

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31168
Docket No. CL-31051
95-3-92-3-894

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

(Transportation Communications International
(Union
PARTIES TO DISPUTE: (
(The Northern Indiana Commuter Transportation
(District

STATEMENT OF CLAIM: "Claim of the System Committee of the Union
(GL-10892) claims that:

1. Carrier violated the effective agreement when, following an investigation on February 27, 1992, it dismissed Mr. Joseph Rzepnicki from service effective March 3, 1992;
2. Carrier shall now restore Claimant to service with his seniority and all other rights unimpaired, shall compensate him for all time lost and shall clear his record of the charges placed against him."

FINDINGS:

The Third 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 on June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties waived right of appearance at hearing thereon.

The Claimant, a Porter, has a seniority date of November 9, 1984.

It should be noted that this is the third discipline determination before this Board involving Claimant and these parties. Third Division Awards 31164 and 31165 involved investigation of alleged Rules violations by the Claimant and their determination, had a predicate effect in imposing the level of discipline in the instant proceeding.

By letter dated March 3, 1992 the Carrier informed Claimant that it was found he was "...unable to present yourself for work in a rested condition".

This conclusion was based upon discovery of ancillary employment of the Claimant with the Indiana Harbor Belt Railroad. With that Carrier stated the Claimant worked a shift which commenced at 10:59 P.M. and ended at 6:59 A.M.. Noting that Claimant needed to be around "moving trains" and "busy stations", the Hearing Officer continued to state that this other job precluded Claimant from being sufficiently rested when he reported for work on the Carrier's 6:15 A.M. shift.

The Organization's protest seeks reversal of the March 3, 1992 letter which ended by informing the Claimant that he was dismissed from service.

The Organization's position is focused on denial of due process in that they maintain that Rules 26-29 and 33 were not followed and thus could not support a violation on the merits of such a vague charge. When analyzed to its full extent, the denial of due process tainted this entire process such that the Carrier did not establish its requisite burden of proof. Also, one of the days of alleged rules violation, January 26, 1992, was a day in which the Claimant was off under the care of the Carrier's physician making it impossible to breach a work rule.

It was known at the time of initial hire by the Carrier and for seven years' duration afterwards that Claimant had this other job.

During this time, due to work related injuries, the Claimant had occasion to be seen by the Carrier's medical staff for several physical problems/work releases. At no time did a physician advise the Claimant that he was insufficiently rested or similarly symptomatic of fatigue brought on by his other job.

Should the Board return Claimant to his prior employment his back pay shall be computed from April 6, 1992, the date representing when he was medically released to resume work for the Carrier.

Mr. McLemore's experience in conducting a Hearing caused him to engage the Claimant in a battle of wits throughout this investigation. The Claimant, understandably felt he was being confined to a narrow and untenable scope of inquiry which he resisted by ready reference to his injuries, lawsuits for same and claims of bias.

We agree that Mr. McLemore understood the scope of the inquiry and was within his rights to insist on it. However, incredibly at the end of the long, torturous investigation interplay between Messrs. McLemore and Rzepnicki the notarized statement of witness Robert Maddox, the Carrier's Superintendent of Transportation, concludes that both he and Mr. McLemore were convinced there was insufficient evidence (emphasis added) for disciplining the Claimant! Given this obvious admission against interest, the Carrier's decision cannot remain unaltered.

Also, the position taken by the Carrier that the Claimant failed to prove his allegations that Rules 26-29 and 33 were breached is patently incorrect since the Carrier bears the burden of proof to sustain its charges.

This voluminous record made on the property therefore clearly establishes that the Carrier did not meet its burden of proof thus the disciplinary action against Mr. Rzepnicki must accordingly be rescinded.

Claim sustained. Claimant is be restored to his former position of employment with backpay from April 6, 1992 less interim earnings and/or unemployment compensation and all benefits and seniority restored.

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 Third Division

Dated at Chicago, Illinois, this 26th day of September 1995.