

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

(Richard A. White  
PARTIES TO DISPUTE: (  
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"(1) The dismissal of Truck Driver R. A. White for alleged '... violation of "Rule D", insubordination (rules covering transportation).' on June 28, 1988 was without just and sufficient cause, arbitrary, capricious and on the basis of unproven charges and in violation of the Agreement.

(2) The Carrier violated the Agreement when it refused to afford the Claimant his right of appeal as set forth in Section VI. 'Discipline', following a hearing which was held on July 14, 1988.

(3) As a consequence of the violations referred to in either Part (1) and/or Part (2) above, Mr. R. A. White shall be returned to his position with all seniority and benefits unimpaired and he shall be paid for all wage loss suffered."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

As Third Party in Interest, the United Transportation Union was advised of the pendency of this dispute and filed a Submission with the Division.

Claimant had been a Chauffeur/Track Car operator on the Springfield Terminal Railway Company. He had not worked as such since November 13, 1987, due to a strike. On February 23, 1988, Claimant acquired a position in the Maintenance of Way Department of Amtrak. He was employed as such when, on June 28, 1988, a member of Carrier's Engineering Department contacted Claimant's home by telephone and informed his wife that Claimant was being recalled to service. Here the record becomes convolved. The Carrier employee who made the call to Claimant's home testified that he did not know what time of day he called nor did he know what day he had Claimant scheduled for a return to duty physical examination. He stated "I believe around the 8th, I'm not sure." Claimant testified that the call to his home was received by his wife at about 11:00 A.M. on June 28, 1988, and that the message given to his wife was to have Claimant report for a physical examination at 2:30 P.M. on that same date, June 28, 1988. The Carrier witness testified that Claimant called him back "later in the afternoon" (he didn't know exactly when and the record contains no such information); Claimant allegedly used vulgar and obscene language when talking to the Carrier witness (no such language is found in the hearing transcript); and, Claimant allegedly said that he was not going to report for a physical examination. Claimant when asked "... did you contact Mr. Beachy that day?", responded "No, I didn't". This issue was not further explored or clarified by the Hearing Officer.

The confusion continues when the Carrier witness noted on his report that Claimant refused on June 28, 1988, to take a physical examination, whereupon the Engineer - Maintenance of Way issued instructions to the Office Engineer to prepare the hearing charge notice which forms the basis of this dispute. The hearing notice which is dated July 5, 1988, alleges a violation of Rule D, insubordination, because of an alleged refusal to report for a return to duty physical examination. The hearing notice did not identify the date of the alleged insubordination, and "requested" that Claimant attend a hearing on July 14, 1988. The hearing was held as scheduled. Claimant was present and represented throughout the hearing. Neither Claimant nor his representative took any exception to the notice of hearing and both indicated a readiness to proceed with the hearing. Following the completion of the hearing, Claimant was notified by letter dated August 14, 1988, as follows:

"In reviewing the hearing held on July 14, 1988, the following facts are evident:

- a) Your wife was contacted on June 28 at your house to inform you of a physical to be given on July 8, 1988.
- b) As a result of the above conversation you called Mr. Beach (sic) on the 28th and identified yourself.

c) During that conversation you said you were not going to report for a physical.

Therefore, as of this date you are terminated from the service of the Springfield Terminal Railway Company."

On September 13, 1988, the same Maintenance of Way representative who had assisted Claimant during the investigatory hearing, addressed an appeal letter to Mr. R. E. Dinsmore, Director-Labor Relations. On September 22, 1988, Mr. L. T. Fay, Director Labor Relations-Maintenance/Administration acknowledged receipt of the September 13 letter and scheduled a conference on the appeal for September 28, 1988. The appeal conference was held as scheduled. When no timely response was received from the Carrier on the appeal conference, the Maintenance of Way representative, on December 21, 1988, again wrote to Director Labor Relations Dinsmore concerning the appeal conference. This letter of December 21, 1988, was acknowledged and replied to by the Vice President - Human Resources on January 3, 1989. In the reply the employee representative was informed - among other things - that Mr. Roland E. Dinsmore, Director Labor Relations was the highest appeals officer on the Carrier and, therefore, appeals should be handled with Mr. Dinsmore. Mr. Dinsmore never answered either of the letters which had been addressed to him. Finally, failing to reach any resolution of this matter on the property, Claimant filed this dispute with the Board for final adjudication.

At the outset of their presentation to this Board, Carrier challenged the jurisdiction of the Third Division to hear and decide this case inasmuch as employees of this Carrier are classified as "Railroaders" and do not fit the traditional craft or class of employees as defined in Circular No. 1 of this Board. Carrier argued that, if heard at all by this Board, the case should be heard and decided by the Fourth Division.

Procedurally, Carrier argued that only the United Transportation Union has authority on this property to handle appeals from discipline. Therefore, Carrier contends, this appeal was not handled "in the usual manner" on the property and should be dismissed by the Board because no appeal was initiated by the United Transportation Union.

Claimant, through representation by the Maintenance of Way organization, has contended that this case is procedurally defective because:

1. There was no stenographer present at the investigatory hearing;
2. There was no copy of the hearing transcript provided to the employee or his representative until after the appeal conference;

3. There was no timely decision made to assess discipline following the investigatory hearing;
4. There was no decision rendered by Carrier following the appeals conference; and
5. There is no proof of the charges as made.

These jurisdictional and procedural arguments have been considered in various forms and degrees and have been ruled on in Third Division Awards 28726, 28767. We need not repeat our opinions here. Those decisions are, by reference, made a part of this Award.

This dispute will be disposed of on its merits. We find that the hearing transcript is woefully lacking in substantial, probative evidence to support a charge of insubordination. There is no reliable record to substantiate when the Claimant was informed of his necessity to take a physical examination. There is no reliable record to support what was said when Claimant contacted Carrier and allegedly refused to take the examination. There is no reliable record to explain why a charge of insubordination was made on July 5, 1988, if the examination was scheduled for July 8, 1988.

On the basis of the relative convincing force of the testimony and evidence as found in this case, it is the decision of this Board that Claimant should be returned to the service of the Carrier with seniority unimpaired. If Claimant elects to return to Carrier's service, any wage loss which he may have suffered after July 14, 1988, will be offset by any and all earnings made by him in any and all employment in any capacity during the period from July 14, 1988 to the effective date of this Award. Claimant is responsible for providing complete outside earnings records to the Carrier.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 15th day of May 1991.