

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13908
Docket No. 13784
06-2-05-2-31

The Second Division consisted of the regular members and in addition Referee Raymond E. McAlpin when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(BNSF Railway Company

STATEMENT OF CLAIM:

- "1. That in violation of the controlling Agreement, Rule 35 in particular, the BNSF Railway Company, as a result of series of five unfair and unwarranted investigations held on January 20, 2004 at Chicago, Illinois, unjustly and arbitrarily dismissed Mechanical Department electrician Larry Thivel from service.
2. That, accordingly, the BNSF Railway Company be ordered to promptly return Electrician Larry Thivel to its service and to make Electrician Larry Thivel whole for all lost wages, rights, benefits and privileges which were adversely affected as a result of the investigations and unjust assessment of discipline, and further that all record of this matter be expunged from his personal record, all in accordance with the terms of Rule 35, Paragraph G of the controlling Agreement."

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, Larry Thivel, was returned to work under Second Division Award 13686 with a long suspension and on a last chance basis. The Claimant was returned to service on July 15, 2002. The Claimant worked sporadically and was again placed on a medical leave. During April, 2003 the Claimant had a number of absences. A number of investigations were scheduled and, after mutual postponements, the investigations were conducted on January 20, 2004. As a result of these investigations, the Claimant was dismissed from service and a claim was promptly and properly filed.

The Organization argued that this assessment of discipline is a clear violation of the governing agreement. The Claimant did not receive fair and impartial hearings as required by the terms of the Agreement and Rule 35 of that Agreement. The Carrier bears the burden of proof and it has failed to carry that burden.

The Organization claims the Hearing Officer is biased. He is in the direct chain of command at the Carrier's Chicago facility. There have been problems with the Carrier's absentee reporting policy at this location and not all procedures were followed as required in that policy. The Claimant was absent as a result of his anxiety disorder. This was confirmed by a psychological evaluation. Investigations were held nine months after the allegations even though the Claimant had been cleared by his own physician and the Carrier's medical department prior to returning to duty. The Claimant is a longstanding employee of the Carrier and, therefore, does not deserve the harsh treatment he received. The Claimant suffers from anxiety disorder and was attempting, to the best of his ability, to comply with the Carrier's attendance policies. Therefore, the claim should be sustained in its entirety.

The Carrier argued that it complied with the decision in Second Division Award 13686 and returned the Claimant to duty. Almost immediately the Claimant was placed on medical leave. Starting on April 3 the Claimant was absent on a number of occasions without reporting off. The Carrier conducted appropriate

investigations. The Organization was given ample opportunity including numerous postponements in order to prepare the defense of this Claimant. All were aware that the problem with this Claimant was his extremely poor attendance. Likewise, there is no evidence in the record that the Hearing Officer was in any way biased. The Organization had ample opportunity to present all defenses. The finding that the Claimant was guilty of poor attendance was amply proven in the record. The Claimant was returned to work on a last chance basis. The Claimant had ample opportunity to prove himself after his reinstatement, however, the record shows that he continued to miss work irresponsibly even more frequently and by his own admission he did not take his medication.

Upon complete review of the evidence, the Board finds that the Claimant was given vigorous and complete defense by the Organization. There is no showing that the Hearing Officer was in any way biased. The Claimant and his representatives were well aware of why he was the subject of investigations. The Board finds that Rule 35 was complied with.

With respect to the discipline of this Claimant, the Claimant was on a last chance return to work basis as a result of Referee Benn's decision. He did not avail himself of this opportunity and continued to miss work on an evermore frequent basis. The Board finds nothing in this record that would allow it to substitute its judgement for that of the Carrier in this matter and, therefore, the claim will be denied.

Claim denied in accordance with the Findings.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

Form 1
Page 4

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 19th day of October 2006.