

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30250
Docket No. CL-30767
94-3-92-3-581

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

(Transportation Communications International
(Union
PARTIES TO DISPUTE: (
(Illinois Central Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Union
(GL-10847) that:

- (a) Carrier erred when it dismissed Claimant F. E. Jenkins from service effective 12:01 AM on Friday, January 17, 1992, and that
- (b) Claimant shall now be restored to service with all rights unimpaired, and
- (c) The Claimant shall now be compensated for all time lost; that is for all time he would have earned had he not been improperly held from service, such payment to include any overtime pay, holiday pay and any other payments he might have received, as well as reimbursement for any health and welfare expense he may encounter while withheld from service."

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 employe 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.

On or about November 15, 1991, Claimant exercised his seniority rights to the position of Operator-Leverman at Carrier's Bridgeport Tower. Since he was not at that time qualified to assume the duties of the Operator-Leverman position on November 15, 1991, he commenced training on the position and continued such training until January 5, 1992.

By letter of January 7, 1992, Claimant was notified to appear for an Investigation "to determine whether or not you exerted full and proper efforts to become qualified as an Operator-Leverman in the Bridgeport Tower, during the period from November 15, 1991, to January 5, 1992." On January 16, 1992, Claimant was informed that he was being dismissed from Carrier's service because he had been found in violation of Superintendent's Bulletin Notice No. 1, paragraph 7, issued January 1, 1992.

Relevant to this case are Rule 10 (b) of the Agreement between the Parties and the Superintendent's Bulletin Notice No. 1, par. 7:

"RULE 10 (b)

An employee who acquires a position through displacement rights and fails to qualify within thirty working days will be allowed seven days from date of removal in which to exercise displacement rights.

Superintendent's Bulletin Notice No. 1 (par. 7)

Dishonesty, desertion from duty, insubordination, wilful neglect, gross carelessness, making false reports or statements, concealing facts concerning matters under investigation, immoral character or serious violations of the law are prohibited...."

It is unrefuted on the record the Carrier requested from the Organization two extensions of the contractually allowed 30-days to facilitate Claimant's attempt to qualify for the position. It is also unrefuted that the Carrier did not raise the issue of the Superintendent's Bulletin Notice No. 1 (par.7) until well into the Investigation. Notwithstanding, the Carrier has not proven negligence or malfeasance on Claimant's part in failing to qualify for the position of Operator-Leverman beyond conjectural speculation into what his alleged motives for intentionally failing might have been. The Board finds that the Carrier has not met its burden of persuasion in this case.

With respect to remedy, the Carrier maintains that Claimant had an obligation to mitigate his damages when offered the opportunity to do so. It notes that it offered him reinstatement in a letter dated March 26, 1992, but Claimant declined that offer. The Organization correctly points out, however, that the letter stipulated that the offer was for a "leniency reinstatement," which, by implication, suggests that Claimant was guilty as charged, but was being reinstated despite his alleged Rule violation. Under the circumstances, Claimant's unwillingness to accept Carrier's offer was not unreasonable.

Subsequently, however, the Carrier revised its offer to Claimant in a letter to him and the Organization dated April 28, 1992. In that letter, no mention was made of "leniency." Rather, Carrier stated: "his seniority will be unimpaired, upon his return his April 1, 1981, protection will be restored and he will maintain the right to pursue his claim for time lost resulting from his dismissal." The letter further provided that he should report for work to Homewood, Illinois, "within fourteen days from the date of this letter." Claimant declined to report as instructed, and the record is devoid of any persuasive rationale for that refusal.


Accordingly, the Board finds that Claimant failed to mitigate his damages when given a bona fide opportunity to do so. Thus, while we find that Claimant should be reinstated with seniority and other rights unimpaired, he should be compensated for time lost only between January 17, and May 12, 1992.

AWARD

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 8th day of June 1994.