

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
(Southern Pacific Transportation Company (Eastern Lines)

STATEMENT OF CLAIM:

1. That the Southern Pacific Transportation Company (Eastern Lines) violated the controlling agreement, particularly Rule 34, when they unjustly and arbitrarily withheld Electrician R. Pantoja from service beginning October 26, 1990, following investigation held November 20 and 21, 1990, and dismissed from Carrier's service November 30, 1990.

2. Accordingly, the Southern Pacific Transportation Company (Eastern Lines) be ordered to compensate Electrician Pantoja as follows:

- a) Compensate him for all wage lost, at the prevailing rate of pay of electricians and all applicable overtime;
- b) Return him to the service of the carrier with all seniority rights unimpaired;
- c) Make him whole for all vacation rights;
- d) Make him whole for all health and welfare and insurance benefits;
- e) Make him whole for all pension benefits including Railroad Retirement and Unemployment Insurance;
- f) Make him whole for any and all other benefits that he would have earned during the time withheld from service;
- g) Any record of this arbitrarily and unjust disciplinary action be expunged from his personal record.

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 October 26, 1990, Claimant was employed as an Electrician at the Carrier's Houston locomotive maintenance plant, when he was observed by a Carrier's Special Agent as he was leaving the electric shop carrying a cardboard box and a brown bag which he placed in his personal automobile. He was also observed to return to the shop and again exit with a white zippered bag which he also placed in his automobile. While he allowed the General Foreman, who was summoned to the scene by the Agent, to examine the contents of the white zippered bag, he refused to let the General Foreman examine the contents of the cardboard box and brown bag and, as a consequence, he was withheld from service on October 26, 1990.

By letter dated October 30, 1990, the Carrier directed him to report to a Hearing on November 6, 1990, charging him with possible violation of that portion of Rule 801 that deals with insubordination and dishonesty. At the Claimant's request the Hearing was postponed to November 20, 1990. On November 30, 1990, the Carrier assessed him with immediate dismissal on the basis that the testimony adduced at the Investigation proved him guilty of dishonesty and insubordination. On March 13, 1991, the Carrier unilaterally reinstated the Claimant to service with all seniority rights and benefits unimpaired but without backpay. Following the Organization's appeals on the property up to and including the Carrier's highest designated officer, the case was docketed before the Board for final adjudication.

Both parties raised several procedural questions on the property and before the Board, which can be summarized as follows:

(1) The Carrier claims that the Claim must be dismissed for failure of the Organization to file a Claim with the designated Carrier officer, G. D. LeLay, in accordance with Rule 32(h), which reads:

"In discipline cases the initial appeal will be made to the officer rendering the original decision in the case."

(2) The Organization alleges that the Carrier violated Rule 32(a) because it did not respond within 60 days to the Organization's appeal letter dated December 13, 1990, to the Plant Manager, and because the Carrier's response to that initial claim did not give detailed reasons for the Carrier's denial. It also claims that the omission of Page 70 of the Investigation transcript provided to the Organization was a fatal procedural defect on the Carrier's part. For these alleged procedural errors, the Organization asks that the claim be sustained.

In ruling on these particular procedural question, the Board notes that the Carrier, in a letter dated August 3, 1990, advised the Organization to file claims and grievances within locomotive plants with Plant Managers. Moreover, even though the Carrier consistently pointed out to the Organization during the appeals process on the property that the Organization had not sent its initial appeal and request for relief to the charging officer on the property, the Carrier did address the merits of the case (at least, as of February 20, 1991, and later) while it was being appealed on the property. Consequently, the Carrier's procedural objection regarding Rule 32(h), and its request to dismiss this case before the Board, is moot.

Neither does the Board find any basis for sustaining the Organization's claim solely on procedural grounds. The Carrier's omission of Page 70 was not a fatal procedural error, given that the Carrier promptly provided (by letter dated December 17, 1990) the missing page of the transcript when it was called to its attention. Nor was a fatal procedural error committed by the Manager who denied the Organization's initial Claim on the property when he failed to give detailed reasons for his denial. The Organization acknowledged the Carrier's December 17, 1990 denial of its initial appeal in the Organization's letter of December 27, 1990.

Having addressed these procedural concerns of both parties, the Board therefore moves to the merits of the instant Claim. The Organization alleges that Carrier witnesses gave conflicting evidence during the Hearing and that the Carrier did not adduce sufficient proof to sustain its dismissal of the Claimant for insubordination and dishonesty. It also alleges procedural improprieties on the part of the Hearing Officer. The Carrier maintains that there is substantial evidence in the record to show that the Claimant was guilty on both counts.

The Board has examined the entire record, including the transcript of the Hearing, and all Awards cited by both parties in support of their positions. As has been established in various decisions of the Board involving disciplinary proceedings, the Board cannot and will not weigh conflicting evidence, attempt to resolve conflicting evidence, or reverse a finding merely because of the presence of contradictory testimony. Third Division Awards 19493, 19696; Second Division Award 4981; and First Division Award 16848. Furthermore, the Board finds no procedural improprieties in the conduct of the Hearing.

The Board finds that the Carrier adduced sufficient evidence at the Hearing to warrant dismissal of the Claimant for dishonesty and insubordination. However, since the Carrier by its own action reinstated the Claimant on March 13, 1991, with restoration of seniority rights and benefits unimpaired but with no backpay, the only issue remaining is whether the Claimant is entitled to backpay for the period he was out of service from October 26, 1990 to March 13, 1991.

The Board finds that, since the Carrier adduced sufficient evidence to dismiss the employee and since it reinstated him by his own action on the basis that the discipline he had already suffered had served its purpose, the Carrier is under no obligation to also reimburse him for backpay for the period of time he was out of service.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1992.