

The Second Division consisted of the regular members and in addition Referee Nancy Connolly Fibish when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Florida East Coast Railway Company

STATEMENT OF CLAIM:

1. That at New Smyrna Beach, Florida, January 12, 1990, Fred J. Bostic, electrical Worker was removed from service pending formal investigation held April 17, 1990 and as a result, was dismissed from service of the Florida East Coast Railway Company. Carrier alleging Fred J. Bostic violated Safety Rules and Instructions for Maintenance of Equipment Department Employees General Rules 1 and 13. Carrier violated the controlling agreement and particularly Rule 26, Discipline Hearings being removed from service and alleging guilt as a result of formal investigation of Fred J. Bostic, denying authorized representative to represent Fred Bostic.

2. That Electrical Worker Fred J. Bostic be compensated for eight (8) hours beginning February 18, 1990 and eight (8) hours each day thereafter at the pro rata rate for all lost wages. Fred J. Bostic to be made whole for all vacation rights, made whole for all health, welfare and insurance benefits, including railroad retirement and unemployment insurance and made whole for any other benefits that Fred J. Bostic would have earned during the time held out of service and personnel record be completely cleared.

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 employes 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.

On January 12, 1990, Claimant's Supervisor instructed Claimant to furnish a written statement giving his reasons for punching out at 4:01 P.M. on January 9, 1990, when he had been instructed the day before to stay until

4:30 P.M. Claimant refused, stating that he would have to check with his Organization's representative before doing so. The Supervisor thereupon issued a notice to the Claimant, charging him with insubordination and directed him to report for a formal Investigation scheduled for January 17, 1990.

At the request of the Claimant, the Investigation was postponed from January 17 to February 5, then to February 28, then to March 28. On the assumption that the Claimant's March 27 letter was another request for a postponement, the Carrier again postponed the formal Investigation--this time to April 17, 1990. While making these postponement requests, Claimant contended that the International Brotherhood of Electrical Workers (IBEW) was his accredited representative. The Carrier, although acknowledging that IBEW was the representative of the Electricians (the IBEW was certified as such by the National Mediation Board on May 17, 1989, and an Agreement between the Carrier and IBEW became effective on April 1, 1990), contended that Electronic Repairmen were represented by the Florida Federation of Railroad Employees (FFRE) and that the Claimant's accredited representative was Mr. R. L. Korman of the FFRE.

Neither the Claimant nor his representative appeared at the April 17, 1990, Hearing. At the Hearing various statements and correspondence were made part of the record, as well as testimony from several Carrier witnesses. On April 19, 1990, Claimant was dismissed from the service of the Carrier for insubordination for refusing to write a statement giving his reasons why he punched out at 4:01 P.M. on January 9, 1990.

In the appeal, it was contended that Claimant was improperly dismissed in violation of Rule 26(b) of the Agreement, that he was not afforded a fair Hearing in accordance with Rule 26 of the Agreement dated April 1, 1990, and that he was not guilty of insubordination and was improperly dismissed.

Although the Claimant and the Carrier had disagreed over whether the IBEW was the certified representative of the Claimant during the proceedings on the property, their representatives now agree that the matter had been resolved on July 30, 1991, and they are in agreement that the IBEW represents Electronics Repairmen. There also is no dispute that the Agreement between the Carrier and the IBEW became effective on April 1, 1990.

Rule 26(b) of the Agreement provides that "employees may be suspended pending final decision" in cases involving intoxication, use of drugs, vicious conduct, or insubordination. The Board accordingly finds that since the Claimant was suspended pending final decision for insubordination, Rule 26(b), which arguably covers the period of the suspension between the April 1, 1990, the effective date of the Agreement and the April 19 discharge, was not violated.

The Board however, finds that the Claimant was denied a fair Hearing as required by Rule 26 (Discipline Hearings), which became controlling on April 1, 1990, when the Agreement became effective. For example, the local IBEW Chairman or Committeeman was not furnished with copies of the written statements to be presented at the Hearing at least 24 hours in advance of the Hearing, as required by Rule 26(f). Admittedly the Claimant did not attend the Hearing, and under normal circumstances a Claimant's unjustified failure to appear entitles the person conducting the Hearing to proceed ex parte. But these were not normal circumstances. The Claimant all along contended that his representative was the General Chairman of the Organization, while the Carrier all along said it was Mr. Korman of the FFRE. Under the circumstances, the Carrier's failure to acknowledge the Claimant's representative denied the employee of due process and a fair Hearing.

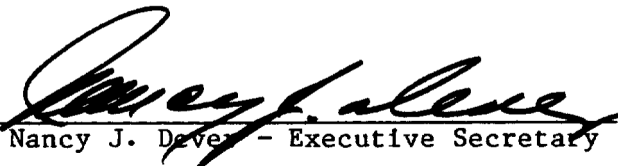
The Board accordingly sustains the claim and directs that the Claimant be made whole under the terms of the Agreement for the period starting April 19, 1990, when he was discharged from the service, and the date he was subsequently reinstated.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of May 1992.