

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13697

Docket No. 13524

03-2-99-2-88

The Second Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(National Conference of Firemen & Oilers

PARTIES TO DISPUTE: (

(Grand Trunk Western Railroad, Inc.

STATEMENT OF CLAIM:

- “1. That under the current and controlling agreement, Firemen and Oiler Timothy A. Foy was unjustly dismissed from service on April 13, 1998 by W. W. Travis.
2. That accordingly, Fireman and Oiler Timothy A. Foy be restored to his position with the Grand Trunk Western Railroad, be made whole for all lost time, with seniority rights unimpaired, vacation, health and welfare, hospital and life insurance benefits be paid effective January 10, 1998, the payment of 10% interest rate added thereto.”

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.

Prior to his April 9, 1998 dismissal, the Claimant had been in the Carrier's service for approximately 17 years. At the relevant time, the Claimant was employed as a Laborer at Battle Creek, Michigan.

On January 9, 1997, Foreman P. Mathis observed the Claimant reading a newspaper on a forklift truck. Mathis told the Claimant to find something to do. The Claimant responded that he was going to the Running Repair area to read his newspaper. Mathis then told the Claimant that there was sweeping to be performed. The Claimant then departed the area on the forklift. Mathis informed Shop Superintendent J. F. Mallmann of the incident.

Mathis later observed the Claimant coming up the ramp from the Running Repair area. Mathis assigned the Claimant to sweep the floor. The Claimant then went to see Mallmann.

Mallmann told the Claimant that the Claimant's job was to sweep the floor and make lifts with the forklift as needed. The Claimant responded that he would either make moves with the forklift or sweep the floor, but that he would not do both. Mallmann instructed the Claimant to sweep the floor and if he was needed to perform a lift, to perform that duty and then return to sweep the floor. The Claimant responded that he was a Forklift Operator and his job was not to assist in cleanup of the shop. The Claimant stated that he would sweep the floor, but would not make a lift if called. Mallmann then advised the Claimant that he could be removed from service if he did not follow instructions. The Claimant then left the property.

After an Investigation, the Claimant was dismissed from service by letter dated April 13, 1998 for failing to follow instructions and direct orders and for insubordination.

The Claimant's prior discipline record shows that he received ten demerits in 1981 for a Safety Rule violation; ten demerits in 1987 for another Safety Rule violation; ten demerits in 1987 for spilling fuel while fueling locomotive units; 15 demerits in 1987 for derailment of an engine; a three-day suspension in 1988 for sleeping on duty; and five demerits in 1996 for failure to properly perform his duties. The record before the Board also shows warnings for excessive absenteeism in 1996.

Finally, the record reveals that the Claimant has been under treatment for major depressive disorder.

Substantial evidence supports the Carrier's determination that the Claimant engaged in misconduct. Specifically, on January 9, 1997, the Claimant was instructed to sweep the floor rather than read the newspaper and to perform lifts with the forklift when needed. The Claimant's responses varied from refusal to do so to stating that he would perform one function or the other. Substantial evidence therefore shows that the Claimant failed to follow instructions and direct orders and was insubordinate.

However, we find that under the circumstances the Carrier's dismissal of the Claimant was excessive and therefore arbitrary. The Claimant was a long term employee - approximately 17 years. Further, while the Claimant had a number of prior disciplinary entries in his record, those entries were relatively minor (the most severe being a three-day suspension) and were remote in time from the incidents in this matter. Indeed, the three-day suspension was in 1988 and eight years went by until he received the next disciplinary action of five demerits in 1996. Additionally, the record shows that the Claimant was suffering from psychological problems, specifically major depressive disorder. While refusal to follow instructions and insubordination are serious offenses and certainly can result in dismissal, on balance, the Claimant's long length of service, remote prior disciplinary actions and psychological condition cause us to find that in this case dismissal was excessive.

The problem in this case is the remedy. In the exercise of our discretion, the remedy shall be as follows:

First, the Claimant shall be reinstated with seniority unimpaired.

Second, because of the demonstrated failure to follow instructions and direct orders and insubordination, the Claimant shall not be entitled to backpay. Nor is he entitled to "... vacation, health and welfare, hospital and life insurance benefits ..." or "... payment of 10% interest ..." as requested in the Statement of Claim.

Third, as a condition of the Claimant's reinstatement and at the Carrier's option, within 30 days of notification from the Carrier to the Claimant, the Claimant must submit to and pass a fitness for duty examination and all other examinations given to

returning employees. Those examinations shall be conducted by a physician and/or other qualified professionals designated by the Carrier.

Fourth, should the Claimant pass those examinations, for a period of 12 months of active employment following his reinstatement, the Claimant shall engage in no misconduct that would cause him to be disciplined.

Fifth, should the Claimant be found fit for duty as specified in this Award, the Claimant shall submit to an evaluation by the Carrier's Employee Assistance Program and comply with any program designed for him. The Claimant shall execute the necessary releases to allow the Carrier to monitor his progress in the program.

Sixth, the Claimant must understand that his reinstatement is on a last chance basis. Should the Claimant fail to comply with any of the conditions placed on his reinstatement or otherwise fail to cooperate with any of the requirements of this remedy, the Claimant shall immediately revert to a dismissed status.

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 31st day of January, 2003.