

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13832
Docket No. 13724
05-2-03-2-67

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

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Canadian Pacific Railway Company (Former Soo Line
(Railroad

STATEMENT OF CLAIM:

- "1. That the Canadian Pacific Railway Company [Soo Line (CP/Soo)], violated the current Agreement, effective September 1, 1949, as amended in 1982, in particular Rule 35, when they wrongfully dismissed Mechanical Department Electrician Eric D. Hisle on February 21, 2003.
2. That the CP/Soo failed to provide Mechanical Department Electrician Eric D. Hisle with a fair and impartial investigation as mandated under Rule 35.
3. That accordingly, the CP/Soo be ordered to promptly reinstate Mechanical Department Electrician Eric D. Hisle to service with all seniority rights unimpaired and to make him whole for all wages, rights and benefits lost including, but not limited to: vacation, insurance, hospitalization and railroad retirement rights resulting from his removal from Carrier service. Further, that any and all reference to this dismissal, including all correspondence, be removed from Mr. Eric D. Hisle'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 has been employed by the Carrier since 1988.

By letter dated January 7, 2003, the Carrier charged the Claimant with continuing excessive absenteeism on December 15, 2002 and January 5, 2003 as well as failure to complete full tours of duty on November 25 and December 23, 2002. Investigation on that charge was held on January 15, 2003.

By letter dated January 14, 2003, the Carrier charged the Claimant with continuing excessive absenteeism on January 11, 2003 and failure to complete a full tour of duty on January 12, 2003. Investigation on that charge was held on January 31, 2003.

By letter dated February 21, 2003, the Carrier dismissed the Claimant for being absent on the dates charged and for failing to complete his full tours of duty as charged.

The Claimant's prior disciplinary record shows the following:

"7/31/2001	Informal Coaching	Absenteeism
4/19/2002	Informal Coaching	Absenteeism
6/19/2002	PAP	Absenteeism
7/17/2002	5-day suspension	Absenteeism
8/30/2002	PAP	Behavior (swearing/arguing with fellow employee)
11/06/2002	10-day suspension	Absenteeism"

Substantial evidence supports the Carrier's determination that the Claimant was excessively absent and did not complete his tours of duty as charged in the January, 2003 letters. Indeed, those absences are not disputed. Misconduct has been shown.

The next question is whether the Carrier's determination that the Claimant should be dismissed was arbitrary. We find it was not.

Our inquiry here is limited to only determining whether the Carrier was arbitrary in the assessment of the amount of discipline. The Claimant has been progressively disciplined and, based upon his absence record, we cannot find under this limited standard of review that an arbitrary disciplinary determination has been made by the Carrier. While the Claimant has gone through some serious personal problems and is attempting to get his personal life in order, nevertheless, he has been repeatedly absent and the prior disciplinary actions have not gotten the message through to him to cause him to correct his conduct.

But the outcome of this case really comes down to the Claimant's admissions that he engaged in the charged misconduct and his request for leniency.

At the first hearing the Claimant stated [Q 143]:

"A. ... [A]ll I ask is that I hope that CP Rail can forgive me for my sins against them. I am committed to good attendance; and, you know, all I want is mercy from the people that determine what is going to happen to me after this. I just want a chance.

* * *

... I just ask that the CP Rail allows me to atone for my inequities against them and my attendance problem for the year ...

* * *

... [W]hoever decides what my fate might be with the company to please have a little empathy and some compassion when you review what I'm all about and the fact that I had a rough year, and things get better."

At the second hearing the Claimant stated [Q 108]:

"A. ... I just hope that the CP Rail company can forgive me for, as I stated before, the fact that I, for lack of a better word, sinned against them in my attendance. I just hope, again, that the company realizes that, and the people in charge of deciding what my future might be, realize that I am a good and productive employee who admits that I have been dealing with some personal things, but also working hard to overcome these issues, working hard with EAP and therapy and am committed knowing that I've hit a very low point in my life"

And, at the second hearing the Organization summed it up best [id.]:

"... We hope that his sincere regrets and his seeking help will be given great consideration. We are asking for leniency."

Notwithstanding the pleas of the Claimant and the Organization, the Carrier did not grant the Claimant leniency. Perhaps the Carrier should have taken the Claimant's personal situation more into account — particularly given his length of service. Perhaps the Carrier should have reinstated the Claimant on a last chance basis and closely monitored his attendance and set specific limits on absences which, if passed, would result in immediate dismissal. But, whether the Carrier should have taken those steps is, in the end, beyond our authority to decide. Given that the Carrier did not grant the Claimant's request for leniency, this Board simply has no power to do so. See Second Division Award 13345:

"The Board has long held that reinstatement of an employee based on leniency is within the sole discretion of the Carrier, and it will not substitute its judgment concerning the appropriate penalty where the discipline imposed is not arbitrary, capricious or excessive. See Second Division Awards 13161, 12573, 7267; Third Division Awards

31937, 31935, 31932, 25705. Because the Board is not empowered to grant leniency, we have no alternative but to deny the claim.”

See also, Third Division Award 34206:

“The Organization is seeking leniency from this Board. It has long been held that the Board does not have the authority to grant leniency — only the Carrier can do that. The standards that guide us in this case are that substantial evidence supports the Carrier’s determination that the Claimant engaged in misconduct and the imposition of dismissal was not arbitrary. The Carrier has made those showings.”

Under the circumstances, we simply have no authority to do what the Organization asks on the Claimant’s behalf.

The Organization’s other arguments do not change the result. The claim shall be denied.

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 1st day of April 2005.