

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 14135
Docket No. 14051
16-2-NRAB-00002-150015

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

PARTIES TO DISPUTE: ((Brotherhood Railway Carmen-Division of TCU/IAMAW
(BNSF Railway Company

STATEMENT OF CLAIM:

“1. On behalf of Memphis, Tennessee Carman Michael McBride, (EID:XXXXXXXX), we are appealing his dismissal from service and claiming eight (8) hours pay at the pro-rata rate for each workday his is withheld from service, commencing March 28, 2014, and continuing until he is returned to active duty. Additionally, we are claiming the following:

1. returned to service with seniority rights unimpaired;
2. made whole for all vacation rights;
3. made whole for all health, welfare and insurance benefits;
4. made whole for pension benefits including Railroad Retirement and unemployment insurance;
5. made whole for any other benefits he would have earned during the time he is out of service;
6. made whole for all wages, lump sum payments, general wage increases and cost-of-living adjustments;
7. paid for any overtime hours that he may have lost during his dismissal;
8. all correspondence and record of the investigation be removed from his personal record and file.”

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 was dismissed from the Carrier's service following a formal investigation in connection with the following:

“. . .your alleged misconduct and failure to furnish information as instructed by your supervisor, during an investigation of an alleged rules violation at approximately 00:10 on Tuesday, February 25th, 2014 while working as a Carman in the Memphis, TN Train Yard.”

At the formal Investigation, Mechanical Foreman Ables testified that on the subject day, he observed the Claimant and another employee performing work without proper blue flag protection. The Foreman instructed both employees to come into the office at which point he provided them with an Operations Test Failure for the observed violation and instructed the Claimant and the other employee to provide a written statement explaining the rule violation. Foreman Ables stated that after a few minutes, the Claimant handed him the following written account: “I have no comment regarding this situation.” Also entered into the record were copies of Mechanical Safety Rule S-28.6, dealing with employee conduct and Rule S-28.2.7, which requires employees to furnish information regarding certain events, including rule violations.

When the Claimant testified at the Investigation, he acknowledged his authorship of the above “statement” and when asked if this was in violation of Rule S-28.2.7, the Claimant responded “yes. . .according to that rule.” Upon examination by his union representative, the Claimant attempted to excuse his rule violation by contending that Mechanical Foreman Ables was hostile and aggressive towards him, threatened to charge him with insubordination if he asked any questions and that he was denied a request for union representation. When Foreman Ables was recalled for questioning, he denied that he had acted hostile or aggressive towards the Claimant or that he had threatened the Claimant with insubordination. In addition, Mr. Ables stated that when the Claimant asked if he needed a union representative, he (Ables)

answered that he did not think he needed one to fill out a statement and emphatically denied that the Claimant asked for or was refused union representation.

There is obviously a conflict in testimony. This Board has held in a plethora of awards that when there is a conflict in testimony that the Carrier, as the trier of facts is in the best position to resolve such conflict, and that this Board, in its appellate capacity, should not upset such finding absent a clear showing of prejudicial conduct by the Carrier. There is no such showing in this case.

The Board finds that the Carrier sustained its burden of proving that the Claimant was guilty of failing to follow the Mechanical Foreman's instructions when asked to furnish a written statement concerning a potential Tules violation. The "no comment" written remark certainly was tantamount to refusal. If the Claimant honestly believed that his rights were in some way being compromised by furnishing a proper written statement, he should have followed the instructions and filed a grievance protesting same.

Relative to the discipline assessed in this case, the Carrier notes that its decision to dismiss the Claimant was in accordance with its Policy for Employee Performance Accountability (PEPA). Specifically, such Policy provides that a first serious violation will result in a 30-day record suspension and a review period of 36 months and that a second serious violation committed within the review period "may result in dismissal." The Carrier points out that at the time of this incident, the Claimant was under an active 36-month review periods for a Level S 30-day record suspensions assessed for a prior violation. The Organization argues that the discipline of dismissal was harsh and excessive, especially in light of the fact that the Claimant was a long term employee at the time of this incident with over twenty-five years of broken service.

In considering the particular facts and circumstances in this case, the Board believes that the Claimant should be given another chance to demonstrate to the Carrier that he can perform his duties in full compliance with the Carrier's Rules and regulations. However, the Claimant should be aware that any future conduct of this nature may result in his permanent dismissal from service. Accordingly, the Board rules that the Claimant should be reinstated to service with seniority unimpaired, but with no payment for time lost.

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 5th day of October 2016.