Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13804
Docket No. 13667
04-2-02-2-28

The Second Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
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(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

"1. That the Kansas City Southern Railway company erred and violated the Controlling Agreement particularly, Rule 29, but not limited to, when Electrician James T. Rankin was unjustly and arbitrarily dismissed from service on October 16, 2001, following an investigation held on October 10, 2001.

2. That accordingly, the Kansas City Southern Railway Company make whole Electrician Rankin as follows:

a. Reinstate him to service with seniority rights unimpaired;

b. Compensate him for all wages lost at the prevailing rate of pay of electricians and all applicable overtime;

c. make him whole for all vacation rights;

d. Make him whole for all health and welfare and insurance benefits;

e. Make him whole for any and all other benefits including Railroad Retirement and Unemployment Insurance;

f. Make him whole for any and all other benefits that he would have earned during the time withheld from service, and;

g. Any record of this arbitrary and unjust disciplinary action be expunged from his 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 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.

The Claimant was an hourly employee regularly employed at the Carrier's Shreveport Diesel Shop, Shreveport, Louisiana. On September 25, 2001, he was issued a Notice of Investigation directing him to appear at a formal Investigation to "ascertain the facts and determine your responsibility, if any, in connection with you allegedly breaking the Shreveport Diesel Foreman's office door window by throwing a reverser handle, while you were serving in the capacity of Electrician, at the Shreveport, Diesel Shop on September 21, 2001."

The Investigation was conducted on October 10, 2001. After reviewing the evidence gathered at the Hearing, the Carrier notified the Claimant by letter dated October 16, 2001, that they found the evidence sufficient to find him guilty. He was dismissed from service for violating Rules 1.1, 1.6, 1.19, 1.24 and 1.7.

The Carrier argues the actions of the Claimant were very serious. They contend someone could have gotten injured by flying glass if not by the projectile itself.

They assert the Claimant is a short-term employee having worked for the Carrier for only one year and nine months at the time of the incident. Moreover, they point out that he admitted his culpability during his testimony at Hearing. Therefore, the Carrier had substantial evidence to support the charges. Besides, the Carrier argues the Claimant was cavalier about his infraction and saw nothing wrong with what he did.

The Carrier insists they committed no procedural errors which would cause the discipline assessed to be overturned. They especially state there are no Rules which require that they state specific Rule violations in the Notice of Investigation.

The Organization argues the Claimant was not guilty of the charges. In any case, they insist the discipline assessed was harsh and excessive.

The Organization does not believe the Carrier met its burden of proof in this case. Besides, they contend, the Carrier committed contractual and technical errors which are fatal to their case.

The Petitioner refers to the Carrier's failure to cite specific Rule violations in the Notice of Investigation which they maintain violates Rule 29 of the Agreement. They also fault the Hearing Officer who ignored an objection raised by the Organization at Hearing.

In addition, they challenge the Carrier's failure to provide pertinent information requested by the Organization and the Claimant. They argue this prevented the Claimant from developing his defense and was clearly a violation of his due process.

They assert the Claimant's due process was further impaired when the Hearing Officer denied him the opportunity to cross examine the General Foreman. They cite Second Division Award 7286 which sustained a claim when the Claimant was denied the opportunity to cross examine carrier witnesses.

The Organization contends the Carrier based its decision on hearsay evidence and failed to meet is burden of proof.

They argue the testimony of General Foreman Edward demonstrates that the actions of the Claimant were accidental and not intentional. They also point to the Claimant's testimony wherein he readily accepted responsibility but also said he never thought the reverse handle would cause damage and never intended to break the window. They argue further that his actions were not malicious or out of anger.

Finally, the Organization urges the Board to consider that discipline should not be punitive but corrective in nature.

The question the Board must answer is whether the discipline assessed the Claimant was in keeping with the infraction. Certainly, if the Claimant had been acting out of anger or intended to cause damage and/or injury to another employee, the discipline assessed would be warranted and sustained. However, all indications, including the testimony of the General Foreman demonstrates that the Claimant's actions were simply poor judgment.

We concur with the Organization's assertion that discipline should be corrective in nature rather than punitive. Just cause requires, among other things, that the employer utilizes the least amount of discipline necessary in order to modify the employee's improper behavior. That is certainly the basis of progressive discipline. In this case, the Claimant demonstrated poor judgment and may not have been as cognizant of his failings as he should have been, however, there is nothing which demonstrates the Claimant could not have been convinced to use better judgment in the future if he had been assessed a lesser discipline. Under the

circumstances the Board must weigh the motives of the Claimant and determine whether he intentionally violated the cited Rules. Based on the facts presented, we cannot answer that question in the affirmative.

Moreover, we cannot agree that the Claimant was cavalier about the situation. He may have been operating out of a belief he did not intentionally do anything to cause injury or damage and therefore certainly needed to be counseled about all the possibilities. However, he did not hesitate to take responsibility for his actions, apologized for breaking the window and offered to pay for the damages. This cannot be considered cavalier.

Finally, although the Claimant is a short-term employee he still must be afforded due process and a reasonable discipline for the offense committed. In addition, the Carrier did not challenge the Organization's assertion that the Claimant has been an exemplary employee during his tenure and in the past has been appointed to a temporary supervisory position. That may go a long way in explaining why the Carrier believed he should have known better. However, even supervisors or potential supervisors are not totally immune from isolated incidents of poor judgment. It is an unfortunate human failing. In this case, we find that the Carrier, albeit unwittingly, abused its managerial discretion in assessing the ultimate penalty for the Claimant's actions.

We believe the better course would have been to assess the Claimant a ten-day suspension for his poor judgment.

Admittedly, this will result in the Claimant getting an Award that exceeds his years of service. However, that is not the fault of the Claimant. The Organization filed a claim in a timely manner. For us to penalize the Claimant for the delays inherent in the system would be itself an injustice. Any Claimant wants an appeal settled as quickly as possible so that there can be closure and they can either get on with their career or find a new career. To determine that the remedy for an unjust termination must be dictated by an employee's years of service is a requirement that he share the blame for the Employer's incorrect action. That having been said, it is

of course customary and appropriate to have any backpay award reduced by the amount of any outside earnings and workman's compensation received by the Claimant from the period of time he was discharged until reinstated.

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 12th day of August 2004.

CORRECTED

SERIAL NO. 119

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 13804

DOCKET NO. 13667

NAME OF ORGANIZATION: (International Brotherhood of Electrical Workers
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NAME OF CARRIER: (Kansas City Southern Railway Company

"The parties request a hearing on a clarification of the appropriate remedy in the above Award which was submitted on the 12th day of August, 2004."

In the original Award for this claim, the Division held that the employee had been wrongfully discharged and reduced the discipline to a ten (10) day suspension. The parties were unable to agree on the appropriate calculation of back pay and benefits in this matter.

The Organization argues that the Award allowed for only two offsets in the back pay Award, namely, actual outside earnings and railroad retirement unemployment compensation payments. They reiterate the relief sought in their statement of claim which succinctly requested that the Claimant be compensated for all wages lost and all applicable overtime and that he be made whole for all lost benefits. Because, the Award did not mandate that the Claimant mitigate his damages, the Carrier does not have the right to deduct from the Claimant's back pay any potential earnings the Claimant could have received during the time of his unjust discharge.

They also argue that the Carrier has no right to deny the Claimant payment for overtime that he would have worked, especially in light of the fact the overtime distribution is not based strictly on seniority but on equal distribution among employees. In addition, they contend the Claimant is entitled to either payment for vacation he was denied and/or for credit for subsequent years for the days he would

have worked and accrued vacation. Finally, they argue that the Carrier had no right to deduct health and welfare payments when the Claimant was unable to and did not utilize the benefits. Nor was it appropriate that the Carrier reduced the Claimant's wage loss by 3% because they calculated his absenteeism to be at a rate of 3% during his tenure with the Carrier.

Finally, they contend the Division has no authority or reason to rule on this issue because the original Award regarding the remedy was clear, not ambiguous and complete. They argue that such discussions would constitute new argument.

The Carrier argues that the Division does have the authority to rule on the appropriate remedy and the calculation of the remedy in this case. They point to arbitral authority within this and other Divisions in support of their contention. Furthermore, they argue, the Courts have consistently held that employees have an obligation to make a good faith effort to mitigate their damages.

They argue that the Claimant, as an electrician, had an extremely marketable skill. They maintain there were positions available for which he could have applied but apparently did not. They contend the Carrier should not be liable for the total wage loss when the Claimant made no effort to seek outside employment during his discharge period.

The Carrier cites arbitral authority that concurs with their position that it is appropriate to take into consideration the Claimant's attendance record when calculating his back pay. They say this authority holds that if an employee has established a pattern of absenteeism, the employer is correct in subtracting the wages for days the employee would have been absent from the total back wage calculation. They argue the term "time lost" supports the propriety of such deductions.

They maintain that they were astonished to learn that the Claimant had no outside earnings during his discharge period. This, they argue, was despite the fact that there were numerous openings and advertisements for qualified electricians in the Claimant's area of residence. They contend the Claimant initially registered with the local Job Services, but thereafter made no effort to follow-up on any of the employment opportunities that were available. They cite numerous First, Second, Third and Fourth Division Awards which emphasize an employee's obligation to mitigate his damages if

he is in a dismissed status.

As far as any lost overtime is concerned, the Carrier contends the Claimant was one of the junior-most employees and would have had little opportunity for overtime. However, they state they would not be averse to examining the records with the Organization to determine to what, if any, overtime the Claimant would have been entitled.

The Division has reviewed the positions of the parties. It is apparent to the Division that, despite what the Organization believes, the remedy was not as clear as they advocate. For one thing, when an award provides that the back pay will be reduced by "outside earnings," there is a presumption that within a reasonable amount of time an employee will find it necessary to seek other employment and in fact will do so. The Division believes it is within its authority to review the contentions of both parties in determining whether the remedy represents the original intent of the Award. Moreover, we agree that it is not uncommon for the parties not to raise these matters in their original positions for a variety of reasons including the fact that they may never become issues unless the employee is ordered reinstated.

In addition, there is arbitral authority as well as case law which has established an obligation on the part of employees to mitigate their losses. Therefore, when a remedy of back pay is requested and granted, the employee, his representative, the Employer and the ultimate decision makers should be operating from that premise. Admittedly, there may be some arbitral decisions and some court cases that have not taken that position but we believe the majority have reached the better conclusion.

Certainly, the concept of make-whole itself requires such a conclusion. After all, an employee receives wages for work performed. That is the quid pro quo. If an employee chooses not to attend work, he is not paid. Even though an employee may be wrongfully discharged, he cannot sit idly by and expect that he will receive back pay at the successful conclusion of his appeal, if he has made no attempt to work. There would be no quid pro quo. If the employee had not been wrongfully discharged he would have been permitted to continue "working" to earn his rightful wage. If the employee does not seek employment during his termination period, it would be asking the employer to support his decision not to work. Employees are not paid to sit idly, except in limited situations, i.e. being on call or on a rotating relief list or being on an earned vacation,

etc. In this case, the record indicates that the Claimant used his time to further his education. No matter how commendable his decision may have been for other reasons, ordering back pay while he chose to attend school rather than seek work, would amount to mandating that the Carrier subsidize his education.

Therefore, absent evidence that the Claimant sought outside employment and was unable to obtain full-time employment, the Carrier is justified in reducing any back pay by wages the Claimant could have earned.

In view of all the evidence presented, the Board concurs in the following remedy:

Due to the Claimant's short time in service, there is no way to determine that he had a pattern of attendance. Therefore, the Board does not consider absenteeism an issue in this case.

On health and welfare, we conclude that the Carrier was entitled to deduct the employee's share of costs through February 2002. Given that the parties agree that the employee's share of costs for this period was $33.39 per month, the Carrier is permitted to offset $133.56; not $2,671.40. This portion of the award is based on the unique facts and circumstances of this Claim. The analysis is not intended for use as precedent in any subsequent disputes or awards.

As to vacation, the Claimant should be treated as if he had rendered compensated service during the period of time when he was dismissed from service. Our award calculations for vacation pay treat him as if he was employed full time and took vacation during the period when he was dismissed from service.

Based on the materials and records supplied to the Board, the Board concludes that the Claimant is due wages after an offset of $54,715.11. The Carrier represents that it made previous payments to Claimant or on his behalf in the sum of $50,550.88, less applicable taxes and withholdings. Allowing for the health and welfare employee cost share of $133.56 and Carrier's previous payments, Claimant is due the balance of $4,030.67, less applicable taxes and withholding. The Board reserves the right for sixty (60) calendar days from the date of this interpretation to further adjust this amount in the event that its calculations reflect material errors or omissions. Otherwise, the amounts as stated reflect the Board's determination of the wages and benefits due the

Claimant with respect to this dispute.

Referee Carol J. Zamperini who sat with the Division as a neutral member when Award 13804 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 16th day of November 2006.

SERIAL NO. 119

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

INTERPRETATION NO. 2 TO AWARD NO. 13804

DOCKET NO. 13667

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
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(AND
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(Kansas City Southern Railway Company

In Interpretation No. 1, the parties requested a hearing on a clarification of the appropriate remedy in the above Award.

In Interpretation No. 1, the Board determined wages due the Claimant less previous payments from the Carrier, less applicable taxes and withholdings and allowing for the health and welfare employee cost share of $133.56. The Board reserved the right for sixty (60) calendar days from the date of the Interpretation to further adjust this amount in the event that its calculations reflected material errors or omissions. By the issuance of Interpretation No. 2, the time limits are extended from sixty (60) calendar days to seventy-five (75) calendar days from the date of Interpretation No. 1.

Referee Carol J. Zamperini who sat with the Division as a neutral member when Award 13804 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 12th day of January 2007.

SERIAL NO. 119

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

INTERPRETATION NO. 3 TO AWARD NO. 13804

DOCKET NO. 13667

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
AND
(Kansas City Southern Railway Company

In Interpretation No. 1 to this Award, the Board determined wages due the Claimant less previous payments from the Carrier, less applicable taxes and withholdings and allowing for the health and welfare employee cost share of $133.56. The Board reserved the right for sixty (60) calendar days from the date of the Interpretation to further adjust this amount in the event that its calculations reflected material errors or omissions. By the issuance of Interpretation No. 2, the time limits were extended from sixty (60) calendar days to seventy-five (75) calendar days from the date of Interpretation No. 1.

After review of the calculations as permitted by Interpretation Nos. 1 and 2, the parties have determined that, from reviewing additional financial records, the Claimant is owed additional gross wages of $11,824.40, less applicable taxes and withholdings.

Referee Carol J. Zamperini who sat with the Division as a neutral member when Award 13804 was adopted, also participated with the Division in making this Interpretation. This Award shall be complied with within thirty (30) days of its issuance.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 31st day of January 2007.