Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 6922
SECOND DIVISION Docket No. 6823
2-HB&T-CM-'75

The Second Division consisted of the regular members and in addition Referee Harold M. Weston when award was rendered.

Parties to Dispute: (System Federation No. 2. Railway Employes' Department A. F. of L. - C. I. O. - Carmen
(Houston Belt and Terminal Railway Company

Dispute: Claim of Employes:

1. That the Houston Belt & Terminal Railway Company violated the controlling agreement, particularly Rule 29, when they unjustly dismissed Car Inspector David B. Hamilton, Jr. from service effective December 17, 1973.

2. That accordingly, the Houston Belt & Terminal Railway Company be ordered to compensate Car Inspector Hamilton as follows:

a) Pay in the amount of five (5) days per week at straight time rate beginning December 17, 1973, until returned to service;

b) Return to service with seniority rights unimpaired;

c) Made whole for all vacation rights;

d) Made whole for all health and welfare and insurance benefits;

e) Made whole for pension benefits including Railroad Retirement and Unemployment Insurance;

f) Made whole for any other benefits that he would have earned during the time he was held out of service.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

Claimant, a carman with 2 years 4 months service with Carrier, was dismissed on December 17, 1973, for failure to protect his assignment on the 11 p.m. shift that began December 14, 1973, a payday night. He had been disciplined on four prior occasions that year for failure to protect his assignments - June 14, July 29, August 18 and November 14, each of which was a payday - receiving a reprimand each of the first three times and a 30 day suspension, after waiving hearing, on the fourth occasion.

It is undisputed that no hearing was held in this matter and that Claimant had signed a statement on December 17, 1973, before he was dismissed, that "I wish to waive formal investigation and accept full responsibility for any failure to protect my assignment, Car Inspector at New South Yard, 11:00 P.M. December 14, 1973." The statement was signed in Superintendent Pettus's office in the presence of Mr. Pettus as well as General Foremen Thompson and Alvarez. A like statement had been signed by Claimant on November 30, 1973, regarding his failure to protect the November 14 assignment.

There is no evidence that the waiver was signed on December 17, 1973, because of duress or fraud. In that regard, we have taken into consideration the fact that it was executed in the Superintendent's office in the presence of three Carrier officials but this fact alone is insufficient to establish duress, particularly when Claimant had come to the office voluntarily to explain why he had not protected his assignment and, according to his own version, was merely asked by Mr. Pettus if "I wanted to go ahead with the investigation or have it waived like the other investigation on me" and Claimant replied that "we could go ahead and waive it." There is no evidence that any supervisor or official even sought to persuade Claimant to sign the waiver or that he was intimidated by their presence or actions. The waiver was not typed until after Claimant indicated that "we could go ahead and waive it."

On the other hand, we are not satisfied that the record is sufficiently free of material defect to provide a sound basis for extreme disciplinary action. No representative of the Organization was notified in advance of the waiver, although the Organization is Claimant's exclusive bargaining representative and a party to the applicable Agreement which, in Rule 29, requires that "No employee shall be disciplined without a fair hearing by designated officer of the carrier.

Moreover, Claimant was not told and did not expect that such extreme discipline would be administered. Whether rightly or wrongly, he did not appreciate the full significance of what he was signing and, having received a 30 day suspension the last time he signed a waiver, was clearly under the impression that another suspension would be assessed. Waiver of a Rule 29 hearing should not be accepted unless the employe involved is aware of the consequences. The charges involved here are not of a nature that if aired would subject the employe to undue embarrassment, ridicule or possibly more punitive measures than the Carrier could impose.

Upon weighing all the considerations present in this case, we will direct Carrier to offer immediate reinstatement to Claimant with seniority and vacation rights unimpaired but without back pay or other back compensation of any kind. While it may seem harsh to some, the denial of back pay is appropriate since Claimant signed the waiver voluntarily and should not profit at Carrier's expense by his independent affirmative action, particularly in the light of his prior record and since he admitted not protecting his assignment on the night in question.

A W A R D

Claimant reinstated immediately with seniority and vacation rights unimpaired but, with no back pay of any kind.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch /es/
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of August, 1975.