

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30804
Docket No. CL-31134
95-3-92-3-962

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International
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(National Railroad Passenger Corporation
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STATEMENT OF CLAIM: "Claim of the System Committee of
the Organization that:

a. The Carrier acted in an arbitrary and capricious manner when it unjustly removed Claimant John Biehl from position TPF Lead Operator, ISD Center, Philadelphia.

b. Claimant's record be cleared of reference to the accusation made in Assistant Director Computer Operations Benjamin's letter of September 10, 1991.

c. Claimant should be reinstated to the TPF Lead Operator and compensated at pro rata for every day withheld, commencing subsequent to September 10, 1991. Claimant should further be compensated for all overtime to which his seniority would have entitled him at the ISD Center during the period he was wrongfully held from the afore-identified Lead Operator position. This is in accordance with Rule 6-B-1 - Appeals."

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 herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant entered the Carrier's service on February 9, 1989, and at the time this dispute arose was serving as a TPF Lead Operator in the Carrier's Information Systems Department ("ISD") at Philadelphia, Pennsylvania. At the time of the incident at issue, Claimant was relatively new to the position.

Claimant's TPF Lead Operator position was "partially excepted" ("PE") pursuant to Rule 1 - Scope, which provides, in relevant part:

"(c) Rule 1-B-1 (Promotion), Rule 2-A-1 (Bulletin Assignment), and Rule 3-C-1 (Reducing and Increasing Forces), shall not apply to positions identified as 'Partially Excepted Positions' * * * "

By letter dated September 10, 1991, the Carrier removed Claimant from the TPF Lead Operator position because of "the incorrect submission of an offline job which had a detrimental impact on the online ARROW Reservations System." He reverted to his prior, non-excepted position.

The Organization protested Claimant's removal from the position by letter dated October 9, 1991 and requested an Unjust Treatment Hearing pursuant to Rule 7-A-1 of the Agreement (Unjust Treatment). The Hearing took place on October 24, 1991 at which the following evidence was adduced.

Claimant became a TPF Lead Operator in the ISD Center on June 19, 1991; he worked the Midnight to 8:00 A.M. tour, with Saturday and Sunday as rest days. During his tour, Claimant did not correctly perform the Recoup Phase Two interaction, which had the effect of shutting down the Carrier's ARROW Reservations System for approximately three hours, causing major disruption to reservation operations.

Claimant admitted incorrectly entering the control tape which led to the computer malfunction, noting his error in certain commands and the stage for entering the tape number. He testified that Chief Computer Operator ("CCO") Tyrone McCutchen was on duty the night of the incident (although Steve Harris was the designated CCO.) Claimant testified that he was not sure whether Harris knew he had never performed Recoup Phase Two, and that McCutchen ordered him (Claimant) to do Recoup Phase Two. Claimant testified that McCutchen told him to move on to Recoup Phase Two when he was finished with Recoup Phase One, and that he (Claimant) "took that responsibility."

Claimant testified that he had been trained approximately three minutes on one occasion in the performance of the Recoup Phase Two interaction. He testified that he had never been

instructed as to the proper application of a particular command when running Recoup Phase Two. Claimant testified that he had never run Recoup Phase Two (noting that Recoup Phase One normally does not finish running before he leaves at the end of his tour) but that at one point during the six days between his award of the TPF Lead Operator job and his assignment to it, CCO McCutchen had shown him how to run Recoup Phase Two. McCutchen testified that he went through and executed the entire Recoup Phase Two interaction with Claimant in June. He further testified that he considered that session to constitute training, but that Claimant took no notes. The whole operation, according to McCutchen, took ten to fifteen minutes. Thomas testified that there was no formalized training program for the TPF Operator position; all training is on-the-job training. He also testified that, "Recoup procedures should be known in [Claimant's] prior job" and that although certain shifts might never see a recoup, it was necessary to know how to perform the interaction.

Claimant further testified that the personnel in Reservation Systems Support ("RSS") usually catch errors in programming the Recoup Phase Two. According to Claimant, RSS had the responsibility for ensuring that he had properly loaded the cartridge for performing the Recoup Phase Two interaction. Claimant referred to an incident on July 21, 1991 in which the RSS personnel caught an error he committed before the system crashed. Claimant testified that the July 21 incident led him to conclude that an error could be adjusted before the system crashed.

Assistant Director of Computer Operations, Benjamin Thomas, confirmed that Claimant used the wrong tapes in performing the interaction. He also testified that Claimant was removed for his lack of overall attention to his job, of which the September 8-9 incident was simply the most serious.

Claimant, Thomas, Shift Supervisor William Acton, and System Software Engineer Myra Moore testified about other incidents of system shutdown or data loss and the discipline assessed as a result. They testified generally that Operator Lucille Whaley lost data sets in June or July 1991; McCutchen brought down the system for short various periods of time up to three hours, apparently by entering incorrect codes; Acton also brought down the system for twenty minutes; and a combination of actions by Shift Supervisor Mike Williams and Rick Sewell brought the system down for 15 hours in 1987, and generally, no discipline was assessed. Thomas testified that he did not recall a 15 hour outage, but recalled hearing about it, asserting that it occurred prior to his coming to work at the ISD Center. He clarified that, contrary to what Claimant believed about certain incidents, disciplinary action was taken in the form of verbal reprimand. Thomas distinguished reprimand from the formal charging process.

Claimant testified that he had heard that Operations Director Dave Hardrick had told the 18 to 20 people on all three shifts that Claimant should have been fired, although he admitted that he was not present when it allegedly occurred. MVS Operator Al Ruxton confirmed that Hardrick had said Claimant would have been fired in any other company. He testified further that Hardrick had told the employees in an introductory meeting that, "If I don't like you, you're not going to work here again."

Public Law Board No. 4304, Award 6 interpreted Rule 1(c) of the Agreement between the parties. It found that a PE employee could bring a claim before a Public Law Board and that the Carrier did not have the "unfettered right" "to determine under what circumstances an employee will be removed from [PE] positions." That Board also found that as to PE employees, the whole of the Agreement applies except the three Rules (Rule 1-B-1 (Promotion), Rule 2-A-1 (Bulletin Assignment), and Rule 3-C-1 (Reducing and Increasing Forces)) specifically exempted in Rule 1(c).

By letter dated November 8, 1991, the Carrier's Hearing Officer Stanley Winkler, Jr., advised Claimant that he found Claimant had not been treated unjustly based on the hearing record.

The Organization progressed this claim in the usual manner, without resolution; and brought it before this Board.

The Organization argues that the Carrier's removal of Claimant from the TPF Lead Operator position is a violation of the Agreement and that Claimant was arbitrarily removed from that position because of "a onetime misstep." It contends that the Carrier disregarded the results of the hearing and was "narrow minded." The Organization argues that the Carrier does not have the unilateral right to remove an employee from a PE position, but rather that there must be cause. It further contends that Claimant was unjustly removed because the Carrier provided inadequate training for him to perform his duties properly, noting the short training time given him for the Recoup Phase Two interaction and that his shift rarely performed that function. The Organization maintains that the RSS should have adjusted Claimant's error, as it had before, prior to the system crash, arguing by implication that the RSS, not Claimant, was at fault for the shutdown. It also asserts that the Carrier treated Claimant disparately when compared to its response to errors by other employees, noting that system shut downs of durations from a few minutes to 15 hours had not led to the responsible employee's removal from his/her position. The Organization contends that Hardrick was personally prejudiced against Claimant, citing Hardrick's alleged statements that Claimant should have been fired and that if he did not like an employee, the employee would not work for the Carrier. The Organization urges, therefore, that Claimant be reinstated and paid

for the days withheld from service and overtime he would have earned.

The Carrier argues that the Organization is not permitted to introduce a claim for compensation before this Board because it did not present that claim in the progressing of this dispute on the property. It contends that it has the exclusive managerial prerogative to appoint or remove employees from PE positions. The Carrier contends further that since Rule 1(c) removes PE employees from the coverage of certain Rules, it is not required to include the subject matter of those excepted Rules in its consideration of appointment or removal of an employee to or from a PE position. It maintains that the only Rule relevant to this dispute is Rule 7-A-1 regarding unjust treatment. The Carrier contends that since it provided the Unjust Treatment Hearing that the Organization requested and made findings that Claimant's removal for shutting down the Carrier's reservation system was not unjust, that it has complied with the Organization and Claimant's request. The Carrier maintains that neither the Organization nor Claimant made a request for compensation on the property and that Rule 7-A-1 makes no provision for compensation. It urges dismissal on procedural grounds and, alternatively, denial.

The Board considered the Carrier's argument that it has an unfettered right to remove employees from PE positions. We are not persuaded. PE employees remain covered by all provisions of Rule 1(c) of the Agreement. It excepts employees in PE positions from three listed Rules. None cover removal. By implication, PE employees continue to enjoy the protections of other provisions of the Agreement. Public Law Board No. 4304, Award 6 confirms this interpretation of the Agreement. The Board concludes that the Carrier did not have the "unfettered right" to remove incumbents from a PE position; it must demonstrate cause to do so.

The Board turns to consideration of the merits of the removal. The record contains substantial evidence in the form of Claimant's admissions and the testimony of Thomas and McCutchen that Claimant's action in running Recoup Phase Two was an error and that his error shut down the Carrier's reservation system for three hours. This was a substantial error with serious consequences. The Organization has not sustained the burden it carries in an Unjust Treatment Hearing of showing that the removal was not based on substantial evidence in the record. Therefore, absent mitigation, the discipline is warranted and should not be disturbed.

Of the Organization's arguments that Claimant's lack of training led to his error and that the lack of training is the fault of the Carrier, the Board is not persuaded. Claimant bears responsibility for his level of understanding of his duties. The

substantial evidence in the record is that Claimant had prior experience with recoup interactions and was trained on the job -- the same way as everyone else in his unit. Moreover, McCutchen specifically trained Claimant in the Recoup Phase Two interaction. Claimant, however, took no notes and did not avail himself of the opportunity to learn the operation. When he was told to perform the Recoup Phase Two interaction during his September 8-9 tour, Claimant "took that responsibility" without warning his superiors of his uncertainty or lack of skill in performing that task.

Of the Organization's argument that RSS should have adjusted Claimant's error and/or that RSS bears the responsibility for Claimant's error, the Board is not persuaded. The presence of back up does not absolve Claimant from the obligation to perform his duties properly.

Of the Organization's argument that Hardrick was personally prejudiced against him, the Board is not persuaded. The Board is limited in its analysis by what the Organization actually proved in the record. Assuming, for the sake of argument, that Hardrick said Claimant should have been fired, Claimant was not dismissed and there is no substantial evidence that Hardrick exerted any untoward influence in the resolution of this matter. The Organization's assertions that Hardrick had personal animus toward Claimant are based on speculation. There is no substantial evidence that he did not like Claimant or that his personal feelings improperly influenced the outcome of the matter.

Similarly, of the Organization's argument that Claimant was subjected to disparate treatment because other employees who had made errors were not removed or disciplined, the Board is not persuaded. Here again the Board is limited by the Organization's evidence in the record, which is incomplete and conflicting as to the incidents and the discipline imposed or not imposed. There is substantial evidence that not all of the prior incidents were of the same magnitude as the shut down precipitated by Claimant's error and/or that the degree of fault by the responsible employee was not as severe. In the absence of substantial evidence in the record, the Board cannot find the disparity in treatment which the Organization asserts.

Since we find that Claimant's removal was justified, the Board does not reach the question of the propriety of the Organization's claim for compensation.

Claimant is not entitled to reinstatement and compensation for time withheld from service and overtime not earned. The Carrier's removal of Claimant from the position of TPF Lead Operator was neither arbitrary, capricious nor in violation of the Agreement.

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AWARD

Claim denied.

O R D E R

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 April 1995.