

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION**

Award No. 26040

Docket No. 45116

04-1-01-1-N-2263

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

(Michael Cumberbatch

**PARTIES TO DISPUTE:** (

(New York Cross Harbor Railroad

**STATEMENT OF CLAIM:**

“Claim is made in favor of Trainman Michael Cumberbatch for financial compensation for all time lost while wrongfully and illegally terminated from [his] employment without just cause and being denied due process. Request is made that [he] be restored to service with the carrier with seniority and all rights and benefits unimpaired and that any discipline-assessed against [his] service record be expunged.”

**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 began his employment with the Carrier on February 23, 1998 as a Brakeman. He was qualified to work on both the Brooklyn, New York, and

Greenville, New Jersey, trackage. The Claimant was subsequently promoted to the position of Conductor upon his qualification on the Brooklyn and Greenville trackage. Next, he was elevated to the position of Terminal Leader in Greenville, New Jersey, but was soon replaced by the Carrier's General Manager on September 13, 1999. Relying on his seniority, the Claimant requested that he be allowed to take the position of Brakeman at Bush Terminal in Brooklyn, New York. The Carrier acceded to this request. At the time of the incident that culminated in the Claimant's dismissal, he was working as a regularly assigned Brakeman on the Bush Terminal crew. His contractual employment rights were covered by a Collective Bargaining Agreement between the Carrier and the Seafarers International Union (the "Organization").

On April 30, 2000, the Carrier's Operation Manager notified the Claimant in writing that his employment was terminated as of April 28, 2000. According to this Carrier Officer, such action was taken because the Claimant had caused a commotion with fellow crew members in Brooklyn. It was further noted that he had been verbally reprimanded during the past several months because of his "negative attitude and lack of respect shown to [his] supervisors" and for causing "numerous problems stemming from [his] attitude and [in]ability to work with other crew members," which impelled the Carrier to relieve him from the position of Conductor in Greenville, New Jersey. In the wake of this termination letter, the Carrier's Vice President of Operations informed the Claimant on May 1, 2000 that he was being discharged "because other employees did not want to work with him." The Claimant protested this action and requested a letter from the Vice President of Operations explaining the reasons for his termination without the benefit of a Hearing to which he was entitled under the labor Agreement. Although the Claimant did not receive a discharge letter from the Company, he sought but was unable to obtain Organization representation on May 3, 2000 for purposes of filing a grievance against the Carrier. On June 6, 2000, the Claimant wrote a letter to the President of the Carrier requesting that he be reinstated to his job as Brakeman because the circumstances upon which he was terminated were purportedly illegal. (The Claimant sent a copy of this letter to the Organization.) The next day, June 7, he received a letter from the Carrier's President requesting his appearance at a Hearing to be held on June 29, 2000. On information and belief, the Carrier's letter was prompted by the Organization which subsequently challenged the Claimant's alleged wrongful discharge. Presumably, the Claimant's right to a Hearing was predicated upon Article II (Discipline) of the Agreement.

At the June 29 Hearing, the Organization's representative informed the Carrier that it was wrong in dismissing the Claimant because he was never charged with violating any Rules or Agreements; that he was discharged without cause and denied due process. In response, the Carrier asserted that the Claimant failed to timely file a grievance after being discharged and thus forfeited his right to reinstatement. This allegation was rebutted by the Claimant when he produced evidence explaining that he attempted to grieve his discharge on May 3, 2000 but was unable to do so in the absence of the Organization representatives from their office. The Hearing soon ended.

On July 7, 2000, the Claimant met with the Organization and according to his version, was told that the Carrier would return him to service with lost wages subject to a number of conditions. Based on these conditions, the Claimant would (1) relinquish his right to take the Carrier to court; (2) agree to a reduction in his hourly wage; (3) forfeit his seniority rights as a Conductor and accept demotion to the Brakeman's position; and (4) allow the Carrier to place him on probation for two years. The Claimant rejected these conditions, which the Organization immediately reported to the Carrier. At the conclusion of this meeting, the Claimant advised the Organization that he wanted to submit this matter to arbitration, to which the Organization purportedly acquiesced.

According to the Claimant, he wrote the Organization on July 12, 2000, expressing his willingness to return to work, but without the Carrier's unfair penalties. He also inquired about the status of the arbitration of his claim for reinstatement and his desire to participate in the arbitration process. On August 15, 2000, the Claimant again wrote the Organization seeking information on how he should prepare for arbitration. The record does not show that the Organization replied to the Claimant's correspondence. However, the Claimant found out from the Railroad Retirement Board that the Organization, in answering the Board's questionnaire regarding his status as a discharged employee, indicated that it had "abandoned" efforts on August 25, 2000 to seek his reinstatement. Since the Claimant felt he had no other recourse, he subsequently submitted the instant dispute to the First Division of the National Railroad Adjustment Board (the "Board") on April 25, 2001.

The Board carefully examined the record in this case and finds, at the outset, that the Carrier deprived the Claimant of his contractual due process rights when terminating his employment in violation of Article II of the Agreement. In pertinent

part, the express language therein provides that "[a]n employee will not be disciplined by record, suspended (except pending investigation) or discharged without a sufficient and just cause until a proper investigation has been made. . . .\*\*\*\*" (Emphasis added) Here, the Claimant was discharged by management prior to "a proper investigation" or evidentiary hearing on the allegations against him. The fact that the Carrier agreed to meet with the Claimant and Organization to discuss his discharge did not exculpate the Carrier from having committed such an egregious procedural error.

Significantly enough, the Carrier apparently realized its errant disciplinary action when it offered to reinstate the Claimant. As recounted herein, an offer of reinstatement was conveyed by the Organization to the Claimant on July 7, 2000. The offer he was asked to consider required him to accept a reduction in his hourly rate of pay, demotion to Brakeman, waive any right to litigate against the Carrier, and be on probation for two years as quid pro quo for reinstatement with no pay for time lost. The Claimant, as previously noted, rejected this offer. Yet he attempted to remain in contact with the Organization as evidenced by his correspondence of July 12, 2000, indicating his willingness to return to work unfettered by any unfair conditions of reinstatement. Based on the Claimant's averment, neither this letter nor his August 15, 2000 correspondence to the Organization was answered. The Claimant remained in a dismissed status only to be abandoned by the Organization on August 25, 2000, prompting him to progress his claim before the Board. The Claimant's rejection of the Carrier's offer of reinstatement, or the Organization's abandonment of his grievance, does not, ipso facto, invalidate the instant claim.

The remedy for the Carrier's violation of the Agreement will be reinstatement and backpay. The Claimant's reinstatement, however, will also be conditioned on his passing a physical examination, including a drug screen, and a Rules examination. Upon satisfying these conditions, the Claimant will be returned to service with unimpaired seniority rights. Further, the Claimant will be entitled to pay for time lost from the date he was discharged on April 28, 2000 until the date of reinstatement. In calculating the amount of backpay to which he 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.

**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 23rd day of July 2004.