

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12576
Docket No. 12535
93-2-92-2-60

The Second Division consisted of the regular members and in addition Referee Eckehard Muessig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railway Carmen/Division TCU
(Chicago Central and Pacific Railroad Company

STATEMENT OF CLAIM:

- "1. That the Chicago Central and Pacific Railroad violated the terms of our Agreement, particularly Rule 35, when they failed to notify Carman Jeff Ott of the precise charges against him in an investigation held on March 11, 1991.
2. That accordingly, the Chicago Central and Pacific Railroad be ordered to compensate Carman Jeff Ott twenty (20) days' pay eight (8) hours per day for the amount of time he was unjustly suspended from 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.

Subsequent to an investigation, the Claimant was suspended for twenty days because the Carrier found that he had crawled under a freight car in order to cross a track. The car was in an unprotected cut of cars being switched.

The Organization contends that the Carrier expanded its initial charges against the Claimant at the hearing because it introduced, for the first time, Rule 222. While this contention is

arguable, it was very apparent from the testimony that what was being investigated was the alleged act by the Claimant of crawling under the car in violation of the Carrier's rules and regulations.

With respect to the substance of the charge, we find that the Carrier has met its burden of proof. However, we also find significant mitigation. From our review of the file, we agree with the Organization that up to the time of the incident leading to this claim, the Carrier has been lax in enforcing its Blue Flag regulations. For example, it was not refuted that certain of its salaried personnel had not complied with these regulations. This tends to provide further substance to the Organization's contention that the Claimant crawled under the car in direct sight of one of the Carrier's Managers. It is unlikely that he would have behaved in such a manner had it been the case that Blue Flag rules had been consistently enforced.

Accordingly, while this Board does not accept the notion that a rule violation may be excused, given the circumstances and noting that the Claimant is a long-time, discipline-free employee, a twenty day suspension is unduly harsh. Therefore, we find that a one day suspension is more appropriate.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 8th day of September 1993.

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 11263

DOCKET NO. 10887

NAME OF ORGANIZATION: International Brotherhood of Electrical Workers

NAME OF CARRIER: Northeast Illinois Regional Commuter Railroad Corporation

The Findings in Second Division Award 11263 concluded:

"...Rule 27 has been violated and the Claimant shall be reinstated with all seniority and other rights unimpaired and entitled to any lost wages and benefits in accordance with the provisions of the agreement."

As a result of the Board's decision the parties disputed the various aspects of the Award. The dispute continued to the courts wherein by order dated January 16, 1991, the Court remanded the Award back to the Second Division of the National Railroad Adjustment Board (88C6255). In its conclusions, the Court held that the Board should "clarify its award as more specifically detailed above."

In a full reading of the Court's report, this Board is guided by the language therein in its interpretation. The Court stated in pertinent part:

"The Board does not specifically tell us how Mr. Peterson is to be returned to service. Does the Board mean that he is to be given a job? Does this mean that he is to be given Galls' job or is the carrier being required to create a position for him? Does it mean merely that his name must be put back on the seniority roster? Respondent cannot be expected to comply with the award until these questions are answered. There is also the question of what the Board means by 'lost wages.' As previously stated, in its findings the Board rejects Peterson's contention that a Rule 23 violation is the basis for his relief (footnote deleted). Therefore it would seem

incongruous to assess lost wages from October 13, 1982. Yet this is of course, precisely what the Board has ordered. What then are the last (sic) wages the Board is referring to?..."

The Board has read the Court summary and order as well as the full record and the respective materials presented by the parties for this Interpretation. Based on the Award, we found that Rules 34 and 35 were inapplicable. We found that the seniority roster was in error and that Rule 27 had been violated.

Accordingly, the Award stated that "Claimant shall be reinstated with all seniority and other rights unimpaired..." It was the Board's intent that as the Carrier had improperly removed the Claimant's name from the seniority roster, that the Claimant's name was to be appropriately inserted into the seniority roster as a furloughed Helper. No other interpretation was implied or meant by that language. This Board lacks jurisdiction and did not intend that the Carrier give Claimant Gall's position or create a working position for the Claimant.

Additionally, the Board continued by utilizing commonly referred to language in this industry when it stated that Claimant was "entitled to any lost wages and benefits in accordance with the provisions of the Agreement." It was as of the February 27, 1984 date when the Claim was filed for violation of Rule 27 that a violation was found. It is from that date that the Claim flows, and not from the date of October 13, 1982 when Gall was hired by the NIRC, a date clearly rejected in the Award. Since Claimant failed to timely protest, the Claim for compensation begins under this agreement only from sixty days prior to February 27, 1984 when the Claim was filed.

The language of "lost wages and benefits" refers to any monies that the Claimant would have earned had he been properly carried on the seniority roster as a furloughed Helper. The Court ordered that the Interpretation carry a "date of reinstatement, the date from which back pay should run, [and] the manner under which lost wages should be determined" is as follows. Claimant is to be reinstated on the Seniority Roster, with compensation from sixty days prior to February 27, 1984. The compensation based solely upon what the Claimant would have earned as a Helper if he would have been recalled thereafter to a position. It is not the intent of this Award to compare his earnings to Gall, whom Claimant never protested and to whom he held a junior position for which he was unqualified. It was solely the intent that Claimant be made whole for what he would have earned if he would have been properly on the seniority roster. As stated in Interpretation 1 to Award No. 10944 over similar concerns:

"The concept of make whole has been well defined by arbitrators. There is no provision for punitive damages... The Claimant is simply entitled to what he would have earned if he had been properly recalled; no more and no less. Assuming the position in question ceased to exist as of August 29, 1984, the Claimant is entitled to wages lost (less earnings for each date he was employed elsewhere during the period) from April 25, 1984 to August 29, 1984. The Claimant cannot be returned to a position that does not exist nor is he entitled to earning for the period he would have been furloughed subsequent to August 29, 1984 since no wages were lost. Award 10944 did not provide that the Claimant should be treated more favorably than other employees."

Accordingly, and in concurrence with the above logic from the Interpretation to Award No. 10944, the Board finds its decision clear.

Referee Marty E. Zusman, who sat with the Division as a neutral member when Award 11263 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois this 15th day of September 1993.