

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 33628  
Docket No. MW-33956  
99-3-97-3-404**

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

**(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Southern Pacific Transportation, Inc. (Eastern Lines)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline (withheld from service and subsequently dismissed) imposed upon Mr. I. Williams for alleged violation of Rules 1.6 and 1.13 of the Safety and General Rules for all Employees in connection with his alleged refusal to comply with the instructions of his supervisor and being hostile, quarrelsome, discourteous, boisterous and insubordinate while employed in Englewood Yard, Houston, Texas on December 1, 1995 was arbitrary, capricious, on the basis of unproven charges, in violation of the Agreement and based on a hearing that was neither fair nor impartial (System File MW-96-32/MW-D96-12 SPE).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with all seniority and benefits unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated 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 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 December 1, 1995, an incident occurred involving the Claimant and the Assistant Division Engineer which led to the Assistant Division Engineer removing the Claimant from service. On December 5, 1995, the Carrier notified the Claimant to attend an Investigation on December 13, 1995. The Notice of Investigation charged the Claimant with allegedly failing to comply with his supervisor's instructions and with being hostile, discourteous, quarrelsome, boisterous and insubordinate, in violation of Rules 1.6 and 1.13. The Hearing was held as scheduled. On December 27, 1995, the Carrier advised the Claimant that he had been found guilty of the charges and had been dismissed from service.

The Organization launched a multi-faceted attack on the Claimant's dismissal. We find it necessary to consider only one of the Organization's arguments because, as developed below, we find it dispositive of the claim.

At the time of the alleged incident, the Claimant, an Equipment Operator and two Laborers were replacing switch ties on the hump in Englewood Yard. The Assistant Division Engineer advised the Claimant to remove four additional ties. The Claimant objected and a conversation ensued. The Claimant and the Assistant Division Engineer disagreed over some of the details of the conversation. The Claimant testified that he objected because he already had eight ties out and unspiked and to remove another four without first spiking the eight would be dangerous and could result in a derailment. The Assistant Division Engineer testified that the Claimant never raised a safety concern.

Regardless of the details over which their testimony disagreed, the Claimant and the Assistant Division Engineer agreed on many significant points. They each testified that at some point in the conversation, the Claimant expressed concern that removing the additional four ties would result in the crew having to work overtime and that the Claimant had to leave at 3:30 P.M. for a doctor's appointment. The Assistant Division

Engineer told the Claimant that he would have to provide documentation of the doctor's appointment. The Claimant replied that he would do so. The Assistant Division Engineer responded stating he would "go you one better," and would "take you to the doctor's and make sure you get there . . ." The Claimant objected to this and further conversation ensued, at which point the Assistant Division Engineer told the Claimant that there was to be no further discussion and that he was to return to work and perform the assigned task. The Claimant continued the discussion and the Assistant Division Engineer reacted by telling the Claimant he was being taken out of service.

The Claimant's actions in trying to get the last word in, while not a paragon of proper employee conduct, were not so serious as to warrant dismissal, especially considering the Assistant Division Engineer's provocative comment that he would do the Claimant one better and take the Claimant to the doctor himself. Indeed, the Assistant Division Engineer testified that he did not regard this incident as even warranting an investigation. He related that, prior to this incident, the Claimant "was probably the one that was working the hardest up there . . . he was doing a wonderful job that day." The Assistant Division Engineer further explained:

"When I asked him to cease his confrontation and his boisterous language towards me, and he didn't, that's basically really why I was taking him to the office. Had it stopped right there, to be honest with you and everybody here in the hearing, that was going to be the end. I was going to talk to Mr. Williams."

What happened next is the subject of considerable dispute. The Assistant Division Engineer testified that he instructed the Claimant to get in the Assistant Division Engineer's truck three times, that the Claimant refused and struck a threatening pose and that the Claimant stated the only way the Assistant Division Engineer would get the Claimant into his truck would be by physically moving him. According to the Assistant Division Engineer, the Claimant relented only after he told the Claimant to stay where the Claimant was because he was going to get a Special Agent to remove the Claimant from the property. If this version of events is credited, the Claimant clearly engaged in very serious misconduct.

The Claimant testified that the Assistant Division Engineer told him to get in the Assistant Division Engineer's truck. The Claimant stated that he wanted to go to his truck to retrieve some personal belongings. The Assistant Division Engineer replied that

the Claimant's path to his truck was blocked by a train and so the Claimant accompanied the Assistant Division Engineer to the Assistant Division Engineer's truck.

The only other witness to the incident to testify was the Equipment Operator. He testified that when the Assistant Division Engineer told the Claimant to go to his truck, the Claimant hesitated. The Assistant Division Engineer gave the direction three times in quick succession. According to the Equipment Operator, the Claimant responded by going toward his truck to retrieve personal items and the Assistant Division Engineer told him not to do so. At that point, the Claimant followed the Assistant Division Engineer to his truck.

The Carrier introduced written statements taken shortly after the incident from the Equipment Operator and the two Laborers. However, unlike the Equipment Operator, the Laborers were not called to testify. The Organization objected to admission of the Laborers' statements unless they were called to testify, but the Carrier overruled the objection. The Organization now argues that in so doing, the Carrier deprived the Claimant of a fair Hearing. We agree.

Written statements are relied on commonly in railroad hearings. However, this is because such statements generally are taken from individuals who, because they are not employees of the Carrier, are beyond the Carrier's ability to be compel to testify. In the instant case, the statements were from two employees and there was no showing that the Carrier was unable to obtain their testimony.

The Carrier contends that the Organization had the burden of producing its own witnesses. We agree but that is beside the point. What is at issue is not the Carrier's failure to produce two witnesses whom the Organization wanted to call. What is at issue is the Carrier's reliance on hearsay written statements taken from two employees who it then chose not to call to testify.

The Carrier also argues that the two Laborers' statements reflect that they heard very little of the conversation between the Claimant and the Assistant Division Engineer, and that therefore their testimony could not have added to the available evidence. We do not agree. The statement of one of the Laborers related that he heard the Assistant Division Engineer tell the Claimant to get in the Assistant Division Engineer's truck and heard the Claimant refuse to do so. The Laborer also related that he heard the

**Assistant Division Engineer tell the Claimant three times that he was being insubordinate.**

**This Laborer's statement could be read as corroborating the Assistant Engineer's version of the events after he removed the Claimant from service. It certainly disputed the Claimant's testimony that he did not refuse to go to the Assistant Division Engineer's truck. Given that the only live testimony from someone other than the two protagonists came from the Equipment Operator and it tended to corroborate the Claimant's version of the events following the Claimant's removal from service, we are unable to say that the Laborer's written statement played no role in the Carrier's decision to credit the Assistant Division Engineer's testimony over that of the Claimant and the Equipment Operator. By relying on the Laborer's written statement and not calling him as a witness and giving the Claimant an opportunity to examine him concerning his statement, the Carrier denied the Claimant a fair Hearing and violated the Agreement. As such, the Claimant's discharge must be set aside.**

**Six months after the discharge, the Carrier offered to reinstate the Claimant on a leniency basis, provided that the Claimant accept the reinstatement in full settlement of the claim. The Claimant rejected the offer. We have considered and rejected the possibility that the Claimant's rejection of the reinstatement offer might cut off the Carrier's liability for backpay. An unconditional offer of reinstatement would have cut off the Carrier's backpay liability because a rejection of the offer would have amounted to a failure to mitigate damages. However, it is not reasonable to expect the Claimant to waive his claim in order to mitigate damages.**

**We have considered First Division Award 23821 and find that it does not control the instant case. In Award 23821, the carrier had offered the Claimant a conditional leniency reinstatement 90 days after his dismissal. The Claimant declined the offer. The Board held that the Claimant was guilty of the transgression with which he was charged, but that dismissal was an excessive penalty. Under those circumstances, the Board opined, "Since he was culpable, the Claimant should have accepted the reinstatement offer. the Claimant created his own damages subsequent to October 28, 1983. Consequently, the Carrier is to reinstate the Claimant to service without backpay."**

**In the instant case, we have not found that the Claimant was culpable. Rather, we have held that the Carrier's finding of culpability was tainted by its breach of the Claimant's due process rights. Accordingly, we cannot say that the Claimant's rejection**

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of the Carrier's conditional reinstatement offer amounted to a failure to mitigate his damages.

**AWARD**

**Claim sustained.**

**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 16th day of November 1999.**