

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 14002
Docket No. 13833
09-2-NRAB-00002-070022
07-2-22

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

**(International Association of Machinists and Aerospace
Workers
PARTIES TO DISPUTE: (
(Canadian Pacific Railway (former Soo Line Railroad
Company)**

STATEMENT OF CLAIM:

“This claim is being appealed on behalf of Machinist Gregg A. Johnson, St. Paul, Minnesota for the immediate reinstatement to service, with the payment of all time lost, his record cleared of all charges with seniority rights unimpaired and all other rights and privileges restored due to being improperly and unjustly dismissed from service effective December 9, 2005 for alleged violation of Carrier policy of a non-violent work place. This includes all rights and remedies of the March 1, 1995 agreement, Rule 30 and 31, but not limited 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.

In the facts of this case, the Claimant was notified by letter dated October 21, 2005 to attend an Investigation into specifics, circumstances and possible responsibility, if any, over an alleged altercation occurring October 20, 2005 in the St. Paul Mechanical Shops parking lot. The Investigation was held on November 4, 2005 with the right of the Claimant to introduce medical information into the Hearing record. Medical neck and brain scans were provided to the Carrier on December 1, 2005. The Chief Medical Officer concluded that the treatment was not a cause of any "aggressive behavior toward a fellow employee." By letter dated December 9, 2005, the Claimant was notified that the Carrier concluded that he was involved in workplace violence. The Claimant was dismissed from service effective that date.

The argument at bar follows an April 3, 2007 notice of appeal "on behalf of Machinist Gregg A. Johnson" by Floyd A. Johnson. The arguments raised by Floyd Johnson before the Board were strong and compelling, but the Board must note the following. First, we are unsure if Floyd Johnson was currently an attorney, but we are sure that he was not the Claimant, Machinist Gregory A. Johnson. Whatever his current position or relation, Floyd Johnson has no legal standing to file a Notice of Intent to appeal to the Second Division. Under Section 3, First (i) of the Railway Labor Act, appeals "may be referred by petition of the parties or by either party to the appropriate division" Floyd Johnson is not a "party" under the Act. A party under Rule 30(c) is "the employee, carrier or duly authorized representative, viz., the labor organization." (See First Division Awards 24100, 24138, 25930 and 25921; Second Division Award 11550; Third Division Award 32992). Accordingly, the claim must be dismissed for procedural defect.

Even if, arguendo, this dispute was not procedurally defective, and we strongly hold that it is, the Board would still deny the claim. The Carrier presented substantial probative evidence that on the date of October 20, 2005, the Claimant was talking with Front Line Manager D. K. Nickolaus when Laborer J. R. Warren

walked up and was bluntly told by the Claimant to leave and did so, saying something that must have set off the Claimant. The testimony indicates that the Claimant quickly exited his car, moved to Warren and shoved him.

There is clear testimony that the shove resulted in injury. Warren fell backwards and clearly hurt his back. During testimony at the Hearing, Warren testified that he was still on a muscle relaxant and that "right now it [his back] is just throbbing." The Claimant engaged in a physical altercation that resulted in injury, for which the Claimant responded that he used "the least amount of force to end the situation." The Carrier notes past discipline, including inappropriate comments, and a clear violation of the Carrier's Violence in the Workplace Policy to this set of facts.

Accordingly, had we been able to consider the claim on its merits, we would most assuredly have denied it, because the Claimant's conduct violated Carrier Policy and dismissal would have been appropriate. However, given the procedural defect, the Board finds that the claim must be dismissed.

AWARD

Claim dismissed.

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 9th day of April 2009.