S.B.A. No. 1139
Case No. 14
Award No. 14

SPECIAL BOARD OF ADJUSTMENTS
NO. 1139
BRS File No.: 12877-LI

Parties to Dispute: BROTHERHOOD OF RAILROAD SIGNALMEN

and

LONG ISLAND RAILROAD (LI)

Statement of Claim: Claim on behalf of M.A. Graf, for immediate reinstatement with all back pay and any overtime that a junior cable splicer may have incurred since his termination, and a provision that any further re-qualification of the Claimant be based on a modified format specific to the position that he would be working, account Carrier violated the current Signalmen's Agreement, particularly Rule 47, when Carrier terminated the Claimant's employment without benefit of a fair and impartial trial; Carrier also violated Rules 29 and 30, when it terminated the Claimant's employment without allowing him to complete his Assistant Signalmen training program.

BACKGROUND FACTS

Claimant M. A. Graf, by letter of September 10, 2003, was advised by the Carrier that his employment with the Carrier would be terminated effective the end of tour, September 11, 2003, because of Claimant's inability to perform satisfactorily as a Mechanic on two practical exams given to Claimant. The Organization appealed the dismissal directly to the Carrier's Labor Relations Department's highest designated officer, which appeal was denied under letter of December 5, 2003. The matter now stands before this Board for adjudication.

According to the Organization, Claimant's dismissal from service amounts to a violation of Rules 29, 30, and 47 of the Parties' Controlling Agreement. According to the Organization, the Carrier violated Rule 47 and the language therein that mandates that employees are not to "be disciplined or dismissed without a fair and impartial trial." As to a violation of Rules 29 and 30, the Organization focuses on the language therein calling for "an assistant signalman to be promoted to the position of mechanic" at "the expiration of the eight basic training periods of 130 each, overtime excluded" (Rule 30 [a]) and the language that "[a]n assistant signalman may be promoted to a position of mechanic before the expiration of the eight-basic training periods of 130 days each ... if such a position is available and if, in the opinion of Management, he is qualified therefor." (Rule 29 [a][2]).

The Organization notes that Claimant, under Rule 29 (a)(2), was promoted to the Mechanic position from the Assistant Signalman position before he completed his eight basic training period of 130 days each. The Organization then focuses on the language of Rule 29 (a)(2) that provides that "[a]n assistant signalman so promoted [before completing the eight basic training periods] who fails to meet the requirements of the position shall be returned to the assistant signalman class to complete his basic training." According to the Organization, the Carrier had the duty to return Claimant to the Assistant Signalman position to allow him to complete the eight basic training periods of 130 each rather than subject him to a dismissal. In setting forth its position, the Organization quarrels with the manner in which Claimant was tested

before being dismissed. Hence, the Organization maintains that Claimant should be returned to work with all back pay and other lost benefits, with the further provision that any further qualification testing of Claimant be predicated on a format that would be specific to the Mechanic position that Claimant would be occupying.

According to the Carrier, no contractual violation has been established by the Organization. The Carrier rejects the Organization's reliance on Rule 47, stating that the instant matter does not concern the imposition of discipline, which would render Rule 47 inapplicable. The Carrier claims that its testing of Claimant was permitted under Rule 56 (d) which allows the Carrier, "in the event of a reasonable doubt as to his [employee's] qualifications, ... to demonstrate his ability by a reasonable and practical test." Further, the Carrier asserts that its testing of Claimant occurred in front of an Organization representative and that there is no basis in the record to conclude that the testing, which Claimant failed, and the attendant disqualification of Claimant was in any way arbitrary or capricious.

The Carrier rejects the Organization's reliance on Rules 29 and 30. Focusing on Rule 29 (a)(2), the Carrier asserts that the language therein allowing the return of an employee promoted to the Mechanic position before completion of the eight basic training periods to the position of Assistant Signalman did not contemplate that an individual such as Claimant, who was promoted to Mechanic eight years earlier, would be returned to the position of Assistant Signalman. Thus, the Carrier claims that the claim has not been sustained.

OPINION OF THE BOARD

Initially, the Board would state its finding that Rule 47 cannot be considered applicable to the instant claim, since Claimant's separation of service was not due to a disciplinary decision reached by the Carrier. It is noted that arbitral support has been advanced by the Carrier in support of its position under Rule 47, and the Carrier's position is consistent with the language of the Rule, which is entitled "Discipline." Further, the Board finds that the Carrier properly applied Rule 56 (d) when it subjected Claimant to practical testing upon his return to work after an extended absence. In fact, the Board notes that the Organization has not disputed the Carrier's right to test Claimant. Insofar as the Organization has claimed that the testing was not specific enough, the Board finds that the Carrier had the right to require Claimant to undertake testing for the Mechanic position without any obligation on the Carrier's part to focus the testing on less strenuous parts of the Mechanic position.

Hence, the crux of the instant dispute between the Parties turns on the language of Rule 29 (a)(2) that calls for the return of a Mechanic to the Assistant Signalman position if the Mechanic was promoted to the Mechanic's position before completing the eight basic training periods of 130 eight-hour days of service. It is axiomatic that contractual language is to be given a reasonable interpretation so as to effectuate the parties' intent. In the instant case, a reading of Rule 29 (a)(2) allows the Board to conclude that a reasonable interpretation is that the ability

of a Mechanic to be returned to the Assistant Signalman position to complete the eight basic training period is contingent upon the Mechanic not being able to fulfill the requirements of the Mechanic position in that period immediately following the promotion. The Board finds that it would be unreasonable to accept the Organization's proffered interpretation that the Rule should apply to an individual like Claimant who had been promoted eight years prior to being disqualified for the position.

Accordingly, the Board finds no basis upon which to sustain the claim.

AWARD

The claim of the Organization is denied.

DATE: 10/15/24

THOMAS N. RINALDO, ESQ., NEUTRAL MEMBER

STEVEN M. DRAYZEN
CARRIER MEMBER

CHARLIE A. McGRAW
EMPLOYEE MEMBER
Dissenting Opinion attached

Organization's Dissenting Opinion
SBA 1139 Award No. 14

Referee: Thomas N. Rinaldo, Esq.

The Organization firmly believes that the findings of aforementioned Award are beyond the point of absurdity and should be reviewed only as an example of an assailable injustice.

The facts of record indicate that the Claimant's career began in 1993. He became qualified and was promoted to a position of Mechanic Communications Cable Splicer in the Communication's Department and worked in that capacity for nearly nine years. The Claimant suffered an on-the-job injury and subsequently underwent two separate back operations. Upon his return to work the Carrier placed him on restricted duty and reclassified him as Assistant Signalman.

The Claimant, along with the Carrier, were both anxious for the Claimant to resume his duties as a Communications Cable Splicer. Carrier then subjected the Claimant to a practical test designed for Signal Linemen, this involved climbing utility poles, installing messenger cable, drilling holes with a brace and bit, manually hauling up and installing cross-arms and other linesman duties. The record indicates that during the first test the Claimant failed to complete the assignment and the Carrier returned him to his former Assistant Signalman's position. He was again tested 26 days later, and according to comments made by the supervisor and a Union Representative who were present during this second test, ***"they were very impressed with the effort by the Claimant and felt that with a bit more practice he would be able to pass."*** The only exception taken by the supervisor was that the Claimant took too long in completing the second test. As noted or more importantly, not noted, is which part of the test the Carrier determined that he supposedly failed. Notwithstanding, the Organization argued that the Carrier failed to allow sufficient time for the Claimant to properly prepare for the test and that he had never been required to perform this type of work in the past.

On September 10, 2003, Carrier notified the Claimant that his employment with the Long Island Railroad was terminated; and he was, therefore, dismissed from service.

The Organization further challenged the termination of Claimant and contended without rebuttal, that Communication Cable Splicers are not required to perform the kind of physical exertion as Signal Linemen and that the Claimant should have been given a modified test only in the areas that would pertain to the position of a Cable Splicer. It was noted and uncontested that the position of Cable Splicer typically performed their work from a bucket truck or ladders.

The Organization challenged Carrier's actions on the basis that Agreement Rule 47 clearly requires that the Claimant was entitled to a fair and impartial hearing before he was terminated.

"RULE 47
Discipline

(a) Employees who have completed their probationary period of employment shall not be disciplined or dismissed without a fair and impartial trial..." (emphasis added)

The Carrier argued that disqualification is not considered discipline and therefore the Claimant was not entitled to a fair and impartial trial. On the other hand, the Organization was not provided the opportunity to challenge the validity of the testing procedures because no Investigation was ever conducted. During the Arbitration Hearing the Claimant stated that he was required to spend nearly four (4) hours on the pole. *{On a personal note as a Signalman I personally have spent considerable time performing pole line work – to subject anyone to spend four (4) hours on a pole without relief is not only unconscionable, but heartless.}*

In its Submission to the Board, the Carrier cited numerous Third Division Awards, i.e., 35991, 31119, 21243, 20361, 19129, 15494, 6143 and 4687. Upon review, they all deal with an employee attempting and failing to obtain a promotion to a higher rated position.

In each case, the employees returned to their former held positions. The common thread in each of the above-cited Awards: there was not one single instance when an employee was disqualified and then terminated.

Carrier also cited Third Division Award 28433 involving the same parties to this dispute. As noted, the Referee clearly stated that while the Claimant was demoted and subsequently furloughed, he was not considered dismissed. The Referee held, in pertinent part:

> **"Claimant was advised that effective April 25, 1986, he was removed from the Assistant Signalman Training Program and was to exercise his rights according to Rule 29 a (1). Claimant was subsequently furloughed from service since he did not have sufficient seniority as a Signal Helper..."**
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> * * * * *
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> **"...The Organization contends that Carrier violated Rule 47 when it dismissed Claimant without granting him an investigation. Rule 47 provides in relevant part:**
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> > ***'Employees who have completed their probationary period shall not be disciplined or dismissed without a fair and impartial trial.'***
>
> **The facts established below clearly show that Claimant was not being "dismissed or disciplined" when Carrier removed him from the Assistant Signalman Training Program. Claimant was returned to the Signal Helper position because Carrier had determined based on tests that he could not satisfactorily complete this program. No disciplinary motive was shown to underlie this action. Moreover, Claimant was not dismissed. Once returned to the Signal Helper position, Claimant did not have enough seniority to maintain that position, all others on the job were more senior than he and he could not, therefore, rightfully bump them, and there were otherwise no vacant positions. Had Claimant held sufficient seniority as a Signal Helper, he would have remained employed and would not have been furloughed."** (*Emphasis added*)

Based on the foregoing Third Division Award 28433, the Claimant should have been allowed to continue on the Assistant Signalman's position, the position that he was holding at the time of the first and second tests. The fact is that his position was never abolished and/or filled by a senior employee, and still therefore, existed at the time of his termination. The fact is, the Claimant should have had the opportunity to remain in the position he had held at the time of the first test.

The Agreement unequivocally states that an employee cannot be dismissed without a fair and impartial trial. The fact is that the Claimant in this instant case was dismissed without a trial.

The Majority in this case has offered no reason or rationale for determining that dismissal without a trial is in compliance with the Agreement. While the Question proffered by the Organization before the Board clearly stated that Rule 47 was violated, the Referee failed to ever address that question.

The Majority stated in its Findings that **"It is axiomatic that contractual language is to given a reasonable interpretation so as to effectuate the parties' intent."** While the Referee makes reference to this time-honored interpretation, he failed to apply it in this instant case. Obviously, the Referee took the bait, hook-line-and sinker, and swallowed Carrier's misguided argument that disqualification is not considered discipline. The problem with this simplistic view is that the Agreement additionally states that an employee will not be **dismissed** without a fair and impartial trial. One can only presume that despite the Referee's quotation, his ability to make reasonable interpretations is highly suspect.

The Referee in this case went beyond the bounds of reasonableness and totally ignored the basic principle of **"Due Process Rights."** This can only be considered as ignorance and inconsiderateness to historic findings of numerous boards of arbitration. It is obvious that the Referee fashioned an award that defies this time-honored principle. Based on the

foregoing, it is the Organization's position that Carrier failed to provide a fair and impartial hearing, and therefore, it did not have the unfettered right to dismiss the Claimant.

This Award should only be viewed as a pinnacle of injustice. The Referee had the opportunity to uphold the clear language of the Agreement that an employee cannot be **DISMISSED** without Due Process, and to uphold the sound principle that the Carrier has the burden to prove their actions were somehow justified. By failing to hold a fair and impartial trial, the Organization was denied its right and responsibility to present evidence that Carrier's actions were arbitrary and capricious.

This is simply justice denied.

In conclusion, it is the Organization's position that the Referee and his findings should suffer the same fate as the Claimant – they should be disqualified and dismissed.

Respectfully submitted,

C.A. McGraw

C.A. McGraw, International Vice President, NRAB
Labor Member - PLB No. 1139