

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25932
Docket No. 45488
03-1-01-1-C-4762

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

(United Transportation Union
PARTIES TO DISPUTE: (
(California Western Railroad Company

STATEMENT OF CLAIM:

“Claim of CWR Employee Steven Smith for reinstatement to service with all rights unimpaired, pay for all time and benefits lost while improperly withheld from service, and removal of all notations of this discipline from his personal record.”

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.

On September 25, 2000, the President of the Carrier notified the Claimant of his suspension without pay pending the outcome of an internal Investigation triggered by complaints that he “created a hostile workplace for [his] fellow employees.” The Carrier’s action in this regard was taken in accordance with Article 6, Section A(2) of the parties’ 1999 Labor Agreement. Concurrent with the

Claimant's suspension was the Carrier's other disciplinary action terminating his employment, effective immediately. This action was based on the allegation that the Claimant, on September 24, 2000, ignored a direct order from the Carrier's President "to treat with potential buyers riding on the train as passengers and not to discuss matters involving the possible purchase of the railroad." According to the Carrier, the Claimant was insubordinate when ignoring this directive which displayed willful disregard of the Carrier and interfered with its legitimate business interest. The Carrier advised the Claimant that he should file a grievance if he disagreed with the action taken against him.

On October 10, 2000, the Carrier, the Claimant and his representative from the Organization held an informal Hearing pursuant to Article 6, Section B(2)(c) of the Agreement. The results of this meeting were summarized in a memorandum prepared by the President of the Carrier on October 19, 2000. According to this Carrier officer's version of what transpired, an informal resolution of the Claimant's grievance disputing the Carrier's action did not materialize because he denied any responsibility regarding his alleged contempt of his supervisor and tirades toward co-workers who were unwilling to work with him. In addition to this allegation, the Carrier maintained that its Investigation of the Claimant's conduct revealed that his inconsistent instructions to employees who worked on assignments with him created unsafe conditions that could have caused bodily harm. The Carrier averred that the Claimant had allegedly been "bad mouthing" the railroad and its manager to passengers which was considered a serious breach of his duty as an employee. Insofar as the Carrier was concerned, it had sufficient reasons for terminating the Claimant's employment.

Several days following this informal meeting, the Claimant notified the Carrier in writing on October 25, 2000 that he denied the allegations upon which his suspension and termination were based. According to the Claimant, the Carrier in this instance willfully disregarded the applicable provisions of Article 6, Sections A and B. He demanded to be reinstated with pay for all lost time. In responding to the Claimant's position, the Carrier notified the Organization on October 26, 2000 of its refusal to return him to work. Instead, the Carrier requested that a Hearing be conducted so that this matter may be thoroughly heard pursuant to Article 6, Section B(4) of the Agreement. On December 7, 2000, the Carrier again notified the Organization in writing that since the latter did not respond to its October 26 correspondence, it reached the conclusion that the Organization was satisfied with the manner in which the Claimant's suspension and termination were handled.

Absent any reply from the Organization to the contrary, the Carrier indicated it would consider this matter closed as of January 1, 2001. Since the Carrier did not receive any response, it notified the Organization on January 12, 2001 that the matter here was closed with no further action required or expected by this railroad.

Three months later, on April 18, 2001, the Organization advised the Carrier that it disagreed with the handling of this matter and the decision to terminate the Claimant's employment. In this vein, the Organization requested that the Carrier return the Claimant to service or else this matter would be progressed to an adjustment board. The Carrier rejected the Organization's request on April 26, 2001, reiterating that the Claimant failed to submit his complaint to a Disputes Committee within 30 days from the date he was notified of his termination. Moreover, the Carrier noted that the Organization failed to respond to its earlier request for a formal Hearing. Insofar as the Carrier was concerned, the Claimant had exhausted all his remedies under the controlling Agreement and that the Organization's request to reopen this matter was untimely. For these reasons, the Carrier refused to reinstate the Claimant.

On May 9, 2001, the Organization challenged the Carrier's position by maintaining that management's actions in this case were erroneous and outside the guidelines of Article 6. Simply stated, the Organization opined that the Carrier either did not understand or failed to abide by the discipline Rule. Specifically, the Organization asserted that the provisions underlying the imposition of discipline "clearly state that an employee shall not be discharged, suspended or otherwise disciplined without a fair and impartial hearing, which obviously was not done [in this case]." According to the Organization, the evidence does not show that the Carrier complied with Article 6, Section B(1)(a). Nor, the Organization argued, did the Carrier have the authority under Article 6, Section B(2) to terminate the Claimant. The Organization also disagreed with the Carrier that the Claimant had exhausted his available remedies under the Agreement and that his request for reinstatement was untimely.

The positions of the parties and the record have been carefully considered by the Board. Based on this review, it is clear to the Board that the Carrier procedurally erred when it simultaneously placed the Claimant on suspension on the allegation of having created a hostile work environment and then terminated him on a separate offense for supposedly disobeying a direct order without providing a fair and impartial Hearing regarding both accusations. Here, the

Carrier bypassed Article 6, Section 1(A) and, instead, mistakenly relied on the procedures set forth in Article 6, Section B(2). Pursuant to Section B(2)(a) of Article 6, the Hearing is waived under circumstances "involving occurrences considered of a minor nature, where in the opinion of the [Carrier], the discipline assessed would be no greater than a suspension of thirty (30) days. . . ." Such disciplinary action is then handled in accordance with the provisions of this section. The express language of subsection (a) of Section B(2) does not encompass permanent dismissal or suspensions in excess of 30 days. This is evident by reading conjunctively subsections (a), (c) and (g) of this section. It is unrefuted that the Carrier considered the Claimant's two offenses to be of a greater nature than a 30-day suspension. In light of this finding, the procedures set forth in Article 6, Section B(2) were procedurally inapplicable in this case. To apply them to a disciplinary action involving a suspension leading to discharge or immediate termination is a fatal procedural flaw.

Due to the nature of the Claimant's purported offenses, the Carrier was required to hold a Hearing in accordance with Article 6, Section B(1)(a)-(g) of the Agreement. The conduct of the Hearing, its aftermath and the time limited to appeals are prescribed in Sections B(4), C, D and F. The record in this case demonstrates beyond peradventure of doubt the Carrier's lack of compliance with the cited contract provisions. Needless to say, the Claimant was entitled to a notice of and a fair and impartial Hearing to defend against and repudiate the accusations against him. The Carrier abridged his contractual due process rights when he was deprived of this opportunity. By reason thereof, the Carrier did not show just cause for either disciplinary action it imposed on the Claimant. Whether or not the Claimant or the Organization timely objected to the manner in which the Carrier handled this situation under the Agreement is of no concern where the violative action looms as an egregious procedural due process error fatally tainting the entire investigative process.

Given the reasons stated, the Carrier's decision to terminate the Claimant's employment on both alleged offenses will be vacated. The Claimant's reinstatement will be conditioned on his passing a physical examination, including a drug screen, and a Rules examination. When satisfying these conditions, 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 initially terminated on September 25, 2000 until the date of his reinstatement. In calculating the amount of lost pay to which the Claimant is entitled, the Carrier should calculate an average using the earnings

of the active person junior to the Claimant on the seniority roster at a 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.

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 26th day of November 2003.