

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION****Award No. 13218
Docket No. 13090
98-2-95-2-116**

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

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(System Council No. 9
(CSX Transportation, Inc. (former Seaboard Coast
(Line Railroad Company)

STATEMENT OF CLAIM:

- "1. That at Waycross, Georgia, May 28, 1994, CSX Transportation violated the controlling agreement, particularly Rule 32, when electrician D.E. Nichols, ID 140091 was directed to attend formal investigation to determine the facts in connection with his reporting of a personal injury that occurred while on duty at approximately 10:30 a.m., May 26, 1994. CSX Transportation adduced that this was approximately three hours after being counseled concerning failure to perform his duties in a timely manner and delaying locomotive repairs. Mr. Nichols was charged (1) with falsely reporting the alleged personal injury; (2) with insubordination by his failure to follow instructions from Plant Manager D.C. Minix not to attempt to aggravate the alleged injury by rubbing his eye; and (3) with possible retaliation for the counseling given him. Mr. Nichols was suspended from service pending the outcome of the investigation. Formal investigation was held on June 8, 1994, and CSX Transportation concluded that Mr. Nichols was guilty as charged of (1) falsely reporting of personal injury on May 26, 1994, supported by the testimony of the Industrial Nurse and Doctors' reports indicating they could find nothing in his eye and no injury to the eye, only minor irritation; (2) insubordination by your failure to follow instructions from Plant Manager D.C. Minix not to attempt to aggravate the alleged injury by rubbing his eye; (3) reporting a personal injury in retaliation for the counseling given him on May

26, 1994, prior to the alleged injury. Discipline assessed was dismissal from all services of CSX Transportation, Inc.

2. That electrician D.E. Nichols be compensated for eight (8) hours at the pro rata rate, commencing May 26, 1994, by reason CSX Transportation unjustly suspended and subsequently dismissed Mr. Nichols from service on July 6, 1994, and compensation be paid for all lost wages until such time Mr. Nichols is returned to service with seniority rights unimpaired, be made whole for all vacation rights, for all health and welfare and insurance, for pension benefits including Railroad Retirement and Unemployment Insurance, and for any other benefits that he would have earned as said benefits are part of the wages lost while being unjustly suspended and dismissed from service and his personal record be cleared of all matters referred to herein."

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 were given due notice of hearing thereon.

Claimant was dismissed from the service of the Carrier on July 6, 1994 after a formal Investigation held on June 8, 1994. Claimant was suspended from May 26, 1994 pending the Investigation.

Claimant was found guilty of falsely reporting a personal injury on May 26, 1994, insubordination for not complying with the instructions of the Carrier's Plant Manager by rubbing his eye, and reporting a personal injury in retaliation for being counseled prior to the alleged injury.

The transcript reveals that at approximately 10:30 A.M. on May 26, 1994 Claimant was working on Spot No. 3 when he got sand in his eye. The Carrier's Supervisor testified:

"When I came down to spot 3, as a matter of fact, right before the accident happened, I was on my way down to see Mr. Nichols and Mr. Nichols came out from under the unit and explained to me that he had received sand in his eye. Well, fans was blowing and the sand was in circulation, so I hollered out immediately to persons on top that if you have sand on, that you have people down here working. Then I assisted Mr. Nichols straight on to the planning room to get the keys to carry him to the nurse."

A member of Shop Safety Committee testified as follows:

"Well, to start, what happened I was in the Safety Director's Office taking his place while he was gone, and was off the property. And about 10:30-10:35 I got a call from the Office to come take Mr. Nichols to the nurse, that he'd gotten sand blown in his eye. When I got to the office, they said that Supervisor Sturdivant had already taken him, but they wanted me to go look at the locomotive and see if there was sand or whatever. And, as soon as I went down to the locomotive 1159, I went downstairs where David works and I talked to the machinist downstairs, and he said he didn't see where it happened and they were getting ready to change out some air equipment. And I checked the area out and there was sand on the wheels, fresh sand on the wheel, and there was a fan downstairs at No. 1 truck that was for ventilation. I went upstairs and I talked to machinist up there and pipefitters and they said that pipefitters had put air on the locomotive to recharge the main reservoir and the machinist were getting ready to change out some air equipment - not air equipment, but do the dirt collectors, and to do the dirt collectors, if you have air on the locomotive, you have to turn it off down at the main reservoir, and the only thing we could figure out that when they cut the air off, that it threw the locomotive into emergency, and the sand was . . . went into emergency, sand blew down on the track."

While in the Planning Room before going to see the shop nurse the Carrier's Plant Manager saw the Claimant rubbing his eyes and told him to stop doing so. Depending on whose testimony is believable, this occurred from one to three times.

When the Claimant finally was taken to the Shop Nurse, his eyes were flushed two times. After the flushing, the Nurse could not find anything in Claimant's eye. The Claimant returned to work and completed the day. That night Claimant's eye was painful and he went to the emergency room where a patch was put over his eye.

On May 27 Claimant went to work wearing the patch. The Carrier took Claimant to an ophthalmologist who found Claimant's eye to be red, but no foreign particles. When the Claimant returned to work, the Carrier pulled him out of service pending the Investigation.

The Organization filed this claim for several reasons. It argues that the Claimant should not have been pulled out of service pending the Investigation. It further argues that the Carrier acted unfairly and was arbitrary and capricious in dismissing the Claimant.

Claimant had 26 years of service at the time of the incident with one lost time discipline of one day in 1972.

The Carrier argues that the charges were proven and the seriousness of the charges warrants dismissal.

The Board should not presume to substitute its judgement for that of a carrier and reverse or modify a carrier's disciplinary decision unless it is shown that it acted in an unreasonable, arbitrary, capricious or discriminatory manner, amounting to an abuse of its discretion.

This case is a gross misuse of the Carrier's discretion. First, the Carrier had no basis for suspending the Claimant from service pending the Investigation. There was no evidence produced to indicate that the Claimant was a safety hazard to himself or other employees, nor had the Claimant violated a Carrier Rule that by its nature requires an employee being pulled out of service.

Second, there is no question that Claimant had sand blown in his eye. The fact that the Shop Nurse could not find anything in the Claimant's eye after flushing it out twice does not mean that the Claimant falsified an injury. The insubordination charge is ludicrous, and there was no evidence presented that the counseling session was anything more than a production meeting. The testimony does not reveal that there were harsh words spoken at the meeting.

The Carrier failed to show that the Claimant warranted any discipline, let alone dismissal. Claimant is to be reinstated with seniority unimpaired, and pay for all time lost except for the 30-day time limit extension granted the Organization to submit the case to the Board.

The Organization's request that the Claimant be made whole for all vacation rights, health and welfare benefits, etc., is unfounded and not supported by the Agreement. Rule 32 reads in part, "If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority unimpaired and compensated the wage lost, if any, resulting from said suspension or dismissal."

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 26th day of February 1998.