Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 9165
Docket No. 9245
2-CMStP&P-EW-'82

The Second Division consisted of the regular members and in addition Referee Albert A. Blum when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Dispute: Claim of Employes:

1. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company violated the current agreement when it unjustly dismissed Electrician Helper John Erkins on September 24, 1979 for alleged failure to protect his assignment and subsequently reinstated Electrician Helper John Erkins on January 28, 1980 without compensating John Erkins for all lost wages and benefits.

2. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to make Electrician Helper John Erkins whole by compensating him for all lost wages and benefits during the period commencing with September 24, 1979 and ending with January 28, 1980.

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.

The Claimant, Electrician John A. Erkins, was dismissed from service for absenteeism, tardiness and failure to protect his assignment on September 24, 1979. He had entered the service of the Carrier on March 3, 1978. The Claimant was reinstated on January 28, 1980 on a leniency basis with full seniority rights but with no back pay.

The Organization first argues that the dismissal was "arbitrary and capricious". It claims that on all of the dates on which the Claimant was absent, arrived late, or left early he had a sound reason for the action. Moreover, he had notified the Carrier of the reason by telephone or in person. The Organization also charges that the hearing was not fair or impartial because of some of the questions asked and because the charging officer, the hearing officer, and the reviewing officer were either the same person or were father and son. In addition, the Organization rejects the leniency settlement as not binding on the Organization in that it was agreed to by the Carrier and the Claimant and the Organization was not involved in it. The Organization consequently believes that the Claimant still deserves back pay and other benefits for his time lost. The Organization also argues that since the Carrier chose to reinstate the Claimant, the Carrier, consequently, admitted that it was in error in originally dismissing the Claimant.

The Carrier, on the other hand, notes that the Claimant was absent eight days and only notified the foreman twice (a violation of Rule 16), had left work early twice and had arrived late twice -- all between July 12, 1979 and August 13, 1979. Moreover, the Carrier says it had warned the Claimant about his past attendance record. The Carrier believes that past awards support its decision to terminate the Claimant.

The Carrier also points out that past Board awards have ruled that leniency given a Claimant is not an admission of guilt on its part. In addition, previous Board rulings further declare that leniency settlements with an employe are binding regardless of the wishes of the Organization.

All of the arguments on both sides become moot if the leniency agreement which no one denies was accepted and signed by the Claimant and the Carrier, though challenged by the Organization, is binding in this case. In a similar case (Second Division Award No. 4555, Referee P. M. Williams the following Board Awards are cited:

"First Division, Award No. 16675,

*** Therefore the general rule that one having a money claim may settle it without regard to the wishes of his representative must prevail.

Award: Claim denied."

"Fourth Division, Award No. 1392,

From the above it appears that this dispute has been finally settled on the property and that there is nothing for this Board to determine. It appears that the controversy was adjusted on terms satisfactory to the Claimant and there is no contention that he did not act freely and voluntarily. See Award 983 of this Division and Award No.s 5405, 11762, 13958, 15019 and 16675 of the First Division.

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Award: Claim dismissed."

"Special Board of Adjustment No. 383, Award 17, Case No. 204,

*** Claimant accepted an offer made to him by the Carrier of reinstatement to his position solely on the basis of managerial leniency, with the express understanding that no claim would be progressed or payment for wages lost as a result of his dismissal. This agreement was made between Claimant and Carrier without prior notice or approval to or by the BRT.

Under similar circumstances, Divisions of the National Railroad Adjustment Board have held that such agreements are binding and conclusive of the claim ***

Award: Claim denied."

Then, the Board in Award No. 4555 declared that:

"The record presented to us does not contain any material or reference thereto, which would tend to show that the organization communicated to the carrier an objection to its dealing directly with the actual claimant herein. Nor is any evidence offered to show that the carrier took advantage of the employee when he signed the waiver. Had the record shown that either of these conditions existed then we would be inclined to distinguish this case from those prior awards, cited above, which have held that such an agreement or waiver as we have before us is binding and conclusive of the claim. However, for the sake of uniformity of awards and for the reasons given, we yield to the weight of authority of the prior awards and find that the claim must be denied because the employee settled his own claim on the property on August 10, 1962."

In the present case, there is no evidence that the Carrier took advantage of the Claimant. It is also true that the Organization did not object to the Carrier dealing with the Claimant until after the settlement was reached. But it also appears, from the record, that the Organization was not informed of whatever negotiations were going on between the Claimant, the Carrier and the State of Wisconsin Equal Rights Division. Moreover, the agreement signed by the Claimant did not waive his rights to pursue his claim through the Railway Labor Act but only through the State of Wisconsin Equal Rights Division. Thus, as stated in the settlement agreement, the Claimant agreed in exchange for the leniency reinstatement "not to institute a law suit under Title VII of the Civil Rights Act of 1964 ..., based on ERD Charge No. 7905815 filed with the State of Wisconsin, Equal Rights Division and agrees not to process the charge any further." (Emphasis added.) The charge he agreed not to process further was the ERD charge.

Because the Organization was not adequately informed of what was taking place and because the evidence indicates that the Claimant did not waive his rights under the Railway Labor Act, the sound guidelines spelled out in Second Division Award No. 4555 have not been met and the leniency agreement is not binding in this case.

Surely, however, past Board awards and sound industrial relations practices require that any offer of settlement by a Carrier should not imply a presumption of its guilt. In this case, such a presumption of Carrier guilt is even less sound given the fact that the Claimant signed the agreement. In fact, the only assumption that the Board can reach is that both the Claimant and the Carrier thought it a just settlement.

And a just, nondiscriminatory, and reasonable settlement it was - given the substantive evidence supporting the Carrier's charge that the Claimant had excessive absences and had not protected his assignment. (See, for example, Second Division Award 7325 - McBrearty.)

> "Numerous prior awards of this Board set forth our function in discipline cases. Our function in discipline cases is not to substitute our judgement for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question whether, without weighing it, there is substantive evidence to sustain a finding of guilt. If that question is decided in the affirmative, the penalty imposed for the violation is a matter which rests in the sound discretion of the Carrier. We are not warranted in disturbing Carrier's penalty unless we can say it clearly appears from the record that the Carrier's action with respect thereto was discriminatory, unjust, unreasonable, capricious or arbitrary, so as to constitute an abuse of that discretion."

The Claimant, who had been in service for only one and one-half years, was absent eight times and tardy or left early four times within a two month period. The Claimant, in the majority of the absences, offered no proof of why he was absent, could not name specifically whom he called at the Carrier, and had no proof that he made such a call.

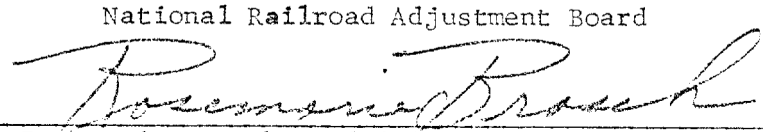
Moreover, however, it might look on the surface when the Carrier used so many people with the same last name in the hearing process (Nielsen and Bidlingmoyer, twice), there is no evidence that these proceedings were unfair. Given all of the above, there is no reason why the Board should disturb the Carrier's decision.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 30th day of June, 1982.