

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 10401
Docket No. 10067-I
2-AT&SF-I-'85

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

Parties to Dispute: (Rocky D. Pettigrew
(
(Atchison, Topeka & Santa Fe Railway
(Company

Dispute: Claim of Employees:

Pettigrew makes this claim for reinstatement and back-pay based upon his discharge for absence from work on a portion of his shift on July 17, 1981 in harmony with Rule 40 (d) of Form 2642 STD. agreement between the Atchison, Topeka and Santa Fe Railway Company and its employees effective September 1, 1974 which reads:

"(d) If the final decision shall be that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with seniority rights unimpaired, and compensated for the net wage loss, if any, resulting from said suspension or dismissal."

Pettigrew claims that good cause existed for his absence, that he informed his foreman at the earliest possible time prior to his absence, that no accommodation of his religious beliefs was attempted and that there was sufficient evidence from the testimony at the investigations that such accommodation could have been made without undue hardship.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

R. D. Pettigrew, the Claimant, entered the service of the Carrier in the Signal Department in December, 1976. He transferred to the Car Department in Cleburne, Texas in August, 1977. Claimant was on sick leave from June 2 to July 2, 1981. He was notified upon his return to work that because he did not have enough seniority to hold a first shift position, he would be assigned the night shift, 4:00 p.m. to 12:00 a.m., Monday through Friday, with Saturday and Sunday rest days. Pettigrew informed the Carrier, verbally and by letter dated July 2, 1981, that, as a Seventh Day Adventist, his observance of the Sabbath on Friday after sundown conflicted with his night shift schedule. He requested that the Carrier accommodate his religious observance. By letter signed by C. A. Moser, Shop Superintendent, Claimant's request was denied because "due to circumstances over which the Carrier has no control, including your relatively low position on your seniority roster, there is no position now available to you which does not require working between sundown on Friday and sundown on Saturday."

There is no dispute that Claimant Pettigrew thereafter absented himself from work during the second half of his shift on Friday, July 3, Friday, July 10 and Friday, July 17, 1981. Each time, he stated that he was unable to work the Sabbath portions of his shift. Three separate investigations were held on July 21, August 5 and August 12, 1981. The first two involved violation of Rule 15 and the third involved violation of Rules 15 and 16, which state as follows:

"15. Employees must report for duty at the prescribed time and place and devote themselves exclusively to their duties during their tour of duty. Those subject to call for duty will be at their usual calling place, or provide information as to where they may be located. They must not absent themselves from duty, exchange duties or substitute other persons in their places without proper authority.

16. Employees must not be careless of the safety of themselves, or others. They must remain alert and attentive and plan their work to avoid injury.

Employees must not be indifferent to duty, insubordinate, dishonest, immoral, quarrelsome or vicious.

Employees must conduct themselves in a manner that will not bring discredit on their fellow employees or subject the company to criticism or loss of goodwill."

The Claimant was assessed ten demerits as a result of the first investigation, 20 demerits as a result of the second, and was removed from service as a result of the third.

The record further reflects that during the period prior to Claimant's dismissal, the Carrier held several meetings with the Local Chairman in an unsuccessful attempt to find a solution which would accommodate both the Claimant's religious beliefs and the Carrier's need to have its work assignments covered. The Organization's position was that it was unwilling to waive the seniority provisions in the collective bargaining agreement to accommodate Claimant Pettigrew. No other viable suggestions or alternatives are indicated in the record.

The Claimant filed a claim, dated October 23, 1981, requesting consideration of the matter. The claim was declined, was appealed to Carrier's highest officer of appeal, and was once again declined.

The Carrier raises several procedural objections which, it claims, warrants dismissal of the instant claim. First, Carrier contends that Petitioner did not comply with Rule 39(b) because he failed to notify the first officer of appeal in writing, within 60 days, of his intent to appeal his removal from service. Second, this dispute purportedly is not properly before this Board because it was not previously discussed in conference. Third, Carrier contends that the claim before the Board is at fatal variance from the claim which was handled on the property.

Without prejudice to its position that the claim is improperly before the Board, the Carrier asserts in the main that, while it sympathizes with the Claimant's plight, it cannot accommodate his religious practices without waiving seniority or other provisions of the controlling agreement.

The Petitioner, on the other hand, argues that the Carrier had a number of ways available to it, short of dismissal, to resolve this dispute. Relying upon the contract, as well as, Title VII of the Civil Rights Act of 1964, the Petitioner concludes that there was ample leeway within the current system to work out an accommodation for Petitioner's religious beliefs in the interim until he could bid on a position with Friday as the rest day. In addition, the severity of the discipline assessed by the Carrier was unwarranted even if some discipline had been appropriate.

With respect to the procedural objections advanced by the Carrier, the Board finds that there is nothing of substance in the record to warrant dismissal of the claim. As to the first point, the record does not support the Carrier's contention that Rule 39(b) was violated under the facts herein. To the contrary, the Carrier specifically agreed by letter dated September 21, 1981, to extend the time for filing an appeal. Moreover, despite the Carrier's protestations, the record clearly indicates to this

Board that the instant dispute was considered and discussed in the usual and customary manner, and that the parties first exhausted all reasonable efforts to amicably dispose of this dispute before submitting it to the Board, as contemplated by Section 2, Second and 3, First (i) of the amended Railway Labor Act. Finally, the Board perceives that the claim as originally submitted is essentially the same as the claim now before it. Thus with respect to the procedural objections, the Board finds that they are without merit.

With respect to the merits, however, the Carrier is correct that almost the same set of circumstances as that before us in the instant case, was considered before the U. S. Supreme Court in TWA v. Hardison, 432 U.S. 63 (1977). In that case, the Court held that the statutory obligation to accommodate religious beliefs imposed by Title VII of the Civil Rights Act of 1964 does not take precedence over the collective bargaining agreement or the seniority rights of other employees. Furthermore, the Court concluded that the statute does not require the employer to bear more than de minimis additional costs to accommodate one employee's religious needs. This Board has strictly adhered to the principles set forth in Hardison in cases involving alleged religious discrimination. See Second Division Awards 8660, 10121, 8226, 10291.

In the case herein, the Carrier made reasonable efforts to accommodate the Claimant by meeting on several occasions with Organization representatives in an attempt to reach a solution to the problem. However, as stated by the Court, in Hardison, supra, the Carrier was not required to circumvent or violate the seniority of other employees in order to accommodate the Claimant's religious beliefs. Nor was the Carrier required to bear the "undue hardship" of allowing Claimant to work less than a five-day/forty hour week or to pay overtime in order to cover his assignment on Fridays after sundown. Since a reasonable accommodation could not be reached, and given the Claimant's stance that he would continue to layoff on Friday nights, we are left with no alternative but to uphold the discipline of dismissal which was imposed by the Carrier in neither an arbitrary, capricious nor discriminating manner.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of May, 1985.