ladder in position for use. The Signal Shop is a mess. Material and trash are in a clutter all over the Shop area. Signal relays have been shipped from the Signal Shop in an inoperative condition. You were instructed by my letter on April 10, 1969 that driving your personal automobile during working hours for Company business was not to be done without proper authority. Twice this past week you have ignored these instructions and driven to Bilby Road in Franklin.

Also twice in the past week you left the job site at Bilby Road in your personal automobile at approximately 3:30 PM and apparently went home ahead of time. Your men had to bring the trucks to the Signal Shop, put away the tools, and lock everything up for the night. From this I can readily understand the feeling of your men that you have given them little supervision, and caused them to assume a number of your responsibilities.

This has occurred only four weeks after your being advised in my letter of September 12, 1969 that supervision of your men must improve. I cannot tolerate such a situation and must therefore relieve you of your duties as Signal Test Foreman of the Sacramento Signal Shop. You have not shown the qualifica-

tions needed for satisfactory handling; the requirements of the job. By your actions you have shown the same lack of personal discipline of action that resulted in your discharge on November 27, 1964. You will be relieved from your present position effective with the close of business October 14, 1969.

Be governed by applicable rules of the Agreement between the Brotherhood of Railroad Signalmen and The Western Pacific Railroad Company. In case you consider your disqualification from the position of Signal Test Foreman, Sacramento Signal Shop unjust, you may request a hearing under the provisions of Rule 72.

A copy of the reinstatement letter dated December 7, 1964, from Mr. W. A. Tussey to Mr. R. T. Bates, is attached for your reference.

B. L. MC NEILL

Attachment"

It would appear from the record that at the October 14, 1969 meeting, the Carrier advised the claimant that he could work on a vacant position as Signaller at the Sacramento Shop beginning October 15, 1969. Furthermore, the Carrier personally delivered a job circular to the claimant at his home on October 14, 1969, which circular advertised the vacant Signaller position at Sacramento. However, the claimant chose not to submit a bid on that vacant position. Instead, he submitted the instant claim challenging the Carrier's action of removing him from the Signal Test Foreman position. Nevertheless, and without prejudice to his claim, the claimant took a Signaller position at Stockton, California on January 13, 1970 and presumably still occupies that position.

The claim in this case is based on an allegation that the Carrier violated Rule 71 of the Agreement in removing the claimant from the Signal Test Foreman position. Rule 71 provides as follows:

"Rule 71. - Investigation and Discipline:

An employee shall not be disciplined or dismissed without a fair and impartial investigation. At a reasonable time prior to the hearing, he shall be apprised in writing of the specific charge against him. Such investigation will be held within ten (10) calendar days after the alleged offense has been committed or within ten (10) calendar days from the time the Management has knowledge of the alleged offense, at which hearing the employee shall have a reasonable opportunity to secure necessary witnesses, and may be represented by duly authorized representatives of the Brotherhood of Railroad Signalmen or an employee coming within the Scope of this Agreement. However, he may be held out of service pending such hearing.

A decision will be rendered within ten (10) calendar days after completion of investigation. When a decision is rendered, if employee believes it unjust, his case may be taken up on appeal within ten (10) calendar days after date of such decision (submitting in writing reasons therefor), to the higher officials whose decision shall be subject to appeal. The right of appeal by employees' representative to the Chief Operating Officer or his representative is hereby established. If the judgment is in favor of the employee, he shall be compensated for wage loss suffered by him, and the charge stricken from the record.

A copy of the transcript of the testimony taken at the investigation shall be furnished the employee's representative."

The thrust of the claim related to the alleged violation of Rule 71 is that the claimant was in fact removed from his position as Signal Test Foreman as a disciplinary matter; that when an employee is disciplined, he is entitled to the protection provided him under Rule 71, such as the right to a "fair and impartial investigation" after he is apprised in writing of the specific charges that have been leveled against him, the right of the employee in such "investigation hearing" to secure necessary witnesses to testify, and the right to be represented at the hearing by duly authorized representatives of the Organization.

That protection, asserts the Organization, was not afforded the claimant, and, therefore, his removal from his Signal Test Foreman position was improper.

The Carrier, on the other hand, takes the position that the claimant was neither disciplined nor dismissed from the Signal Test Foreman position. The Carrier contends that the claimant was removed from that position because of his lack of qualifications to perform the job, and that the Agreement does not prohibit the Carrier from so doing. The Carrier contends that Rule 72 of the Agreement is applicable to the facts in this case, that the claimant was informed of his right to request a hearing pursuant to the provisions of Rule 72, and that the claimant did not avail himself of the opportunity of such a hearing by failing to request one. Rule 72 of the Agreement provides as follows:

"Rule 72 - Unjust Treatment:

An employe who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided above if written request is made to his immediate superior within ten (10) calendar days of cause of complaint.

Any complaint made by one employe against another shall be made in writing."

In the light of the Carrier's defense to the instant claim that the claimant was not disciplined but was removed because of lack of qualifications, the Organization contends that the Carrier cannot remove an employe for lack of qualifications after he has been in a position for thirty days. The Organization cites Rule 60 of the Agreement in support of this contention. Rule 60 of the Agreement reads as follows:

"Rule 60 - Assigning Positions:

In transferring employees to fill vacancies or new positions in their own class, seniority shall govern. An employee transferred in the exercise of seniority rights in his own class and failing to qualify within thirty (30) calendar days may exercise his seniority to displace the junior employee (if his junior) in the same seniority class; if no employee his junior in that class he may displace the junior employee (if his junior) in the next lower seniority class in which his seniority will permit him to work."

The Carrier responds to the Organization's contention regarding Rule 60 by asserting that it may remove an employee from a position for lack of qualifications at any time that it can be established that the employee in fact does not possess the necessary qualifications to perform the duties of the position in which he is an incumbent. In other words, it is the Carrier's position that Rule 60 does not impose a thirty day limitation on the Carrier in removing an employee from a position because of lack of qualifications. Rather, says the Carrier, the thirty day provision in Rule 60 limits the employee in his right to displace other employees when he is disqualified from his position. That is to say, according to the Carrier, Rule 60 gives an employee a right to exercise his seniority rights to displace other employees if the employee is disqualified within thirty calendar days following the assignment to the position in which he is found to be unqualified, but that Rule 60 does not restrict the Carrier to any time period in removing an employee from a position if he is determined to be unqualified in that position.

Insofar as Rule 60 is concerned, the Board finds it unnecessary to make a determination in this case as to whether the Carrier's interpretation or the Organization's interpretation

of that Rule is the correct one, and the Board wishes it to be expressly understood that nothing in this Opinion and Award is intended to indicate in any way whether or not the Carrier can disqualify an employe after he has been in a position over thirty calendar days. A determination on that question is not needed in this case for the following reasons.

The real issue in this case, as the Board sees it, is whether the claimant was removed from the position of Signal Test Foreman because of his "lack of qualifications" as contended by the Carrier, or whether his removal was disciplinary in nature, as contended by the Organization. The Carrier asserts that it has the unrestricted right to determine "which course to follow, that is, disqualification or discipline". (Carrier's submission, p.14). In this regard, the Board believes the Carrier to be clearly wrong.

The Board is of the opinion that there is a distinction between a situation on one hand where an employe simply does not possess the skill or experience to perform a job and the failure of satisfactory performance is not attributable to any "fault" on the part of the employe in the sense that he could do the job if he wanted to, and a situation on the other hand where an employe has the native ability to do the job but does not do so because he is careless, insubordinate, or does not follow instructions or directions that he is capable of following. The former situation is clearly one that involves the issue of

"qualifications" and the latter does not. One might say, for example, that an employe who is removed from his job for stealing is removed on the basis that any person who steals is not "qualified" for the job. However, it is clear to the Board that in such an example, removal from a job for stealing is disciplinary in nature and does not involve the question of qualifications as contemplated or intended by the Agreement. The Agreement provides for a very specific procedure to be followed when disciplinary action is taken against an employe, and that procedure cannot be avoided by calling the action by another name.

This is not to say that "lack of qualifications" and "discipline" are in all cases necessarily mutually exclusive. There certainly could be and undoubtedly are situations where an employe is both unqualified for a job and has conducted himself in such a manner as to justify disciplinary action. / Take, for instance, a man who does not possess the capabilities in terms of knowledge, ability, or experience to perform the job in question and who also shows up on the job in an intoxicated condition. In such an instance, the Carrier could well have the option of deciding which route to follow in removing the employe from his job --- removal by disqualification or removal by disciplinary action. However, the facts themselves must govern which course of action must be taken in any given situation, and simply saying that a man has been removed for lack of qualifications does not in and of itself make it so.

This brings the Board to a consideration of the facts in this case. The claimant was removed from his job for a number

of reasons as set forth in the Carrier's October 14, 1969 letter to the claimant. The first stated reason was because the claimant had "failed to properly supervise the activities of men placed under you." (Emphasis supplied. NOTE: The charge was that the claimant had failed to supervise properly, not that he was not capable of doing so.) The second stated reason was because the claimant had "disregarded direct instructions". Several examples were given in support of this reason: (1) The claimant had not disposed of an unsafe ladder that he had been told to get rid of; (2) he had not seen to it that the Signal Shop had been cleaned up; (3) Signal relays had been shipped from the Signal Shop in an inoperative condition; (4) he had driven his personal automobile during working hours for Company business in direct violation of Carrier instructions; and (5) he had left work ahead of time.

It cannot fairly be said that the above reasons for removal relate to "qualifications". The claimant could have done everything that the Carrier asked of him and was capable of refraining from doing those things which the Carrier told him not to do. He was removed not because he couldn't but because he didn't. Under those facts, the Board has no doubt that the removal was disciplinary in nature.

Having made this determination, it follows that the Carrier was required to follow the provisions of Rule 71 and it did not, among other things, conduct a hearing as required in that Rule and did not provide the claimant the opportunity to secure

witnesses to testify in his behalf at such a hearing. Consequently, the Board finds that the Carrier violated Rule 71, and that the claim has merit.

As for the remedy for this violation, the Board believes that the claimant had the obligation of mitigating the Carrier's damages while he was pursuing his claim. When the Carrier offered him the Signalman position at Sacramento on October 14, 1969, the claimant should have taken that position since the Carrier did not make that offer contingent upon the claimant's dropping the instant claim. Consequently, the Board finds that the claimant is entitled only to the difference in pay between the Signal Test Foreman's position and the Signalman's position for the period between October 15, 1969 and the date when the claimant took the Signalman position at Stockton. Furthermore, from the date the claimant took the Signalman position at Stockton to the date that the Carrier offers to return the claimant to the Signal Test Foreman's position, the claimant is entitled only to the difference in pay between the Stockton Signalman position and the Signal Test Foreman position.

As for reinstatement of the claimant to the Signal Test Foreman position, the Board makes the following observations. The claimant has travelled a rather bumpy road in his employment history with the Carrier. The Board has no basis for evaluating what would have happened to the claimant had the Carrier removed him under Rule 71 and followed the procedures under that Rule. Suffice it to say that it is possible that the result may well have been discharge. In fact, there is every indication that the

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number in which the Carrier conducted itself vis-a-vis the claimant was intended to give the claimant a "break" and to avoid the necessity of discharging him.

The Board believes that it is required to direct the Carrier to offer reinstatement to the claimant in the Signal Test Foreman position, and it does so direct. At the same time, it is apparent to the Board that if the charges against the claimant while he was in that position were true and if the claimant were not to improve his job performance after his reinstatement, he is likely not to remain in that position for very long. Therefore, the Board urges the claimant to consider deeply whether he should accept the Carrier's offer of reinstatement to the Signal Test Foreman position.

AWARD

1. The claim is sustained to the extent that the Carrier is directed to offer the claimant reinstatement to the position of Signal Test Foreman and to compensate the claimant in accordance with the above Opinion for wage loss suffered from October 15, 1969 to the date of such reinstatement offer.
2. The claim to the extent that it is sustained is to be implemented by the Carrier within thirty days from the date of this Award.

Dated September 3, 1970.


Morris L. Myers
MORRIS L. MYERS, Chairman

J. T. Bass
J. T. BASS, For the Organization

W. A. Tussey *Presenting*
W. A. TUSSEY, For the Carrier