

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

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM:

1. That the Missouri Pacific Railroad Company is violative of Rule 32 of the June 1, 1960 controlling agreement and has unjustly dealt with and damaged Electrician D. D. Compton at DeSoto, Missouri when they did not afford him a fair and impartial investigation, resulting in the unjust and improper discipline of dismissal by notice dated May 4, 1989.

2. That accordingly the Missouri Pacific Railroad Company be ordered to compensate Electrician D. D. Compton as follows: (a) reinstate him to service with seniority rights unimpaired; (b) for all wage losses suffered by Mr. Compton; (c) made whole for all vacation rights; (d) made whole for all health and welfare and insurance benefits; (e) made whole for pension benefits including Railroad Retirement and Unemployment Insurance; (f) made whole for any other benefits he would have earned during the time withheld from service; (g) in addition to the money amounts claimed herein, the Carrier shall pay Electrician D. D. Compton an additional amount of 6% per annum compounded annually on the anniversary date of the claim and further, any record of this disciplinary action 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 employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

As a result of an Investigation held on April 27, 1989, the claimant was dismissed from service for being absent without authority on January 18, and 19, 1989; January 20, 1989, and from January 25, 1989, through and including March 8, 1989.

It is the Organization's position that the Claimant was medically disabled at the time of the Investigation and at the time of dismissal. Further, the Organization claims that the Carrier was aware of an injury sustained by the Claimant that caused his disability and absence from work.

It is axiomatic that this Board will not tamper with the findings of a hearing officer. This axiom remains constant provided that the hearing officer affords the proper weight to the evidence presented to him. In the instant case, the Board does not find that the credibility of any of the witnesses is at issue. Carrier officials claim that they were not aware that the Claimant did not report to work due to an injury. At the same time, the Carrier acknowledges that on February 10, 1989, the Claimant called and spoke to a Carrier official asking if there was any light duty work available. This resurfacing of the Claimant, does not, in and of itself establish that the Carrier was aware of the Claimant's injury as of the first date of his absence as charged herein. At the same time, the Carrier's lack of knowledge is balanced against the Claimant's credible testimony that he called the Carrier's facility and spoke to a clerk during his initial absences. Thus, the question before the hearing officer was whether or not the Claimant asked for and received the authority to be off work. The record indicates that the Claimant was not charged with the violation of any specific Rule or established procedure whereby Claimant would seek authority to be off work. This is balanced against the Claimant's unrefuted testimony that he did call in to the property and spoke to a clerk. The record also establishes that on February 10, 1989, the Claimant did ask a Carrier officer if there was any light work available, as per his doctor's instructions. While there is not enough evidence in the record to show that the Carrier should have known that the Claimant was off work due to an injury, the evidence is sufficiently ambiguous to establish that the Carrier absolutely did not know of the Claimant's condition and circumstances.

In order for this Board to sustain an assessment of industrial capital punishment, the Carrier must establish by a preponderance of the evidence that it dismissed the Claimant for just cause; or, at the very least, for the reasons stated in the charge letter. In matters of discharge, where questions of fact are unresolved, the benefit of the doubt must be given to the employee. In so doing in the instant case, the Board finds that the hearing officer did not assign to the Claimant's testimony the weight which it deserved. As such, the Board finds that the dismissal of the Claimant can not be justified by the weight of the evidence. This Board also notes that in order for a Claimant to be reinstated with full backpay and benefits, that Claimant must establish by a minimum standard of clear and convincing evidence that he had clean hands did not contribute to the circumstances which lead to his dismissal. Thus, this Board finds that the Claimant was derelict in conveying his physical condition and the need to absent himself from work. The fact that the Claimant may have been under the care of a physician does not relieve him of the duty and responsibility to inform the Carrier of the necessity for time off of work so that the Carrier may cover his assignment.

On the basis of the foregoing, the Board directs the Carrier to reinstate the Claimant to his former position without loss of seniority but with no backpay or other monetary benefits.

A W A R D

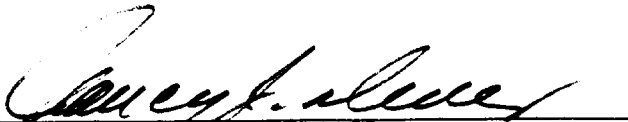
Claim sustained in accordance with the Findings.

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Award No. 12167
Docket No. 11951
91-2-90-2-105

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Deper - Executive Secretary

Dated at Chicago, Illinois this 16th day of October 1991.