

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32005
Docket No. SG-32402
97-3-95-3-264**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Consolidated Rail Corporation (Conrail):

Claim on behalf of T. E. Campbell for reinstatement to service with seniority unimpaired and with payment for all lost time and benefits and entry of discipline removed from his record, account Carrier violated the current Signalmen's Agreement, particularly Rule 6, when it failed to provide the Claimant with a fair and impartial investigation and imposed the harsh and excessive discipline of dismissal without meeting its burden of proving its charges against the Claimant. Carrier's File No. SG-785-D. General Chairman's File No. RM-2586-2-594. BRS File Case No. 9521-CR."

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 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 18, 1993, Claimant was notified to attend a trial on August 30, 1993, in connection with his alleged insubordination resulting from his refusal to obey an order of the Staff Engineer on August 12, 1993, to return Carrier owned property in his possession on August 18, 1993, and his failure to obey that order. Following two postponements, the trial was held on March 3, 1994. Claimant did not appear and the trial proceeded in absentia. On March 16, 1994, Claimant was notified that he had been dismissed from service.

The Organization contends that Carrier failed to prove the charges. The Organization maintains that Claimant did not refuse to obey the order to return the property; rather, he indicated the need to consult with his attorney. Furthermore, the Organization contends, Claimant did return the property on August 19, 1993. In the Organization's view, the one day delay in the return of the property did not amount to a failure to obey the order. Finally, the Organization contends that dismissal was an excessively harsh penalty and that Carrier should have resorted to progressive discipline.

Carrier contends that it proved the charges by substantial evidence. Carrier argues that Claimant responded to the Staff Engineer's order by stating that he only took orders from his lawyer and by hanging up. Carrier further maintains that it is undisputed that Claimant failed to return the property on August 18, 1993. Finally, Carrier maintains that dismissal was appropriate in light of the seriousness of the offense.

The Board notes that our review is confined to the record developed on the property. Having reviewed that record carefully, we find that substantial evidence supports the findings made on the property.

The Staff Engineer's order resulted from the execution of a search warrant on August 11, 1993, during which numerous items of Carrier property were seized from Claimant's home. Some items remained in Claimant's possession. Consequently, on August 12, 1993, the Staff Engineer telephoned Claimant and ordered him to return the items on August 18, 1993. Claimant responded that he only took orders from his lawyer. The Staff Engineer told Claimant that he interpreted Claimant's response as a refusal to reply. Claimant did not respond by clarifying that he was not refusing to comply but

merely expressing the need to consult with counsel before deciding whether to comply. Instead, Claimant hung up the phone. Thus, although Claimant's initial response to the order, while rude was somewhat ambiguous, his hanging up the phone left no doubt that he was refusing to comply. Moreover, it is undisputed that Claimant did not comply, i.e. he did not return the property on August 18, 1993, as ordered.

We are not persuaded by the Organization's argument that dismissal was an excessive penalty. The offense of insubordination is a serious one. In the instant case, the offense was aggravated by the nature of the order Claimant refused to obey, i.e., an order to return property that he was not authorized to have in his possession. Our review of the penalty is limited to determining whether it is arbitrary, capricious or excessive. In light of the seriousness of the offense, we see no reason to disturb the penalty.

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 Third Division

Dated at Chicago, Illinois, this 6th day of May 1997.