

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12693
Docket No. 12727
94-2-93-2-48

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

(International Brotherhood of Electrical
Workers
PARTIES TO DISPUTE: (
(Burlington Northern Railroad

STATEMENT OF CLAIM:

- "1. That in violation of the controlling Agreement, Electronic Technician Rodney Swain headquartered at Fort Worth, Texas, was unjustly withheld from service then, following a heavily biased investigation, he was unjustly suspended from service; the two events totaled 71 days of service denied Mr. Swain by the Carrier.
2. That the investigation held on October 29, 1991, was not a fair and impartial hearing as required by the rules of the controlling Agreement and that the discipline assessed was unjust and unwarranted.
3. That accordingly, the Burlington Northern Railroad Company should be directed to make Electronic Technician Rodney Swain whole for all time lost, which amounts to 71 days compensation at the pro rata rate in addition to restoration of, or compensation for, all rights, benefits and privileges of which he was deprived. The claim also includes removal of the reference to the disciplinary hearing from Mr. Swain's personal record."

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 employe 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 was employed as an Electronic Technician at Fort Worth, Texas, a position he had held throughout his employment with Carrier, which commenced on July 18, 1988. On Tuesday, October 8, 1991, Claimant was working on an ongoing project of moving communication equipment as a result of the relocation of employees following a reorganization. The project also involved the use of an outside contractor. In order to try to meet deadlines, Claimant's supervisor gathered the foreman and technicians, including Claimant, on the morning of October 8, and advised them that everyone would be required to work overtime to complete the necessary work. At 3:30 P.M. that afternoon, Claimant approached his supervisor and asked to have the next three days off (Claimant was scheduled to be on vacation the following week). Claimant further stated that if the supervisor would not give him the time off, he would go to EAP and get it. His supervisor told him to return at 4:30 P.M. Claimant returned at 4:40 P.M. and met with his supervisor and his foreman, who had been requested to attend. The supervisor advised that he could not spare Claimant to be off for the three days he had requested. Claimant stated that he needed the three days off and that he was going to take them. Thereafter, he departed work and did not work the scheduled overtime on October 8, nor did he report for work or contact Carrier on October 9, 10, or 11.

On October 11, 1991, Claimant was sent a notice advising him to report for an investigation, charging him with insubordination and failure to protect his job assignment, which by agreement between the parties was postponed until October 19, 1991. Following the investigation, Claimant was issued a 60 calendar day suspension (October 21 - December 19, 1991). In a letter dated December 9, Claimant advised his supervisor that he was resigning from Burlington Northern, effective December 30. On December 17, Carrier wrote Claimant, accepting his resignation and advising him that he would be paid for all work days between the end of his suspension and December 30, 1991, and he would not be required to return to work.

The Organization raises numerous procedural arguments which they contend require the discipline assessed Claimant to be set aside. First, the Organization contends that the notice of investigation was imprecise, did not list the numerous rules which the Carrier subsequently cited during the investigation, and did not give the precise reason why Claimant was being withheld from service, as required by Rule 30 of the Agreement. The Board, after reviewing the notice, finds that it provided Claimant with sufficient information concerning the circumstances under inquiry.

The record of the investigation indicates Claimant was aware of the events associated with the charge and prepared his defense accordingly. The notice also advised Claimant that he was being withheld from service pending the outcome of the investigation on the charges presented in the notice. The Board likewise concludes that this was precise enough to meet the requirements of Rule 30. The Organization's contention that insubordination is not a "serious infraction" and that Carrier's withholding of Claimant from service was indicative of prejudgment is equally without merit.

The Organization also contends that Carrier's letter of November 12, 1991, which began:

"Reference dismissal notice dated October 11, 1991, and ensuing investigation scheduled and held on October 29, 1991.

The decision to dismiss you for insubordination..., is hereby reduced to read as follows:"

demonstrates that Carrier had exhibited prejudice against the Claimant from the outset. The record before this Board does not include an October 11 dismissal notice. Likewise, it does not appear from the record that this argument by the Organization was raised during the handling on the property; therefore, it may not properly be considered by this Board.

The Organization also argues that Carrier's investigating officer refused to permit Claimant's representative to pursue certain lines of questioning, particularly involving Claimant's qualifications and the stress inducing management style of his supervisor. While the Board believes investigating officers should allow considerable latitude to an employee representative's questioning of witnesses and that failure to do so may, in some instances, deprive an employee of his right to due process, the Board does not find that the investigating officer's conduct in this instance to have deprived Claimant of a fair and impartial hearing.

Finally, the Organization alleges that the Carrier violated Rule 15 - Leave of Absence, when it refused Claimant's request for three days off. The Organization argues that had Claimant's request for time off been granted, the incident leading up to this charge would not have occurred. Rule 15 reads, in pertinent part, as follows:

"(b) The arbitrary refusal of a reasonable amount of leave of absence to employees when they can be

spared, or failure to handle promptly cases involving sickness or business matters of serious importance to the employees, is an improper practice and may be handled as unjust treatment under these rules."

The Board is of the opinion that if Claimant felt his rights under Rule 15 were being abrogated, he had the obligation to pursue a remedy under the procedures provided for within the rule, that is, to request an unjust treatment hearing. An employee may not take matters into his own hands and take a leave of absence, which Carrier has not authorized.

Carrier, on the other hand, asserts that as a result of Claimant's resignation, effective December 30, 1991, he has relinquished his right to pursue this Claim before the Board. Carrier cites numerous Awards which it contends supports its position that the Claim should be dismissed on the grounds that the Claim is now moot. A review of these Awards shows that in each of those instances, the Claimants had signed a "release", giving up their rights to pursue any pending claims. In this case, while Claimant submitted a letter of resignation, the record is void of any signed "release" or "waiver", which would preclude the further handling of this Claim. The Board finds that this Claim is properly before this Board for adjudication.

As to the merits, the Board finds that Claimant had been advised that overtime work would be required of all Electronic Technicians in order to meet certain service deadlines. Claimant nonetheless sought permission to be off for three days, in addition to the week of vacation which Carrier had already authorized him to take. His supervisor refused such request and, although Claimant was warned that failure to protect his job could result in charges of insubordination and failure to protect his assignment, Claimant nevertheless elected to absent himself from required overtime on October 8, as well as his regular assigned work days of October 9, 10 and 11, 1991. The Board finds that the record of the investigation supports the Carrier's finding that Claimant was guilty of insubordination and failure to protect his assignment. An employee has the obligation to comply with instructions given by proper authority, and then, if he feels the instructions were improper handle the matter through the grievance procedure. The Rule is firmly established: comply and then complain (see Second Division, Award 11628). Likewise, if Claimant was suffering from stress, as he alleges, he may seek help through Carrier's EAP program, but must follow the procedures set up thereunder, including seeking a medical leave, if warranted. In this case, Claimant ignored the established procedures, and by so doing, placed himself in a position where he was subject to disciplinary

action by Carrier. Insubordination is a serious offense, which can under certain circumstances, be considered grounds for dismissal. Based on the record before us, Carrier's decision to suspend Claimant for 60 days cannot be considered to be arbitrary or capricious. Likewise, Carrier's decision to begin such suspension on Claimant's first work day following his week of scheduled vacation was not unreasonable.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: _____

Linda Woods

Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 20th day of April 1994.