Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25920
Docket No. 45853
03-1-02-1-I-1665

The First Division consisted of the regular members and in addition Referee Charles P. Fischbach when award was rendered.

PARTIES TO DISPUTE: (United Transportation Union
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(Iowa Interstate Railroad, Ltd.

STATEMENT OF CLAIM:

"Request on behalf of Conductor Mike Fry for reinstatement from unjust dismissal from service with all seniority rights unimpaired, compensation for all time lost until reinstated."

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.

The Claimant was employed by the Carrier as a Conductor on September 10, 1999. He worked on trains operating between Rock Island and Chicago, Illinois, which included operating into the Chicago Terminal on trackage owned and operated by METRA, the Chicago commuter line. On October 6, 2001, the Carrier's Road Foreman posted a bulletin notifying all train and engine service employees that they were required to take their Rules classes and qualifying

examination on the General Code of Operating Rules, METRA Rules and CSXT Rules on either October 19, 20 or 21, 2001 at Rock Island, Illinois. The Carrier allowed these employees to schedule their attendance at one of these sessions.

The Claimant did not attend the classes that were held on October 19 and 20. Upon arriving at Rock Island on the morning of October 21, he was completing his pool service from Rockdale. The Claimant's tour of duty ended at 7:00 A.M., and he departed for home to rest. However, he returned to the Rock Island yard and took the Rules class which was being held at 9:00 A.M. The Claimant did not pass that part of the Rules examination related to the METRA operating Rules, and was scheduled by the Carrier to retake the test on November 6, 2001. When the Claimant again took the Rules examination, he failed to qualify on the METRA Rules, scoring lower than he had on his earlier test.

On November 13, 2001, the Carrier notified the Claimant to attend a formal Investigation "concerning the allegation that [he] failed to pass a required rules examination on November 6, 2001 for the second time." This allegation was predicated upon Operating Rule 1.3.1 of the General Code of Operating Rules, which mandates that employees must pass the required examination. The investigative Hearing was scheduled for November 26, 2001 but was subsequently changed to November 29. In the interim, the Claimant received another Notice of Investigation from the Carrier on November 17, 2001, charging him with alleged violation of safety guidelines and unsafe practices that was reported to the Carrier from November 13 through November 16 involving possible Rule violations of General Safety Rules A, D, I and L, and General Code of Operating Rules 1.1.2, 1.1.1, 1.6 and 1.11. The Claimant was removed from service pending an Investigation on this allegation and Rule violations. The Investigation on the latter charges was originally scheduled for November 26, 2001, and then rescheduled and finally cancelled.

The Hearing on the alleged violation subject to the Claimant's November 13, 2001 notice was held on November 29, 2001. Based on the evidence of record developed at the Investigation, the Carrier terminated the Claimant's employment, effective December 17, 2001. This action was taken on the same day the Carrier canceled the second Notice of Investigation. Shortly thereafter, the Organization filed a claim on behalf of the Claimant appealing his termination. The Carrier denied the claim of January 8, 2002.

In disputing the Claimant's dismissal from service, the Organization maintains that the Carrier violated Article 22, (b) of the Agreement when it did not afford him the opportunity to take the Rules examination on an off-day so that he would be fully rested. The Organization avers that on the two occasions the Claimant was given the Rules examination, he had just completed a tour of duty and was not rested. Here, the Organization faults the Carrier for not properly setting up the days and times so that each employee, including the Claimant, would know exactly when to mark-off. Despite this situation, the Organization notes that both times the Claimant had taken this examination, he passed the Carrier's and CSXT's portions of the Rules examination but failed to pass the examination on METRA's Rules. According to the Organization, the Carrier's General Foreman at Rock Island told the Claimant that he would be allowed to take the METRA portion of the examination a third time which never materialized because Carrier policy allegedly precluded a third examination.

The Organization submits that if the Carrier had a policy providing that an employee's failure to pass the Rules examination twice would culminate in termination, such a policy had never been produced; nor, based on the testimony of the Carrier officer in charge of administering this examination, seen by him or the Organization. Continuing in this vein, the Organization contends that other employees have been given the opportunity to take a Rules examination a third time after failing to pass it twice. It is the Organization's position, therefore, that the Carrier has already set a precedent by allowing employees three chances to pass this particular examination. Besides, the Organization opines there is no restrictive language in the General Code of Operating Rules stating that the Carrier will only give employees two chances to pass a Rules examination.

Moreover, the Organization opines that the Carrier violated the Claimant's seniority rights under Article 9(c) and Article 10(a), (g) and (h) of the Schedule Agreement by not allowing him the opportunity to exercise his seniority to a position at a terminal other than Rock Island where he was not required to operate over METRA trackage. Stated otherwise, the Organization argues that the Claimant could have worked other jobs while the Carrier here prohibited him from working on foreign line trackage, viz., METRA where he was unqualified to operate. On this point, too, the Organization posits that operating over METRA territory is remote because no jobs are bulletined out of Rock Island to run over that line's trackage. According to the Organization, the only way an employee may be required to operate over METRA trackage would occur when a vacancy for a job

in Blue Island existed and the extra board was exhausted. Mindful of this situation, the Organization opines that the Carrier should not have dismissed the Claimant from service for having failed that part of the Rules examination pertaining to METRA, but should only have prohibited him from operating over METRA trackage until such time as he became qualified to work on that territory.

Given the foregoing reasons, the Organization seeks the Claimant's reinstatement with unimpaired seniority rights and pay for time lost.

Conversely, the Carrier submits there can be no argument that the Claimant failed to pass a Rules examination as required by the General Code of Operating Rules. In this regard, it is the Carrier's position that the dismissal of the Claimant did not violate any Schedule Agreement Rules, including Rules governing the exercise of seniority which has no application to this dispute. Nor, in the Carrier's judgment, did it violate Article 22(b) of the Agreement by not allowing the Claimant to take the test on a day off. The Carrier avers that he had nearly two weeks to arrange his work shifts in a way that would have given him the opportunity to take a rules class on one of the three days it was being offered. Insofar as the Carrier is concerned, the Claimant had ample opportunity to lay off to be fully rested. Notwithstanding the situation in which the Claimant placed himself, it is the Carrier's position that the Rule in question does not support the Organization's assertion that an employee must be permitted to lay off prior to taking a rules class. Instead, the Carrier opines that Article 22(b) only provides that an employee "will be given the opportunity to take the [rules] class without loss of pay."

Further, the Carrier refutes the Organization's allegation that its action terminating the Claimant's employment contravened the provisions of Articles 9(c), 10(a), (g) and (h). According to the Carrier, the record does not indicate that the Claimant ever attempted to bid on an assignment under Article 9(c), or was denied such a contractual right. Nor, the Carrier posits, did any event occur which would have allowed him the opportunity to exercise his seniority to another assignment pursuant to Article 10(a) or (g). Correspondingly, the Carrier observes that the Claimant did not move to another district thereby triggering the opportunity provided by Article 10(h). In sum, the Carrier argues that the contract provisions cited by the Organization have no application to the fundamental issue in this case, to wit, the Claimant's failure to pass the required Rules examination mandated by Rule 1.3.1 of the General Code of Operating Rules.

The Carrier also disagrees with the Organization's contention that past practice on this property gives employees more than two opportunities to qualify on a Rules examination. Here, the Carrier points up that there is no evidence of such a practice because one never existed. To support its position, the Carrier relies on the testimony of its Road Foreman who administers Rules examinations and testified that employees are only entitled to two opportunities to take and pass a Rules examination. In this same vein, the Carrier claims there is no provision in the parties' Agreement requiring management to provide employees with a third opportunity to pass a Rules examination. On this point, the Carrier contends that the express language in Article 22(d) actually supports its position that an employee is limited to two chances to pass this type of examination. Specifically, Article 22(d) states: "Employees who fail to pass an examination will not be paid for loss of time when taking a re-examination." It is clear to the Carrier that Article 22(d) contemplates, without ambiguity, a "singular" re-examination; that had the parties envisioned multiple opportunities to retake a Rules examination, they would have used, instead, the term "re-examinations" rather than re-examination when drafting this provision. Contrary to the Claimant's testimony, the Carrier denies his account that the Road Foreman offered to give him a third opportunity to pass that part of the examination pertaining to METRA Rules. The Carrier notes that such an offer was refuted by the Road Foreman's testimony.

Turning to the Organization's complaint that the Claimant was required to take the Rules examination on October 21 and November 6, 2001 under conditions where he just completed service and was not fully rested, the Carrier maintains that he placed himself in this situation on both occasions by failing to arrange his work schedule in anticipation of the first Rules examination and subsequent re-examination. The Carrier acknowledges that when the Claimant took the Rules examination on October 21, he had been on duty eleven hours, and on November 6 when taking the re-examination, he had performed duty for five hours and 15 minutes after having 12 hours of rest. While conceding that he may have been tired on October 21, the Carrier considers that he was rested and alert on the day he took the re-examination under a satisfactory environment. Insofar as the Carrier is concerned, the Claimant was unable to pass the re-examination and thus failed to comply with Rule 1.3.1 of the Code of Operating Rules.

From the Carrier's perspective, the Claimant's inability to pass the METRA part of the Rules examination was a severe breach of his obligations under the Operating Rules warranting his dismissal from service. The Carrier submits that

his termination was the appropriate penalty under these circumstances instead of disqualifying him from performing service on METRA territory but allowing him to work at a location other than Rock Island where he was qualified to operate, as urged by the Organization. In the Carrier's opinion, the latter arrangement would not have been practical or responsive to the underlying issue because the Claimant was required to pass all parts of the Rules examination (which included METRA rules). Besides, the Carrier asserts that if the Claimant could not pass a basic Rules examination, he was not qualified to perform service for this railroad. The Carrier further expounds that the extra boards to which he could have possibly been assigned serve as supplemental sources of supply for the extra board at Rock Island. For this reason, the Carrier's penultimate argument is that the Claimant could never escape his responsibilities to be qualified on the METRA Rules.

Finally, the Carrier avers that the Claimant was employed for more than two years during which he should have been completely knowledgeable of the Rules on the territories he operated. Accordingly, it is the Carrier's position that its action dismissing the Claimant should be affirmed by the Board because his failure to assume his responsibilities deprives him of a second chance at employment.

The factual record in this case has been reviewed correlatively with the respective, albeit conflicting, arguments advanced by the parties concerning the Claimant's employment termination for failing to pass a required Rules examination in its entirety on October 21 and November 6, 2001. Based on this review, it becomes apparent that the matter at issue involves a discharge with disciplinary and contractual ramifications. Both elements of this dispute are hinged on a policy purportedly promulgated by the Carrier entitling an employee to retake a failed Rules examination only once, resulting in dismissal from service if the employee again fails to pass the examination. As recounted herein, it is the Carrier's position that such a policy is consistent with Article 22(d) of the parties' Agreement which only refers to a "singular" re-examination and was applicable to the Claimant.

Before considering the merits of this case, the Board must first determine whether the policy in question was appropriately disseminated to the Carrier's employees, including the Claimant. Integral to this determination is whether the policy (written or verbal), if, in fact, promulgated unilaterally by the Carrier, is consistent with or violative of the Agreement.

Ordinarily, the employer has the right to establish reasonable work Rules and policies that do not infringe upon the Labor Agreement. In this regard, an employer-promulgated Rule or policy must clearly and unambiguously establish the scope of the covered subject, as well as the consequences of a violation, to be enforceable. Most importantly, it must then be found that the affected employees were adequately notified of the Rule or policy. As a fundamental labor relations and arbitral principle, the employer must provide sufficient actual and constructive notice to employees of the Rule or policy it has promulgated. Besides, just cause requires that employees be informed of a Rule or policy, an infraction of which may result in suspension or discharge. Simply stated, the employer cannot expect compliance with a Rule or policy it has issued that has not been properly communicated to the employees; nor can the employment of employees be terminated for purportedly violating a Rule or policy they do not know exists. Notice, therefore, continues to be an essential element of due process which is inherent in the just cause standard.

In the instant matter, there is no demonstrable evidence, written or verbal, that the Carrier promulgated a policy limiting employees, like the Claimant, to retake only once a failed Rules examination which, if failed again, would result in termination. Here, neither the Claimant nor the Organization had actual or constructive notice of the existence of such a policy. Even assuming, arguendo, the policy existed, the Carrier is not on solid footing when justifying its application by narrowly construing the term "re-examination" as used in Article 22(d) to mean just one re-examination. Arguably, that term as intended by Article 22(d) may also be interpreted to mean more than one re-examination. Absent persuasive evidence to the contrary, the Carrier's application of this provision of the Schedule Agreement cannot prevail. Nor can any Carrier policy on this subject run counter to or supersede a contract provision. In any event, the Board is not convinced that a Carrier policy existed limiting the number of chances an employee has to retake a Rules examination - especially under circumstances where notice of that policy has not been specifically communicated to the employees.

Although the Carrier had the right under Rule 1.3.1 of the General Code of Operating Rules to test the Claimant on the Operating Rules and the Rules in effect on the METRA and CSXT territories, and appropriately did so pursuant to Article 22(b) on the dates he was initially examined and then re-examined, it did not have the contractual authority or managerial prerogative to limit him from retaking a failed Rules examination more than once. To hold otherwise would countenance the

Carrier's action terminating the Claimant's employment without due process. In sum, the Carrier did not have sufficient cause under a questionable policy or the Schedule Agreement to dismiss him from service shortly after he again failed that part of the Rules examination pertaining to METRA Rules.

Alternatively, the Carrier should have disqualified the Claimant from working on METRA territory until he successfully passed another examination involving the latter's Rules. Such action by the Carrier may have prompted the Claimant to exercise his seniority to another terminal in accordance with the applicable provisions of Articles 9 and 10 where he did not have to operate on METRA trackage. Nevertheless, had the Claimant not been dismissed from service and performed service at the location where his assignment on some occasions involved operating on CSXT and METRA territories, the Carrier would have had the right to run around him and have another employee qualified on the Rules of both territories work that particular assignment.

For the foregoing reasons, the Carrier's decision to terminate the Claimant's employment will be vacated. In this regard, the Claimant's return to service will be conditioned on his passing a physical examination, including a drug screen, and a Rules examination on the territory he plans to work upon exercising his seniority. The Carrier must promptly arrange for rules and physical exams, and the Claimant must take the test when offered. When these conditions have been satisfied, he will be returned to service with unimpaired seniority rights. Further, the Claimant will be entitled to pay for time lost from the day he was removed from service on November 17, 2001 until the date of his reinstatement. In calculating the amount of backpay to which the Claimant is entitled, the Carrier should calculate an average using the earnings of the active person senior to and the active person junior to the Claimant on the seniority roster at the location where he last performed service. Backpay will be subject to all appropriate offsets, including unemployment compensation he received and any earnings he may have had from other employment during the period of his dismissal.

The Board will retain jurisdiction over this case for a period of 60 days in order to resolve any problem that may arise with respect to the Claimant's reinstatement.

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 30th day of September 2003.