

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 14005
Docket No. 13872
09-2-NRAB-00002-080022**

The Second Division consisted of the regular members and in addition Referee Joseph M. Fagnani when award was rendered.

**(Brotherhood Railway Carmen Division - TCU
PARTIES TO DISPUTE: (
(Delaware and Hudson Railway Company**

STATEMENT OF CLAIM:

- "1. That the Delaware & Hudson Railway Company violated the terms of our current Agreement, in particular Rule 26.1, when they arbitrarily dismissed the Claimant without a fair and impartial investigation.**
- 2. That accordingly, the Delaware & Hudson Railway Company be required to compensate Carman Scott Esser in the amount of eight (8) hours at the straight time rate of pay for each day he is withheld from service without benefit of a fair and impartial hearing."**

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 material facts in this case are not in dispute. On May 30, 2006, the Claimant's assignment as a Carman in Saratoga Springs, New York, was abolished and he exercised his displacement right to a Carman position at Binghamton, New York. The Claimant, after being permitted to take vacation time, reported to work in Binghamton on June 15 and worked until June 26, 2006. On July 7, the Claimant enrolled in the Carrier's Employee Assistance Program (EAP) indicating that he could no longer work in Binghamton and that he was dealing with a high level of stress.

On October 26, 2006, the Claimant was released from EAP and approved to return to work; however, the Claimant failed to do so. On November 27, the Claimant's supervisor, Manager Stillittano spoke with the Claimant and the Claimant indicated that he would not be reporting to Binghamton due to family commitments in Saratoga and an inability to set up a second place of residence in Binghamton.

By certified letter dated January 11, 2007, the Carrier notified the Claimant to report to his position in the Car Department at Binghamton within seven days. The letter also stated that "Failure to do so will result in the forfeiture of your System Carman seniority rights." The Claimant's representative was also copied on this letter. The Claimant did not report to work as directed and forfeited his Carman seniority.

The Organization vigorously pursued this case and argued that the Claimant was denied his "day in court" contending that the Carrier dismissed him from service without a fair and impartial Investigation as provided for in Rule 26.1 of the Agreement, which reads as follows:

"An employee in service ninety (90) calendar days or more will not be disciplined or dismissed until a fair and impartial investigation has been held."

The Carrier, on the other hand, argues that it did not discipline the Claimant as that term is used in Rule 26.1, but that the Claimant abandoned his job and forfeited his seniority when he failed to report to work when directed in writing to do so by the Carrier.

The Board notes that it is not disputed that the Claimant was given written notice by letter dated January 11, 2007 that he was to report to his Carman assignment at Binghamton, New York, within seven days. As noted above, the letter clearly informed the Claimant that if he failed to report to his assignment, he would forfeit his Carman seniority. The Claimant, for his own personal reasons, opted not to report for duty as directed and in effect abandoned his employment with the Carrier. In fact, even prior to the letter, the Claimant had told Manager Stillittano that he did not intend to return to Binghamton due to family issues.

A substantially similar situation was involved in Second Division Award 8894, wherein the Board held:

“The Board, upon a careful and complete review of the total record which has been presented in this dispute, is convinced that the specific issue which is involved is not one to which the hearing procedures specified in Rule 35(a) were meant to apply. Or perhaps as was stated most cogently and succinctly by Referee Hall in Third Division Award 12993, ‘(A)n employee removing himself from a Carrier’s service by his own voluntary act cannot be held to have been discharged from such service by Carrier as a disciplinary act’.”

The Board finds the reasoning stated above to be sound. The Carrier did not discipline or dismiss the Claimant. On the contrary, the Claimant, by his own inaction, effectively resigned and forfeited his seniority.

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.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 8th day of May 2009.