

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION**

Award No. 13784

Docket No. 13675

03-2-02-2-36

The Second Division consisted of the regular members and in addition Referee Don A. Hampton when award was rendered.

(Brotherhood of Railway Carmen Division  
( Transportation Communications International Union

**PARTIES TO DISPUTE:** (

(Duluth, Missabe and Iron Range Railroad Company

**STATEMENT OF CLAIM:**

“Claim of the Committee of the Union that:

1. The Duluth, Missabe and Iron Range Railroad Company violated the terms of our current Agreement, in particular Rule 30 of the Duluth, Missabe and Iron Range Agreement, when they arbitrarily and unjustly disciplined Proctor, Minnesota Carman Mark C. Jacobson.
2. That, accordingly, the Duluth, Missabe and Iron Range Railroad Company be directed to compensate Carman Mark C. Jacobson five (5) hours pay for October 3, 2001, eight (8) hours pay for October 4, 2001, forth (4) hours pay for November 20, 21, 26, 27, 28, 2001, and sixteen hours pay for November 22,23, 2001, Thanksgiving Day and the day after Thanksgiving Holidays. All claimed hours to be paid at the straight time rate of pay. We also request the removal of this unjust discipline from his personal records.”

**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.**

**By letter dated October 4, 2001 the Claimant was notified to be present for a formal Investigation to be held at 2:00 P.M., Thursday, October 18, 2001 in the Transportation Department Conference Room, Proctor, Minnesota. The Claimant was charged with being insubordinate when he refused to sign a return receipt as directed by the Manager of Maintenance. That such refusal was a violation of Rule 19, of the current Car and Locomotive Department Book of Rules, effective April 1, 1988 which reads:**

**“Rule 19 - Employees must not be careless of the safety of themselves or others. They must not be negligent, insubordinate, dishonest or conduct themselves in such manner that the Railway Company will be subjected to criticism or loss of good will.”**

**On October 3, 2001, the Manager of Maintenance called the Claimant to his office and gave the Claimant a letter citing the Claimant for Disciplinary Investigation. (Unrelated to the instant case)**

**The Claimant contends that the Manager of Maintenance was belligerent, cursing, and demanded that he sign a piece of paper which he did not understand. Further that as he didn't understand what he was being requested to sign he requested his Union Representative to advise him. This request was denied and eventually he was instructed to either sign the receipt or go home.**

**The Carrier witnesses testified that the receipt was explained to the Claimant, that he was informed that he was signing for receipt of the notice and that such receipt was not an admission of guilt, only that he received the notice. All Carrier witnesses testified that the meeting was business like and there was no cursing, yelling, screaming, hollering, or raised voices. Carrier witnesses also testified that the Claimant was given three opportunities to sign the receipt before being sent**

home. Carrier witnesses also confirmed that the Claimant did in fact ask for Union Representation but that the Manager of Maintenance did not feel Union Representation would be necessary in the instant situation.

Initially we must note that in situations where there is conflicting testimony during a formal Investigation we cannot substitute our judgment for that of the Hearing Officer absent a showing of bias or impropriety. Numerous Awards have upheld this principle. Having not found bias or impropriety on the part of the Hearing Officer in this case, we cannot substitute our judgment for his on the issue of credibility of witnesses.

The record reflects the Claimant was asked three times to sign a receipt indicating that he had received a notice to attend an Investigation concerning another incident. The Claimant admits that he did not sign the receipt. He defends his decision not to sign by stating he did not understand what he was being asked to sign and was denied the opportunity to consult with his Union Representative. Conflicting testimony indicated the exact nature of the document he was being directed to sign was explained to the Claimant. Again, we will not substitute our judgment for that of the Hearing Officer. The Claimant's request to confer with his Union Representative to allay his concerns, in hindsight, could possibly have prevented this dispute from escalating to a point where it is before the Board. The record however does not cite any requirement that the request must be granted.

While the Union contends that past behavior on the part of the Manager of Maintenance in regards to another incident should enter into our considerations in this matter we cannot transfer the particulars of that previous incident to the case before us as the record simply doesn't support such a conclusion.

Obey now and grieve later is one of the basic tenets of labor relations throughout industry. Absent any danger or safety issue, the Claimant should have signed the receipt and then sought Union counsel. Instead, he in essence resorted to self-help and such is not permissible.

It is unclear why the Claimant returned to work prior to the Investigation after being instructed not to return until the Investigation. In any event, subsequent to the Investigation the Claimant was notified by letter dated November 19, 2001 that the evidence supported a violation of Rule 19 and the Claimant was suspended from service for five working days. This was in addition to the 13 hours the

**Claimant lost prior to the Investigation when he was sent home. Due to the timing of the suspension, the Claimant also lost 16 hours Holiday Pay.**

**The record reflects that the Carrier has substantiated their position and we will not substitute our judgment regarding the five-day suspension. However, in this particular situation the Carrier's action of withholding the Claimant from service prior to the Investigation was arbitrary and capricious. The Claimant shall be awarded 13 hours pay at the appropriate rate for the time he was withheld from service prior to the Investigation.**

**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 24th day of October 2003.**