

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25919
Docket No. 45863
03-1-02-1-U-2944

The First Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Locomotive Engineers
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim in behalf of Conductor T. A. Keller, (hereinafter referred to as claimant), SS No. 327-38-4407, Union Pacific Railroad Northern Region, Chicago Terminal Complex, that claimant be reinstated to service with full seniority and vacation benefits restored, compensated for any and all lost time, including time spent at the investigation, reimbursed for any and all medical and dental expenses incurred while claimant was dismissed from service, that claimant be removed from the Union Pacific Upgrade Discipline Policy and that this incident be expunged from claimant's personal record when claimant was investigated on September 19, 2001 and October 4, 2001 on the following charge:

'... to develop the facts and determine responsibility, if any, in connection with the report that on Wednesday, September 5, 2001, at approximately 11:30 AM, while you were assigned to Job UT38, you were observed allegedly watching a television while on duty in the Switchtender's Shanty located at Harding Avenue on the Geneva Subdivision. This is a possible violation of Union Pacific Operating Rule 1.10 of the General Code of Operating Rules effective April 2, 2000.'"

FINDINGS:

The First 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.

Pursuant to notice dated September 7, 2001, the Carrier charged the Claimant, a Yardman, who had accumulated 24 years of service, with watching a television set while on duty on September 5, 2001.

At the ensuing Investigation, the Manager of Terminal Operations testified that, after much soul searching on September 6, 2001, he decided to remove the Claimant from service pending the Investigation. The Manager explained that he based his decision on the fact that the Claimant was at Level 4 on the Carrier's Upgrade Discipline Policy and, since the penalty for the charged offense was Level 1, the Claimant could be subjected to dismissal if the Investigation determined that he was guilty. The Organization vigorously objected to the Carrier's decision to withhold the Claimant from service pending the Investigation.

The Rule in the applicable Agreement does not specifically address the standard for withholding employees from service but, historically and traditionally, the Carrier's discretion is relegated to withholding employees from service for major offenses. In this particular instance, continuing the Claimant in employment until the disciplinary process was concluded would not have posed a threat to other workers (or the public) and would not have disrupted the workplace. Therefore, the Carrier had insufficient justification for withholding the Claimant from service pending the Investigation.

The Investigation was held on September 19 and October 4, 2001. The Manager of Terminal Operations testified that he came to the Harding Avenue Switchtender's Shanty (the Claimant's work location) to conduct a chair inspection at 11:30 A.M. on September 5, 2001. The Manager testified that when he entered the shanty, he observed the Claimant watching a television program. The Manager

related that he told the Claimant to remove the television set from the shanty and the Claimant did so.

The Yardmaster, who supervises the Claimant, declared that the Claimant admitted to him during a telephone conversation a short while later, that the Manager caught him watching television while on duty.

The Claimant testified that when he returned from vacation on September 4, 2001, he found the television set in the shanty. The Claimant denied that the television set was "on" when the Manager entered the shanty.

The Carrier proffered substantial evidence that the Claimant was watching a television program while on duty on September 5, 2001. Although the Claimant denied that the television set was activated, he admitted to the Yardmaster that he had been observed watching television. Rule 1.10 prohibits employees from using electronic devices that are unrelated to their job, while on duty. Watching television is a distraction that could pose a safety hazard. If the Claimant became involved in a television program, he may not have been alert to performing his switching duties.

The Carrier assessed the Claimant a Level 1 for the instant infraction. However, because the Claimant was at Level 4, the Level 1 elevated the Claimant to Level 5 which was permanent dismissal.

We carefully reviewed the Claimant's prior disciplinary record. He has compiled a record that can only be characterized as less than stellar. Nevertheless, because the Claimant has provided 24 years of loyal service to the Carrier, the Board will reinstate him to service, with his seniority unimpaired, but without pay for time lost except as specified below. In doing so, the Board gives the Claimant a final warning that he must comply with all Rules. Further offenses will not be tolerated. When the Carrier reinstates the Claimant to service, he shall be placed at Level 4 so that, if he commits another offense (either minor or major) within the applicable time period, he will be discharged.

To reiterate, the Carrier shall pay the Claimant for pay lost from September 7, 2001 (the date that the Carrier improperly withheld the Claimant from service) until the date of the disciplinary notice (October 5, 2001).

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 19th day of September 2003.