

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12577
Docket No. 11948
93-2-90-2-101

The Second Division consisted of the regular members and in addition Referee Joseph S. Cannavo, Jr. when award was rendered.

PARTIES TO DISPUTE: (Union Pacific Railroad Company
(
(International Brotherhood of Electrical
(Workers

STATEMENT OF CLAIM:

- "1. That the Union Pacific Railroad Company violated the controlling agreement and in particular Rule 37 and Ruling 19, but not limited to, when Electrician T. M. Wingett was unjustly withheld from service on the date of June 1, 1989.
2. That the Carrier scheduled and attempted to hold a hearing on the date of June 5, 1989, at 10:00 a.m., prior to Electrician Wingett or myself, as his duly authorized representative, being properly notified in accordance with the controlling agreement.
3. That accordingly, the Union Pacific Railroad Company be ordered to compensate Mr. T. M. Wingett as follows:
 - a. Compensated for all lost time at the prime rate of interest.
 - b. Returned to service with seniority rights unimpaired.
 - c. Made whole for vacation rights.
 - d. Made whole for all health, welfare and insurance benefits.
 - e. Made whole for pension benefits, including railroad retirement and unemployment insurance.
 - f. Made whole for any and all other benefits that he would have earned during the time withheld from service.
 - g. Any record of this unjust disciplinary action be expunged from his personal record.

4. Carrier violated Rule 35 of the Agreement effective November 1, 1976."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 June 1, 1989, Claimant was withheld from service pending formal Investigation due to his alleged failure to perform his duties as requested by a foreman thereby violating General Rules A & B and Rule 607 of Form 7908, "Safety, Radio and General Rules for All Employees." A formal Investigation was held on June 8-9, 1989. On June 23, 1989, the Claimant was advised that he was found guilty as charged and that he was being assessed discipline of 30 days actual suspension from service.

The position of the Organization is that the claim should be allowed as presented because the Carrier violated Rule 35 of the controlling agreement when it failed to make reply to claim initiated by the General Chairman within the 60 day time limit as prescribed by Rule 35. The Organization further argues that the Claimant was not apprised of the precise charge against him and was not treated in a fair and impartial manner in accordance with Rule 37. The Organization also states that the evidence does not support the conclusion of the hearing officer. Also, the Organization notes that the Claimant should not have been withheld from service on June 1, 1989; that he posed no danger to himself or his co-workers; that as a result of being withheld from service on June 1, 1989, he served an actual suspension of 43 days. Organization advises that the Claimant is a 19 year employee with an unblemished record and holds a position with the Organization. On the basis of the foregoing, the Organization requests that the claim be allowed in accordance with its Statement of Claim.

The position of the Carrier is that it did respond to the claim initiated by the General Chairman within 60 days and as such it did not violate Rule 35. The Carrier claims that the evidence

supported a finding that the Claimant refused to hook up a battery pack and that no safety considerations justified the Claimant's refusal to obey an order thereby being insubordinate. The Carrier also charges the Claimant with using profanity toward the relief foreman.

This Board has reviewed the evidence and finds as follows:

The Board rejects the Organization's claim that the Carrier failed to respond to the General Chairman's claim within 60 days thereby violating Rule 35. The evidence established that the claim was filed by letter dated July 6, 1989, via U.S. Postal Service, certified mail/restricted delivery. The date of delivery was established as July 15, 1989, and the Carrier's response was dated September 12, 1989. It is well established by the Board that the date of receipt determines the 60 day time limit which commences to run from that date and that the Carrier stops the running of the time limit by mailing or posting the notice required within the 60 days of the date that the claim was received. (See Second Division Award 8833.)

However, the weight of the evidence does not support the Carrier's claim that the Claimant was insubordinate. The Claimant and two other witnesses disputed the relief supervisor's testimony that the Claimant was ordered to hook up battery packs. Their testimony establishes that the Claimant was ordered to hook up batteries to which he responded that he would do so upon approval by his supervisor; that his concern was out of fear that an electrician may be working on the locomotive and he wanted to avoid any potential danger. Furthermore, the relief foreman's testimony that only two people could occupy the area in which he had the conversation with the Claimant was rebutted by the testimony of the Claimant, two other employees and the Claimant's regular supervisor. They testified that 20 to 40 people could occupy that area. Also rebutted by the weight of the evidence was the relief foreman's claim that the Claimant used profanity toward him. While the Claimant did admit to using an impolite word, it was not directed toward the relief foreman.

On the basis of the foregoing, the claim must be allowed.

A W A R D

Claim sustained.

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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.

CARRIER MEMBERS' DISSENT
TO
SECOND DIVISION AWARD 12577, DOCKET 11948
(Referee Cannavo)

The careful consideration given to this case by the Referee is apparent from the following. At the time this docket was argued before the Referee, it was pointed out that another docket likewise was to be considered involving the identical claim - the only difference being that one dispute had been progressed to the Board by the Carrier, the other by the Organization.

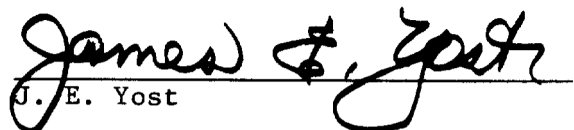
It was suggested to the Referee that in the interest of expedition, efficient cost containment, and common sense, the Referee should decide one of the disputes, explaining his rationale, and dismiss the other dispute as repetitious.

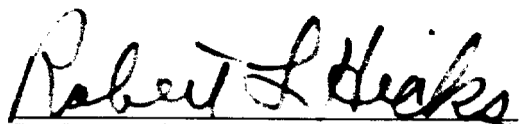
The other dispute, adopted this same day is Second Division Award 12578. It is noted that not only did the Referee write a separate Award in both cases, he did not even refer to the other case as the doppelganger of the one he was considering. Accordingly, we have two independent Awards sustaining the same claim! No more need be said on this point.

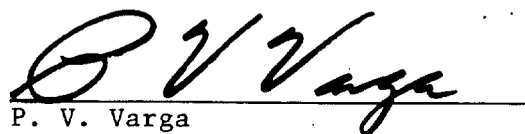
To add injury to the injury, in the Referee's haste to write duplicate Awards, he sustained the entire claim including interest and a whole host of fringe benefits that this Board has consistently found to be beyond its authority to grant. Even this Referee knows better than that. Second Division Awards: 12161, 11867, 11737, 11733, 11732, 11730, 11728. Given the fact that these cited Awards are by the same Referee here, one can only conclude that he never even considered the subject of remedy.


M. W. Fingerhut


M. C. Lesnik


J. E. Yost


R. L. Hicks


P. V. Varga