

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

PARTIES TO DISPUTE: (Sheet Metal Workers International Association
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

1. The Carrier violated the provisions of the current controlling agreement when they improperly withheld Sheet Metal Worker R. Gonzalez from service on June 14, 1989 pending the results of an investigation conducted on June 20, 1989 at the Alliance Diesel Shop.

2. The Carrier violated the provisions of the current controlling agreement when they improperly dismissed Sheet Metal Worker R. Gonzalez from the service of the Carrier commencing July 3, 1989 as a result of the aforementioned investigation.

3. That Accordingly, the Carrier be required to compensate Mr. Gonzalez for all time lost in addition to an amount of 6% per annum compounded annually; remove impairment of his seniority, if any; make Mr. Gonzalez whole for all vacation rights; reimburse Mr. Gonzalez and/or his dependents for all medical and dental expenses incurred while Mr. Gonzalez was improperly held out of service; pay Mr. Gonzalez estate whatever benefits he has accrued with regard to life insurance for all time he was improperly held out of service; pay Mr. Gonzalez for all contractual holidays; pay Mr. Gonzalez for all jury and all other contractual benefits to which he is entitled.

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.

The Claimant is a sheet metal worker with a 1969 seniority date assigned to the Carrier's Alliance, Nebraska, facility. On June 2, 1989, the Claimant was due to begin his work week at 3:30 P.M. At 2:10 P.M. the Claimant called the Carrier to notify it that he would not be at work since he was 250 miles away in Denver, Colorado. As a result of an Investigation held on June 20, 1989, the Claimant was dismissed from service.

It is the Carrier's position that the Claimant gave no reason for his absence, and since the Carrier was shorthanded, it had to call a pipefitter to fill the Claimant's assignment on overtime. The Claimant was not given permission to be off. At the Investigation the Claimant stated that his reason for being off was that he had an appointment with a paralegal at 5:00 P.M. The Claimant has a terrible past record which was made part of the record of the case. The Carrier contended that it has not been arbitrary or capricious, and since the past record of the Claimant was a poor one, the penalty is appropriate in this case.

The Organization stated the past record of the Claimant was not appended to the Organization's file and, therefore, not in the record. The reporting procedure used by the Claimant was in line with the Carrier's instructions, which state that you must call in 30 minutes before reporting time if you are not able to report. In any event there are some procedural issues. The notice of Investigation contained no mention of Safety Rules. The Claimant was withheld from service in what the Organization characterized as a premature act. The Claimant did comply with the instructions of the Carrier's directive in that he reported more than 30 minutes prior to the start of his shift. The Organization noted that the Carrier did not ask the Claimant to come in late, and the Claimant could not report at his 3:30 starting time since he was 250 miles away. It was not the Claimant that was quarrelsome during this incident. In fact, the Claimant's Supervisor yelled and screamed at him, and there was a lack of uniform treatment.

Upon complete review of the evidence, the Board finds that the procedural violations alleged by the Organization do not preclude a review of the merits of this case. While the Rules violations that the Claimant was ultimately charged with were not in the notice letter, it was clear to the Claimant and the Organization as to what incident would be investigated on June 20, 1989. The Claimant and the Organization were able to make an appropriate defense and the transcript bears that out. While the Claimant was withheld from service, this is permitted by Rule 35, which also provides for compensation if exonerated.

Regarding the merits of this case, it is clear that the Claimant called the Carrier approximately 1 hour and 20 minutes prior to the start of his shift. However, the Claimant was 250 miles away at the time, which is approximately 5 hours driving time. The Claimant knew long before 3:30 that he would not be able to protect his assignment. The question before the Board is: Is this a violation of Carrier Rules or policies? Employees Exhibit B, Page 53, is a Shop Superintendent's notice that requires that employees who are going to be late or absent from duty in order to receive an excused absence must request 30 minutes prior to the start of the shift, and the nature of the layoff must be stated. This memo does not state that if someone

calls prior to the 30 minute period, that they will automatically be excused, and it does not state that employees may not call even earlier than the 30 minute time period. Rule 16(a) states that "An employee detained from work on account of sickness or for any other good cause shall notify his foreman as early as possible." It is clear from the record of this case that the Claimant did not comply with Rule 16(a). He knew well in advance of his phone call that it was not going to be physically possible for him to protect his assignment, which led to an unexcused absence and other Rules violations contained in the letter of dismissal. In addition, the Board finds the reason given for the absence was not proper and the testimony of the paralegal not credible.

Regarding the alleged quarrelsome activity, the Board finds that there was a heated exchange between the Claimant and his Supervisor. There is sufficient proof that the activity on the part of the Claimant was overly abusive which shows a poor attitude towards the job and Carrier to the point that would require disciplinary action.

The question remaining for the Board is: What is the appropriate penalty under the circumstances of this case? It was the Organization's position that the prior record of the Claimant was not appropriately introduced into the record of this case. Appended to the Carrier's Submission of the transcript of this case is the complete written record of this employee. This was not part of the Organization's Submission and, therefore, it appears to be something that was added in after the fact. Such written documents are inappropriate to be part of the record unless they were submitted on the property. The Board notes that on Page 3 of the transcript, the Organization was put on notice that part of the reason for the withholding from service and the ultimate disciplinary penalty was because of the Claimant's previous record. The previous record was also mentioned in various letters and responses regarding the appeal process of this case. The Board finds that the Organization was given sufficient notice that the prior record of the Claimant would be taken into account. Therefore, it is appropriate for the Board to take into account the Claimant's past disciplinary record when determining the appropriateness of the penalty. A review of the Claimant's disciplinary record, which was discussed on the property, shows an employee who is making substantial efforts to be terminated; and while the incident of June 2, 1989, would not normally result in dismissal from service, this incident coupled with previous major disciplinary actions in the employee's file has led the Board to conclude that the Claimant is not capable of conducting himself in the appropriate manner. Therefore, the Board concludes that the Carrier has not acted in an arbitrary and capricious manner, and the claim will be denied.

A W A R D

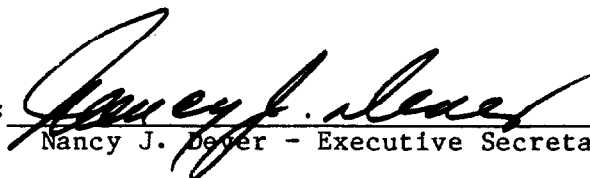
Claim denied.

Form 1
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Award No. 12118
Docket No. 12118
91-2-90-2-168

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of August 1991.