

**NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION**

Award No. 13642

Docket No. 13517

01-2-99-2-123

The Second Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

(National Conference of Firemen & Oilers

**PARTIES TO DISPUTE:** (

(Union Pacific Railroad Company (former Denver and  
( Rio Grande Western Railroad Company)

**STATEMENT OF CLAIM:**

- "1) That in violation of the current Agreement, Mr. S. Hilton, Laborer, Denver, Colorado, was unfairly dismissed from service of the Denver and Rio Grande Western Railroad Company (Union Pacific Railroad Company), effective March 26, 1999.
- 2) That accordingly, the Denver & Rio Grande Western Railroad Company (Union Pacific Railroad Company) be ordered to make Mr. Hilton whole by restoring him to service with seniority rights, vacation rights, and all other benefits that are a condition of employment, unimpaired, with compensation for all time lost plus 6% annual interest; with reimbursement of all losses sustained account loss of coverage under Health and Welfare and Life Insurance Agreements during the time held out of service; and the mark removed from his 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 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 were given due notice of hearing thereon.**

**On February 16, 1999, the Carrier directed the Claimant to attend an Investigation on February 17, 1999, concerning allegations that, on February 12, 1999, while on duty, he failed to comply with instructions of the Manager Operations Practices to submit to a drug and alcohol test, was negligent in his duties, and was quarrelsome, in violation of Operating Rules 1.6 and 1.13. The Hearing was convened as scheduled but, upon the Claimant's protest that he did not have sufficient time to prepare a defense and secure witnesses, the Hearing was recessed to February 22, 1999. The Hearing proceeded for several hours but was recessed when the Claimant walked out of the hearing room. Upon request of the Acting Local Chairman, the Hearing was continued to February 25, 1999. On February 25, 1999, neither the Claimant nor his representative showed up for the Hearing. The Carrier recessed the Hearing until March 16, 1999. On March 16, 1999, the Acting Local Chairman appeared and related that the Claimant had chosen not to cooperate with the Investigation and would not be present. Upon the Acting Local Chairman's request, the Hearing was recessed until March 23, 1999, with a warning that if the Claimant did not appear on March 23, the Hearing would proceed in absentia. The Claimant did not appear on March 23 and the Hearing proceeded to its conclusion. On April 19, 1999, the Carrier informed the Claimant that he had been found guilty of the charges and had been dismissed from service.**

**The Organization has raised several arguments in support of its position that the Claimant was denied a fair Hearing. We have reviewed the record and find that, contrary to the Organization's contentions, the Hearing Officer went out of his way to provide the Claimant with a fair Hearing. At the outset, the Claimant objected that he had only one day's notice of the Investigation and did not have sufficient time to prepare his defense or secure witnesses. The Hearing Officer recessed the Hearing in response to the Claimant's objections. When the Claimant insisted that the Hearing reconvene within ten days of the incident that formed the basis for the charges, the Hearing Officer obliged him. The Hearing Officer arranged for most of the witnesses that the Claimant requested to be present on February 22, the date the Hearing was reconvened. The only witnesses not present were unavailable, due to being on vacation, or were determined not to be able to provide relevant testimony.**

The record reveals that the Hearing Officer conducted the Hearing on February 22 in a fair and orderly manner. The Claimant sought to raise grievances that were not a part of the charges under Investigation. The Hearing Officer explained to the Claimant that these grievances were to be pursued in other forums. Nevertheless, the Claimant persisted in his attempts to expand the Hearing beyond the charges under Investigation and, when the Hearing Officer attempted to maintain an orderly Hearing, the Claimant walked out. At that point, the Hearing Officer could have proceeded in absentia. Instead, he granted a request from the Claimant's representative that the Hearing be recessed until February 25.

On February 25, when neither the Claimant nor his representative appeared, the Hearing Officer could have proceeded in absentia. Instead, he again recessed the Hearing until March 16. On March 16, when the Claimant's representative appeared but the Claimant did not, the Hearing Officer again recessed the Hearing to afford the Claimant one last opportunity to appear and present his defense. On March 23, the Hearing Officer proceeded in absentia, but still arranged for the presence of witnesses that the Claimant had requested and these witnesses were questioned by the Claimant's representative.

The record reflects that the Hearing Officer bent over backwards and gave the Claimant far more by way of accommodation and procedural protection than he deserved and than the Agreement's guaranty of a fair Hearing required. The Organization's contention that the Claimant was denied a fair Hearing borders on the frivolous.

The Organization also argues that the Carrier failed to prove the charges by substantial evidence. We cannot agree. On the date in question, the Claimant was assigned to the North Yard as a driver to transport train crews. The Claimant, who was also Local Chairman, was upset that the Carrier was using an outside contractor to transport crews on that date. The Claimant believed that the Carrier was violating the Agreement. The Claimant decided that, because of the outside contractor, he had no work to do and took it upon himself to leave the North Yard and go to Burnham Shop to conduct union business. The record is clear that the Claimant did not ask permission to leave his assignment and MTO Wilson had to track him down and direct him to return to the North Yard and perform his duties. The Carrier clearly proved by substantial evidence that the Claimant neglected his duties on the date in question.

The record further reflects that when the Claimant returned to North Yard he was abusive toward MTO Wilson. The Claimant complained about being called back to transport a train crew while the contractor was present and alleged that the Carrier's Officers were engaged in a conspiracy to violate the Agreement and the law and to deprive laborers of their jobs. Ultimately, the Claimant complied with MTO Wilson's directive to transport a train crew.

The Claimant returned to North Yard about an hour later. MTO Wilson and MTO Murray both testified that, when the Claimant returned, he was abusive toward MTO Murray. The Claimant was highly agitated, complaining about a contractor's bus that was outside and about an alleged conspiracy of the Carrier's Officers. His eyes were described as bloodshot and his behavior was described as irrational. The Claimant accused MTO Murray of lying to him and stated that Supervisors would go to jail for violating federal law and for having interests in the contractor and a taxi company. MTO Murray directed the Claimant to submit to a drug and alcohol test and the Claimant refused. MTO Murray repeated the directive several times and the Claimant persisted in his refusal. The Claimant complained that he was suffering from a bleeding ulcer. MTO Murray told the Claimant to come to the hospital to have his ulcer treated and to submit to the drug and alcohol test and the Claimant still refused. Eventually, the Claimant punched out and left the facility before the scheduled end of the shift. There can be no question that, on this record, the Carrier proved by substantial evidence that the Claimant was quarrelsome and insubordinate in that he refused to comply with Manager Murray's directive to submit to a drug and alcohol test. Moreover, there is no question that the Claimant's behavior gave MTO Murray reasonable cause to issue the directive.

There remains the question of the penalty imposed. Our role in reviewing the penalty is limited. We may only disturb the penalty if we conclude that it is arbitrary, capricious or excessive. Insubordination, particular in the context of a refusal to submit to a reasonable cause drug and alcohol test, is a very serious offense. Moreover, we note that five years earlier the Claimant had failed to pass a post accident drug screen.

However, we also note that the Claimant had 20 years of service at the time of the incident. Most importantly, the record reflects that all of the Claimant's misconduct was bound up in what he perceived to be the performance of his duties as Local Chairman. The Claimant's zealous advocacy was clearly misguided. The Claimant must understand that there are appropriate channels for the processing of grievances

and that acts of self-help, such as walking off the job, being abusive and hurling accusations toward Supervisors, and refusing to comply with directives, are inappropriate and cannot be tolerated. The Claimant must learn to control his anger and to direct his advocacy toward proper channels. However, it is clear from the record, that the Claimant's misconduct was the result of his misguided perception of his role as Local Chairman rather than a desire to avoid detection of substance abuse.

Considering the unique circumstances presented, and without setting a precedent for future cases, the Board finds that the penalty of dismissal was excessive and that the Claimant should be given one last chance to demonstrate that he can perform his duties and behave appropriately. The Claimant shall be reinstated to service with seniority unimpaired but without compensation for time held out of service. The Claimant's reinstatement shall be on a last chance basis. Any further violation of any Rule in the three years following his reinstatement shall be the basis for the Claimant's permanent dismissal. The Claimant's reinstatement shall be conditioned on his passing any reasonable medical examination, including a drug and alcohol screen, that the Carrier may require. The Claimant's reinstatement shall also be conditioned on his contacting the Carrier's Employee Assistance Program and on his compliance with any requirements of the EAP.

#### **AWARD**

Claim sustained in accordance with the Findings.

#### **ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of Second Division

Dated at Chicago, Illinois, this 6th day of August, 2001.