

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 13042
Docket No. 13000
96-2-95-2-20

The Second Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

PARTIES TO DISPUTE: (Sheet Metal Workers' International
(Association
(Southern Pacific Transportation Company
(Western Lines)

STATEMENT OF CLAIM:

- "1. By letter dated October 29, 1993 Carrier removed Sheet Metal Worker M. L. Maldonado from service and subsequently dismissed him for violation of Rules 1007 and 1011. This was in violation of Rules 38 and 39 of the controlling agreement.
2. As a result of said violation Carrier shall be required to reinstate Sheet Metal Worker M. L. Maldonado to service as follows:
 - 1) Restore the claimant to service with all seniority and other rights unimpaired.
 - 2) Compensate claimant for all time lost.
 - 3) Make claimant whole for all vacation rights.
 - 4) Reimburse the claimant and/or his dependents for all medical and dental expenses incurred while employee was improperly held out of service.
 - 5) Pay to the claimant's estate whatever benefits the claimant has accrued with regards to life insurance for all time claimant was improperly held out of service.
 - 6) Pay claimant for all contractual holidays.
 - 7) Pay claimant for all contractual sick pay.

- 8) Pay claimant for all contractual bereavement leave.
- 9) Pay claimant for all jury duty and for all other contractual benefits, and have all mention of this removed from his 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 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 September 2, 1993, Claimant was notified by certified mail, return receipt requested, to appear for an Investigation to develop the facts and place responsibility:

"... if any, in connection with your alleged failure to protect your employment since July 29, 1993 through and including September 2, 1993; and in addition, your alleged failure to present yourself to California Occupation Medical Group ... for a Company designated physical examination on August 25, 1993 at 10:30 a.m., in accordance with my letter of instruction...."

The letter was sent to the address on file for Claimant, and receipted for by someone other than Claimant.

Claimant did not appear at the Investigation; an option available to any charged employee. The Organization argued Claimant was not aware of the Investigation. Carrier countered by stating that it was sent to the address on file for Claimant, just as it has sent other certified, return receipt letters for which Claimant acknowledged. Who the signee was has never been explained, and it is significant to note that at no time in the on-property handling has Claimant submitted a statement professing lack of knowledge of the scheduled Investigation.

Carrier complied with its requirements to timely notify Claimant of the pending charges.

Prior to discussing the merits or lack thereof, the Organization has raised a procedural issue involving the handling of the dispute following the dismissal of Claimant. On December 15, 1993, following the October 29, 1993, dismissal of Claimant, the Organization presented the claim as now before the Board to the Carrier Officer authorized to receive claims and/or grievances in the first instance.

On March 28, 1994, the claim was appealed challenging Carrier's right to dismiss, and stating the first Carrier Officer never responded to the claim. Under these circumstances, the Organization says the claim is payable as presented in the first instance.

Carrier responded on May 13, 1994, but never countered the procedural argument. It is, therefore, clear to this Board that Carrier defaulted in not responding to the claim as first presented.

The Carrier, as stated, did not rebut the "no denial" charge of the Organization, but did raise the mitigation of damages and cited Second Division Award 12580 as precedent. That Award, however, has been overturned by a Court.

In this particular dispute, there is one other issue that must be considered before ruling on the procedural issue. Claimant was offered a conditional reinstatement on May 24, 1994. The offer read:

"... The Carrier will reinstate you to service with seniority unimpaired, but without payment for time lost...."

Claimant was asked to sign the offer if he accepted it. He did not accept the offer. On June 24, 1994, Claimant again was offered reinstatement without pay for time lost, but with the further proviso that his acceptance would not in any way jeopardize his right to progress the claim for time lost from dismissal to point of reinstatement. Claimant, needless to say, also refused this offer.

It is, therefore, the opinion of this Board that the claim for damages ceased with Carrier's June 24, 1994, offer of reinstatement. Claimant should have accepted the offer. He has the obligation to mitigate the damages, and this he chose not to do.

The claim is therefore sustained from date of letter of dismissal (October 29, 1993) to the date of the offer of unconditional reinstatement (June 24, 1994).

Subsequent to June 24, 1994, the claim will be reviewed on the merits, and we do find that the Carrier clearly substantiated the charges assessed and that the dismissal will not be overturned or modified in any way. Claimant's election not to attend the Investigation did leave all of the Carrier's evidence unchallenged and uncontested; in spite of Claimant's representatives valiant efforts to defend the absent Claimant.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 21st day of August 1996.