

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13750

Docket No. 13649

03-2-02-2-10

The Second Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Burlington Northern Santa Fe Railway Company)

STATEMENT OF CLAIM:

- “1. That in violation of the current Agreement, Rule 30 in particular but not limited thereto, Telecommunication Department Towerman T. M. Wise was unjustly dismissed from the service of the Burlington Northern/Santa Fe Railroad Company following an investigation held on September 8, 2000.
2. That the investigation held on September 8, 2000 was not a fair and impartial investigation under the terms required by the rules of the current Agreement and that the dismissal of Electrician T. M. Wise was unjust, unwarranted and excessive.
3. That accordingly the Burlington Northern/Santa Fe Railroad Company be directed to restore T. M. Wise to its service and further that he be made whole for all lost wages, rights, benefits and privileges which were adversely effected by his suspension and dismissal. In addition, that all record of this matter be removed from T. M. Wise’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 in this matter was employed in 1993 and worked in the Carrier Bridge and Building Department. In 1997, he was transferred to the Carrier's Telecommunication Department as a Towerman. In the new position, he was paid a higher wage and was entitled to expense payments. In return, he was required to work five days and be available for a sixth day.

The Claimant desired further advancement and requested additional training. He was advised that he could take correspondence courses for which he would be reimbursed. The Claimant rejected the idea on the basis that he worked away from home and was unable to study in motels.

Instead the Claimant took it upon himself to sign up for a college course which necessitated his absence or partial absence on Mondays and Wednesdays. He made no arrangements with the Carrier to be absent those days, although he subsequently advised them that he would not be in attendance on those days. However, the Carrier advised him that he could not be spared and had to report for work.

Upon hearing this, the Claimant became angry and reportedly announced he was quitting. He informed his Supervisor he was leaving and slammed his fist into an inner door, and, perhaps an outer door on the way out and broke his hand.

By letter dated August 17, 2000, the Carrier notified the Claimant he was being suspended from service pending an Investigation due to alleged improper conduct that day.

The Carrier by letter dated August 18, 2000, directed the Claimant to attend a formal Investigation at the BNSF conference room, Division Office Building, Springfield, Missouri, on August 25, 2000. The purpose of the Hearing was to determine the facts concerning the allegations that he demonstrated improper conduct on August 17, 2000.

The Investigation was postponed and held on September 8, 2000. After reviewing the evidence adduced at Hearing, the Carrier notified the Claimant by letter dated September 25, 2000, that he was guilty of improper conduct for self-infliction of a personal injury, in violation of Rule 1.6 Conduct - 1. Careless of the safety of themselves or others. He was further informed that he was being dismissed from service. The cited Rule reads in part:

"Rule 1.6 Conduct

Employees must not be:

1. Careless of the safety of themselves or others.
2. Negligent."

The Organization took exception to the discipline and filed a claim on behalf of the Employee. It was progressed through the appeals procedure and denied by the Carrier. It is now before the Second Division for consideration.

The Carrier argues there is substantial evidence which shows the Claimant became so irate when his request was denied he struck the door with his fist and broke his hand. The Carrier maintains he was unnecessarily emotional and careless which resulted in a personal injury. In doing so, he violated the Carrier's Policy for Employee Performance and Accountability (PEPA), which provides in part:

- "6) Gross negligence, indifference to duty, intentional destruction of company property, malicious rule violation, insubordination.
- 7) Rule violation that results in serious collision and/or derailment, serious injury, fatality or extensive damage to company or public property.
- 8) Knowingly placing the safety of themselves or others in immediate danger."

The Carrier denied the Claimant's request not with the intent to stifle his advancement but because he could not be spared. Moreover, the Organization failed to prove the Carrier had any other motive or violated any of the Rules cited in their claim.

The Carrier rebuts the Organization's assertions that the Hearing was not fair and impartial. The Carrier references the admission of both the Claimant and his Representative that they believed the Hearing was fair and impartial. In doing so, they waived any right to raise procedural errors subsequent to the Hearing. The Organization contends the Organization failed to cite any portion of the Hearing that was not fair and impartial.

The Carrier cites the Claimant's revelation of his medical history as evidence that he is not medically qualified to return to work. This testimony established that there were times he was so despondent, medical personnel did not feel comfortable leaving him alone. In addition the Claimant indicated there were times working on the towers when he considered suicide. The Carrier maintains the Claimant should not be returned to work under the circumstances and certainly not before he has been medically cleared.

The Organization submits the Claimant was denied a fair and impartial Hearing and was contrary to the terms of Rule 30. That the Carrier did not attempt to develop all the facts and issues. The Organization argues the main reason for the Hearing was to find the Claimant guilty and then dismiss him since this was the least troublesome avenue for the Carrier.

The Organization claims the transcript contains no factual information concerning the cause of the injury.

The Organization asserts the Claimant's tenure should have been considered in mitigation. In addition, the Carrier witnesses were aware the Claimant had been experiencing ongoing personal and psychological problems which should have been taken in to account.

The Organization asks the Board to consider the Claimant's years of service and exemplary record. It points to testimony which revealed he was an excellent employee who did not merit dismissal. It argues that there was no evidence to demonstrate that the actions of the Claimant were premeditated.

The Board certainly finds the actions of the Claimant to be unacceptable regardless of the personal problems he may have been enduring. However, there are

mitigating factors which must be considered in view of his exemplary record, his tenure, and his mental state at the time of the incident.

The Claimant had been employed by the Carrier for over seven years. During that period he has served the Carrier well. Admittedly, he had problems which he was trying to resolve through the Carrier's Employee Assistance Program, but never had he allowed those problems to interfere with his job or his job performance. Even when the Claimant had admitted himself to a hospital due to depression, he did so on his own time and reported to work the next day.

On the other hand, we appreciate that the Carrier has been sensitive to the needs of its employees. We do not accept for one minute any contentions raised by the Claimant that the Carrier lacked concern or did not want him to advance. They simply felt an obligation to protect him from himself and to protect other employees who might be adversely impacted by the Claimant's future actions. Regardless, the Board believes there was a rush to judgment.

We agree that no one can predict the future and we appreciate the Carrier's concern that the Claimant, may have hurt himself or someone else in the future if he had been retained. However, we also agree with the Organization that the Carrier has frequently provided employees with drug/alcohol or anger problems the opportunity for a second chance either through drug/alcohol rehabilitation or anger management courses. Surely this employee should have been entitled to the same opportunity.

We believe the Claimant should realize that he is paid to work his scheduled hours of work. The Carrier is not obligated to give him time off for schooling or to pay for such schooling any more than it is required to reimburse someone who chose to go to school before they became an employee. The reward for such effort comes when it results in opportunities for advancement. We do not believe discharge was an appropriate course of action for this one occasion when the Claimant lost control.

The Claimant maintains that he has been successfully employed for the last three years. Certainly, the Carrier is entitled to have this information verified. Secondly, the Carrier is within its rights to have medical verification that the Claimant is physically and mentally able to cope with his work on the Railroad. This includes assurance that the Claimant can and will accept the responsibilities that go with his former position, namely the scheduled days and hours of work and the fact that it may require him to

work out of town. If the Claimant satisfies all of these requirements, he shall be reinstated, but without backpay.

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 30th day of June 2003.