

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12584
Docket No. 12452
93-2-91-2-278

The Second Division consisted of the regular members and in addition Referee Nancy Connolly Fibish 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 S. M. Basinger was unjustly treated when he was suspended from service for thirty (30) days beginning on December 12, 1990, following investigation for alleged violation of portion of Rule 810 of the General Rules and Regulations of the Southern Pacific Transportation Company (Western Lines).
2. That, accordingly, the Southern Pacific Transportation Company be ordered to compensate Electrician S. M. Basinger for the thirty (30) days suspended with all rights unimpaired, including service and seniority, vacation, payment of hospital and medical insurance, group disability insurance, railroad retirement contributions, with less of wages to include 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 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 waived right of appearance at hearing thereon.

Claimant is an Electrician in the Carrier's Eugene District, Oregon Division, with a seniority date of November 16, 1974. On September 28, 1990, the Carrier served notice on Claimant to be present for a formal hearing scheduled for October 10, 1990, to develop the facts and place responsibility, if any, in connection with his alleged failure to protect his employment and for his continued absenteeism (in possible violation of Rule 810 of the Carrier's Rules and Regulation) on the following dates: May 4 and 11, 1990; June 11 and 28, 1990; July 26, 1990; August 1, 5, 11, 12 and 16, 1990; September 2, 16, 23, 26, and 27, 1990. The hearing was postponed twice at the Organization's request and was held on November 6, 1990, following which the Carrier suspended the Claimant for a period of 30 days, from December 12, 1990, through and including January 10, 1991.

However, the Carrier stated that it was willing to show leniency with regard to the suspension if the Claimant were agreeable to four conditions, which are quoted as follows:

- "1. You are to contact the Southern Pacific Employee Assistance Counselor and arrange through him for a psychiatric evaluation of yourself within the next 30 days.
2. You are to participate in a family counseling program as recommended by the Southern Pacific Employee Assistance Counselor.
3. You are to have the Southern Pacific Employee Assistance Counselor provide me with monthly updates until such time as he recommends, but not to exceed one year. These updates are to include in particular that you are participating in a family counseling program.
4. You must refrain from failing to protect your assignment, and failure to report for duty must be substantiated and verified."

The Claimant subsequently declined this four-point alternative proffered by the Carrier in lieu of suspension. The Organization appealed the suspension and subsequently requested that, because the 30-day suspension imposed a financial hardship on the Claimant,

the Carrier allow the Claimant to serve out the suspension at one or two days per week until the 30-day suspension would have been served. The Carrier denied this request on the basis that it would enable the Claimant to continue his pattern of absenteeism and would not serve the intended purpose of the suspension. After subsequent appeals to the Carrier's highest designated representative, including a conference held on August 30, 1991, the matter remained unresolved and was submitted to the Board for final adjudication.

The Carrier points out that this is not the first time Claimant has been disciplined for failing to protect his assignment. Following counseling for absenteeism in 1978 and 1979, Claimant was suspended for 30 days on January 31, 1979. Although the Carrier admits that between January 1980 and 1990, the Claimant did improve his attendance record, Claimant began to have attendance problems again in February 1990. This pattern of absenteeism continued through March and April 1990, for which he was counseled twice in March and May of that year--particularly on the implication of Rule 810 for dismissal for continued failure of employees to protect their employment--and which led to his eventual 30-day suspension for violation of Rule 810. However, the Carrier points out that in recognition of the Claimant's ongoing family problem in connection with his absenteeism, it offered leniency (with four conditions imposed) in lieu of a 30-day suspension. The Carrier argues that if the Claimant had agreed to these conditions, he would not have been suspended and that the Claimant himself chose the 30 day suspension.

The Organization alleges that the Carrier violated Rules 38, 39, and 25(a) and (b) of the Agreement and that the Carrier acted in an arbitrary, capricious and uncaring manner in the handling of this case. It contends that the Claimant was away from work for cause, that he did notify his supervisors of his family difficulties, and that he should not have been disciplined for unavoidable excused absences. The Organization describes the volatile situation that existed in the Claimant's home, as testified to by a qualified counselor at the hearing, in which the Claimant's 18-year old son was physically and verbally abusive to Claimant's wife, and which necessitated Claimant's staying home to protect her. The Organization regards the prior counseling on Rule 810 that is referred to by the Carrier as irrelevant to this appeal before the Board.

As a remedy, the Organization is asking that the Claimant, if returned to service for the period of the suspension, should have vacation rights restored as provided for in the Agreement and that he be compensated for all wages lost, with payment of six percent interest.

Rule 810 reads in part as follows:

"Continued failure by employees to protect their employment shall be sufficient cause for dismissal."

Rule 38 (a) reads:

"An employee who considers himself unjustly treated, or that this Agreement as applicable to his craft is not being properly applied, shall have the right to submit the facts informally too this foreman for adjustment and/or to the nearest duly authorized local committee of his craft. The duly authorized local committee (of not to exceed three members of the craft), if they consider it justified, may submit the case informally to the foreman, general foreman and/or the master mechanic (or the foreman to general foreman and/or to shop superintendent in General Shops)."

Rule 39 reads:

"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 representatives will be furnished with a copy."

Rule 25(a) and (b) (Absence from Work) reads:

"(a) An employee detained from work account sickness or for other cause, shall notify his foreman as early as possible.

(b) If an employee is unavoidably kept from work, he will not be unjustly discriminated against."

The Board has reviewed the entire record, including the transcript of the hearing. There is no dispute that the Claimant established the mitigating circumstances surrounding his absences in 1990 and early 1991 through the testimony of a qualified counselor. However, while he mentioned his family problems to one or more of his supervisors, there is no evidence in the record of the hearing that the Claimant provided such information about these mitigating circumstances on those occasions that he was counseled about the implications of Rule 810 or that his personal file contained any documentation from a doctor or outside counselor that there was a valid reason for his being away from his job. The counselor who testified at the hearing, when asked what were his suggestions for ameliorating the family situation attendant upon the Claimant's absenteeism, suggested psychiatric counseling for the entire family of the Claimant. It should be noted that the Carrier then offered a four-point program to the Claimant, which included a family counseling program recommended by the Carrier's Employee Assistance Counselor (EAC), and that the Claimant refused this four-point program in favor of taking the 30-day suspension.

From the evidence of the record, the Board finds that the Claimant was counseled sufficiently about the implications of Rule 810 and therefore had sufficient time to provide documentation in his personal file about the reasons for his continued absences, particularly since he was meeting with a qualified counselor who subsequently testified on his behalf at the hearing. He did not provide such documentation and did not indicate during his counseling about Rule 810 what were the reasons for his absence. Nonetheless, in recognition of the Claimant's family problem, the Carrier offered leniency in lieu of discipline, which the Claimant refused. The Board finds that the Carrier met its burden of proof in this instance and that there has been no demonstrated abuse of discretion on its part in assessing discipline.

A W A R D

Claim denied.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 15th day of September 1993.