

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13923
Docket No. 13812
07-2-06-2-22

The Second Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

(International Brotherhood of Electrical Workers

PARTIES TO DISPUTE: (

(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

- "1. That the Kansas City Southern Railroad Company violated the Controlling Agreement, particularly, but not limited to Rule 29, when Shreveport, Louisiana, Electrician Robert Wolfe was unjustly and arbitrarily dismissed from the service on September 29, 2005 following the investigation held on September 13, 2005.**
- 2. That, accordingly, the Kansas City Southern Railroad Company make whole Electrician Wolfe as follows: (a) reinstate him to service with seniority rights unimpaired; (b) compensate him for all wages lost at the prevailing electrician's rate of pay and all applicable overtime, including interest as the judicial rate; (c) compensate him for, and restore, all vacation rights; (d) compensate him for, and restore, all health and welfare insurance benefits; (e) compensate him for, and restore, any and all other benefits including Railroad Retirement and Unemployment Insurance; (f) compensate him for, and restore 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.

On August 31, 2005, Carrier notified Claimant to appear for a formal Investigation on September 13, 2005, to develop all the facts as to whether or not he had failed to work in a safe manner or plan his work to avoid injury resulting in an alleged strained right shoulder about 6:00 A.M., on August 13, 2005 while attempting to operate switch No. 401 on 71 track South runaround at the Diesel Shop.

On September 29, 2005, Claimant was notified that he had been found guilty as charged and was dismissed.

It is the position of the Organization that Claimant was deprived of a fair and impartial Investigation because the Hearing Officer displayed negative pre-judgment and the charges were not precise. Additionally, it argues that the Carrier erred in its dismissal because it did not prove that Claimant worked in an unsafe manner.

Carrier argues there is no substance to the Organization's argument that Claimant was denied a fair and impartial Hearing. The Carrier also raises an argument stating that the claim before the Board has been changed from that presented on the property. It states the Organization never requested reinstatement on the property, thus that request before the Board significantly changes the claim, therefore, it is procedurally defective and should be dismissed. Last, it argues that the transcript indicates that Claimant did not plan or do his work in a safe manner and because he is a relatively short term employee dismissal was appropriate.

The Board has reviewed the transcript and record of evidence and finds no merit to the Organization's procedural argument that the Hearing Officer denied the Claimant the opportunity to a fair Hearing. At the close of the Hearing the Organization was asked whether the Hearing had been fair and impartial and it responded in the affirmative with the caveat that the charges were not precise. Regarding the alleged lack of specific charges we find no merit because it is clear that Claimant and the Organization understood the charges as the Claimant was ably and vigorously represented by the Organization at the Hearing. We next turn to the Carrier's procedural argument that the claim should be dismissed because it has been altered at the Board. That argument is rejected on the basis that the Organization asked that the Claimant "be made whole" on the property and to "make whole" would include reinstatement, therefore, the specific request for reinstatement before the Board is not a new or novel request that the Carrier should not have expected. There has been no showing that the Carrier has been or was misled as to what the Organization was trying to secure in behalf of the Claimant.

The dispute will be resolved on its merits. The facts indicate that on August 13, 2005 about 6:00 A.M., Claimant and Laborer Levingston were moving a consist of locomotives from the south side of the shop to another location in the Shreveport Locomotive Facility, Levingston was operating the controlling locomotive and Claimant was working as the ground man during the move. While aligning switch #401 on track 71, Claimant was in the motion of throwing the switch from the top position downward when he encountered resistance about a third of the way down. At that point in accordance with Carrier instructions he finished throwing the switch with his foot and leg. Approximately, 30 minutes later Claimant advised Foreman Mitchell that switch No. 401 was difficult to throw and that his right shoulder was sore as a result. During the Hearing, Claimant testified that he did not realize he was hurt as badly as he was, therefore, he did not fill out a personal injury report nor was he asked to. Subsequently, he began to experience increased pain and he went to his doctor who diagnosed the injury as a torn rotator cuff.

Testimony verifies that the Carrier had prior notification that switch No. 401 was hard to throw and that Claimant did not have the benefit of that knowledge. It further indicates there been no showing that the Claimant had the locomotive stopped in too close of a proximity to the switch, thereby rendering it more difficult to move.

The Board finds and holds that the discipline must be rescinded as the Carrier did not meet its burden of proof and Claimant should be reinstated with seniority intact and all other rights unimpaired, but without backpay. We are not awarding any monies in this instance because Claimant claimed an injury to his shoulder that prevented him from working his regular assignment and since that injury he has not provided anything to show that he was medically able to perform service. We have denied Claimant's request for reinstatement in Award 13924. That subsequent case nullifies reinstatement."

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 2007.