

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 11514
Docket No. 11491
88-3-87-2-139

The Second Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM:

(1) That under the current Agreement, Mechanical Department Electrician C. E. Hicks was unjustly treated when he was returned to dismissed status on October 31, 1986, following random testing upon being recalled to service after signing a condition reinstatement with the Southern Pacific Transportation Company (Western Lines).

(2) That accordingly, the Southern Pacific Transportation Company be ordered to restore Electrician C. E. Hicks to service with all rights unimpaired, including service and seniority, vacation, payment of hospital and medical insurance, group disability insurance, railroad retirement contributions, and loss of wages; including interest at the rate of ten percent (10%) per annum.

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 employees 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.

Claimant entered service of Carrier as a laborer on July 24, 1978. On September 25, 1978 he was promoted to a position of Electrician within the scope of the IBEW Agreement. On April 25, 1985, he was furloughed from his IBEW Electrician's position at Sacramento. Subsequently he went to work for the Carrier at Tucson on an Assistant Signalmen's position working under the provisions of the BRS Agreement.

On January 15, 1986, while assigned at Tucson, Claimant was charged with being under the influence of marijuana while on duty and on Carrier property. An investigation was conducted under the provisions of the Signalmen's Agreement. On February 14, 1986, Claimant was advised that the evidence developed at the investigation established his violation of Rule G and he was terminated.

Two months later a "conditional return to duty" was effected between Carrier's Division Engineer, Claimant and a Local Chairman from the BRS. This understanding set forth five requirements (abstinence from alcohol and drugs, participation in a rehabilitation program, submission to random testing, clearance from Carrier's Medical Department and regular work attendance), for Claimant's return to duty, any violation of which "may" result in his "return to a dismissed status." Pursuant to that understanding Claimant returned to duty as an Assistant Signalman.

On May 27, 1986, Claimant was recalled to work, under the IBEW Agreement, as an Electrician at Carrier's Sacramento Locomotive Works. On October 27, 1986 Claimant was given a random drug screen which tested positive for amphetamines and methamphetamines. Four days later he was "returned to a dismissed status."

The IBEW immediately protested this termination contending that Claimant was denied due process and a fair hearing as contemplated by Rule 39 of its Agreement reading:

"Rule 39 - Discipline-Suspension-Dismissal

"No employee shall be disciplined or dismissed without a fair hearing by the proper officer of the Company. Suspension in proper cases pending a hearing which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee shall, in writing, be apprised of the precise charge against him, be given reasonable opportunity to secure the presence of necessary witnesses, and shall have the right to be represented as provided for in Rule 38. If it is found that an employee has been unjustly suspended or dismissed from service, such employee shall be reinstated with his seniority rights unimpaired and compensated for the wage loss, if any, resulting from said suspension or dismissal. Stenographic report of hearing will be taken if requested and employee's representative will be furnished with a copy."

On the property Carrier contended that it was proper to return Claimant to a dismissed status, without a hearing under the IBEW Agreement, because of his failure to remain drug free as required by his "conditional reinstatement." It argues that the return was not a contractual right but at

the discretion of the Carrier who is attempting to deal with drug use in a reasonable manner. In support of these arguments it cited Decision 5759 of SBA No. 18 wherein Carrier's action in returning a Brakeman to a dismissed status under a similar return to service settlement was upheld.

Before the Board the contention was advanced that the reinstatement understanding, signed by the Carrier, the BRS Local Chairman and the Claimant, was akin to an undated letter of resignation which Carrier was free to place into effect any time the conditions of return to duty were breached by Claimant. In support of this position Second Division Awards 6628, 6714, 8317 and 10965, all dealing with specific resignations that were later attempted to be rescinded, were cited.

These Awards and the decision of SBA No. 18 are not directly in point with this case, thus, we do not consider them to be controlling here. Decision 5759 did not involve a return to duty settlement reached while working under one craft's Agreement and a termination while working under a different craft's Agreement, the facts in our case. IBEW argues, with merit, that the requirements of its Agreement ought not be modified by an understanding reached with a Signalmen's Local Chairman resolving a disciplinary termination arising from an investigation conducted under the terms of the BRS Agreement.

Additionally, the Awards cited by the Carrier all concerned clear and specific resignations on the part of the individuals there involved, not a situation concerning conduct that "may" result in a return to a dismissed status. Thus, even if we were to embrace the notion that the return to duty understanding was akin to an undated resignation we would find that the Awards cited are unpersuasive in this fact situation.

Notwithstanding that which obtained with respect to Claimant's reinstatement to an Assistant Signalman's position assigned under the terms of the BRS Agreement, it is our view that if he was deemed to be in violation of Carrier's Rules while employed as an Electrician under the IBEW Agreement the terms and provisions of that Agreement must control in the administration of discipline or dismissal for any employee working thereunder, unless, of course, an authorized IBEW representative agreed otherwise. Accordingly, when Claimant allegedly tested positive on the drug screen that was given on October 27, 1986, he was entitled to a hearing as provided in Rule 39 of the IBEW Agreement prior to any discipline being assessed. This was not done. Therefore, the Agreement was violated.

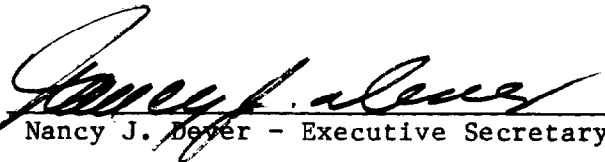
The parties, in the penultimate sentence of Rule 39, have provided a remedy to be applied in instances where an employee has been "unjustly suspended or dismissed." We will order that this remedy be applied here. Compensation for any wage losses shall be less outside earnings. Interest and other items demanded in the Statement of Claim, beyond those provided by Rule 39, are rejected.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 13th day of July 1988.