

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13663

Docket No. 13588

01-2-00-2-80

The Second Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

(Sheet Metal Workers' International Association
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

- "1. That the National Railroad Passenger Corporation (hereinafter referred to as Carrier), violated Rule 23 of the current controlling Agreement between the Sheet Metal Workers' International Association and the National Railroad Passenger Corporation, effective October 1, 1977, subsequently revised on December 22, 1992, when they unjustly terminated Sheet Metal Worker Jean-Pierre H. Leyx (hereinafter referred to as Claimant) for allegedly being in violation of Carrier's Standards of Excellence.**
- 2. That the Carrier compensate Claimant for all lost wages, payment of hospital and medical insurance, group disability insurance, railroad retirement contributions, and all other rights that are a condition of employment, and that the entire investigation digest be expunged from Claimant's 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 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.

The Claimant, Oakland Sheet Metal Worker J. Leyx, was the incumbent of a third shift assignment working 11:59 P.M. to 7:59 A.M. At the end of his shift, Foreman M. Fabian asked the Claimant if he would remain on duty and work overtime on first shift. The Claimant said he was tired and declined. However, the Claimant stated that he would go home, rest, and then return to work overtime on second shift, from 3:00 P.M. to 11:00 P.M. Foreman Fabian agreed.

The Claimant testified that it was his understanding, based on this conversation, that he would not be compensated at the overtime rate for working second shift because he was simply switching shifts and would therefore not be required to work his regular third shift assignment upon completion of the second shift. Foreman Fabian's testimony directly contradicts that of the Claimant. He stated that there was no agreement or discussion to suggest that, by coming in on the second shift, the Claimant did not have to protect his regular job assignment.

The Claimant went home, then returned and worked the second shift. Shortly before 11:00 P.M., he told Foreman Given that he was leaving because he had previously arranged with Foreman Fabian to work the second shift and then go home. Foreman Given stated that he was not aware of any such arrangement. He also stated that he had already scheduled the job assignments and that the Claimant was needed to work his regular, bulletined third shift assignment. There is no dispute that the Foreman directed the Claimant to stay and that the Claimant refused. According to Lead Coach Cleaner P. Williams and Laborer D. Baldwin, who were in the Foreman's office and witnessed the incident, Foreman Given repeated at least three times that the Claimant was required to stay on the job. Instead, the Claimant punched out and left the premises.

The Claimant was subsequently informed that he was to appear for an Investigation to determine whether there had been a violation of Amtrak's Standards of Excellence, including those portions titled Professional and Personal Conduct and Attending to Duties. In particular, the charges specified that the Claimant was insubordinate and failed to protect his assignment on March 23, 2000. Following the Investigation, the Claimant was dismissed from service.

Based on the factual predicate before the Board, there is little doubt that the Carrier has met its burden of proving the charges directed against the Claimant. The evidence in support of the charges is essentially uncontroverted. The Claimant refused his Supervisor's

directive not once but at least three times. Accordingly, the only remaining questions are whether there were any extenuating or mitigating circumstances which should have been considered in assessing the propriety of the penalty.

The Organization's position is that there were a number of factors in this case which point to the conclusion that the discharge penalty was overly harsh. It argues that the Claimant was ill and exhausted from having worked the prior shift and that the Carrier shares culpability in this matter for ignoring the Claimant's well-being. The Organization further argues that the Claimant simply misunderstood the context of the conversation with Foreman Fabian. In the Organization's view, the evidence shows that the Claimant did not intend to be insubordinate when he refused to work his third shift assignment; he simply believed that he was not required to report.

In considering these arguments, it must be remembered that they are made, not in the context of a claim protesting the work assignment, but in response to discipline for failing to obey the direct order of a supervisor. As such, we find that the Organization's contentions are not a persuasive defense. The Claimant refused to adhere to the well-established Rule that employees must "obey now, grieve later." If he disagreed with the Foreman's order, he should have filed a claim challenging the directive. It was not the Claimant's prerogative to ignore the Foreman and leave the work premises, no matter how legitimate he felt were his reasons for doing so. To find otherwise would give employees free reign to resort to self-help, thereby creating an obviously untenable situation in the workplace.

The Board emphasizes that the facts in the instant case are clearly distinguishable from Second Division Award 8938, cited by the Organization. There, the claimant had been given permission to leave early to pick up his son at a hospital. He was dismissed for failing to perform job duties which would have extended beyond the 11:00 A.M., the time when the claimant had been given permission to leave. Sustaining the claim, the Board concluded that the employee had not been insubordinate.

Here, careful review of the Claimant's own testimony undercuts his assertion that permission had been given not to perform his third shift assignment. The Claimant testified:

"He [Foreman Fabian] told me that he didn't have no pipe fitter to cover this shift. Can I do something about it? And I felt like - well, Mike, I cover the second shift. This is my words. I say - and I said, and I quote myself saying,

‘Mike, I’ll cover it, second shift.’ And he thanked me, he said, ‘Thank you very much.’ And he turned around and walked away.”

The Claimant asserted that he “was under the understanding that I was not supposed to cover my shift, but work second shift instead.” However, nothing in the conversation related by the Claimant would reasonably lead to this conclusion. In any event, even if the Claimant had misunderstood his conversation with Foreman Fabian, he should have protected his regular bulletined assignment as directed by Foreman Given.

We note, too, that the claim of illness relied upon by the Organization was not raised by the Claimant until the Hearing. This after-the-fact assertion, unsubstantiated by any medical evidence, is insufficient to excuse the Claimant’s misconduct.

Finally, the Board finds no other circumstances present to justify modifying the penalty imposed on the Claimant. Notwithstanding the Organization’s arguments to the contrary, the record evidence indicates that the Claimant was afforded a fair and impartial Hearing, with all attendant rights of due process. Moreover, his record is not one that speaks in favor of mitigation. On the contrary, the Claimant was far from being an exemplary employee, having amassed numerous disciplinary occurrences during his employment with the Carrier. For all these reasons, therefore, we must rule to deny the claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 11th day of December, 2001.