

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 13990
Docket No. 13869
09-2-NRAB-00002-080019**

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

PARTIES TO DISPUTE: (
(Brotherhood Railway Carmen Division of TCIU
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

- "1. That the Springfield Terminal Railway Company violated the terms of our current Agreement, in particular Rule 13.1, when they arbitrarily assessed the record of Carman Ryan Hale with 'termination from service' as a result of a hearing on May 11, 2007.**
- 2. That accordingly, the Springfield Terminal Railway Company be required to reinstate Carman Ryan Hale when he returns from furlough status and compensate him with eight (8) hours per day until this inequity is retracted. This is the amount he would have earned had the carrier not violated our 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.

On April 2, 2007, the Carrier notified the Claimant to appear for a formal Investigation on April 10, which was postponed and subsequently held on May 11, 2007, concerning the following charge:

“This Notice of Hearing is issued to develop the facts and place your responsibility, if any, in connection with incident(s) outlined below:

Responsibility for your action on Thursday, March 29, 2007 when you were requested by Carrier official John Baker to accept a written notification of postponement of discipline from this office, your reply to the Carrier was a vulgar profanity. Secondly, you then failed to report for your regular assignment on Sunday, April 1, 2007, contrary to written and verbal instructions from the Carrier.

In both of these instances, your actions were in violation of the following Company General Rules:

Rule GR-C which states in paragraph three: “Any act of insubordination, hostility or willful disregard of the Company interests will not be condoned and is sufficient cause for dismissal.”

Rule GR-L which states in paragraph one: “Employees who are dishonest, immoral, vicious, quarrelsome, and uncivil in deportment or who are careless of the safety to themselves or of others will not be retained in the service.”

Specifics to be reviewed and discussed at subject hearing investigation.”

On June 5, 2007, Claimant was notified that he had been found guilty as charged and was dismissed.

It is the position of the Organization that the Carrier erred in dismissing the Claimant. It argued that the Claimant had a right not to appear for work on April 1, 2007, because he made an arrangement with the Carrier to serve that date as the first day of a ten day agreed to suspension. Secondly, it argued that the Claimant was denied Agreement due process because the Investigation was held in his absence while he was working outside of the railroad industry account of being furloughed from the Carrier's service. It further argued that the Investigation should have been postponed until after the Claimant returned from furlough. Therefore, it concluded that the discipline should be set aside and the claim sustained as presented.

The Carrier argued that there is no validity to the Organization's arguments. It submits that the Claimant is guilty as charged and there were no procedural errors in the handling his case. It argued that the Hearing was postponed twice pursuant to the Claimant's request and was not postponed on May 11, 2007 because there was no request by the Claimant for a third postponement. Nor did he subsequently offer any explanation as to why he could not have attended the Hearing. In summation it stated the dismissal was appropriate and should not be disturbed.

The Board reviewed the transcript and record evidence which constituted the third in a series of three cases involving the Claimant and discovered that he again chose not to appear at the Investigation just as he did in Second Division Award 13989 and again he offered no subsequent proof that he could not attend the Hearing. As we previously stated in the aforementioned Award the Carrier did not violate the Claimant's right to a fair and impartial Hearing when it was held in absentia because the record substantiates that the Carrier granted two postponements and there was no request by the Claimant for a third postponement of the May 11, 2007 Hearing which was recessed for 15 minutes to allow the Claimant time to appear at the Hearing in the event that he was late. As previously stated in Second Division Awards 13957 and 13989 involving these same parties:

"It is further noted there is no requirement that an accused must attend their formal Investigation, but when a charged employee chooses not to attend, he does so at his own potential peril because he

offers no rebuttal or alternative theory or story. See Second Division Awards 11763, 13217, 13360, 13491 and 13924.”

The Board, having determined that the Claimant was not denied his Agreement due process rights, next turns its attention to the merits. Our review of the transcript indicates that on March 29, 2007, Mechanical East Superintendent Mayo faxed a letter to the Mechanical Department office in Rigby for the Claimant to sign. The letter advised the Claimant that there would be a postponement to their agreed-to-discipline and he should report to work on April 1, 2007. The Claimant’s immediate Supervisor (Baker) read the letter to the Claimant who refused to sign for receipt of it. In conjunction with that refusal to acknowledge receipt of the letter, Baker testified that the Claimant stated:

“... f_ _ _ them I signed a contract. I’m not, I’m not going in. I’m not going to be there on the first.”

Baker further testified that the Claimant was vicious, quarrelsome and uncivil in his deportment. He also stated that Carman D. Reynolds was a witness to the conversation.

Carman Reynolds testified that he did not hear the entire conversation, but he did hear Baker instruct the Claimant to report to work on April 1. He further suggested that the Claimant’s response was to the effect that he had no intention of complying with the Carrier’s order.

The record substantiates that at the time of the incident, Superintendent Mayo explained to Mechanical Supervisor Baker that he should inform the Claimant that the March 27, 2007 letter (Agreement between the Claimant and the Carrier to a ten day suspension) was an acceptance of responsibility and waiver of a Hearing and the Carrier had the right to reassign the dates when the discipline would be served and the Claimant was expected to be at work on April 1, 2007. The record also confirms that Baker advised the Claimant of the Superintendent’s instructions. Unfortunately, because the Claimant elected not to attend the Investigation the evidence that was presented by the Carrier, which was substantial, stands un-refuted. The Organization’s vigorous effort to defend the Claimant at the Hearing without his assistance simply could not overcome the un-refuted testimony

of the Carrier's witnesses. The Board determined that the Claimant's behavior was not appropriate. It is clear that the Carrier met its burden of proof that the Claimant was guilty as charged. The Claimant would have been wise to have followed the old adage "obey now and grieve later."

The only issue remaining is whether the dismissal was justified. Our review of the Claimant's personnel record shows that the Claimant accepted a three day suspension for excessive absenteeism on August 5, 2005, a ten day suspension for another period of excessive absenteeism on March 27, 2007, and was found guilty of exhibiting a discernable pattern of absences for which he was suspended for 30 days on May 21, 2007. It is clear that the Carrier attempted to use progressive discipline to alter the Claimant's behavior to no avail. The Claimant was insubordinate, quarrelsome and uncivil in his deportment in the instant case when he failed to follow a direct order. Therefore, the Board finds and holds that termination was appropriate because it was not arbitrary, excessive or capricious.

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.

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

Dated at Chicago, Illinois, this 11th day of February 2009.