

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30904
Docket No. CL-32026
95-3-94-3-392

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

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

STATEMENT OF CLAIM:

- "(1) Carrier erred when it dismissed Claimant Floyd E. Jenkins from service on July 16, 1992, and that;
- (2) Claimant shall now be restored to service with all rights unimpaired; and
- (3) 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 expenses he may have encountered 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 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.

Claimant was dismissed from service January 17, 1992, basically, for the alleged act of negligence in failing to qualify for a position. A claim was filed and was finally adjudicated by the Board in Third Division Award 30250, adopted June 8, 1994.

The Board ordered Claimant's reinstatement, but limited his economic recovery from the date of his dismissal to May 12, 1992, because it was held that Claimant had the obligation to mitigate the damages by returning to service within 14 days of an April 28, 1992 letter.

This dispute flows from the Carrier's April 28, 1992 letter. The Carrier contends that said letter instructed Claimant to return to service within 14 days and when he did not, he was insubordinate. Following an Investigation, Claimant was dismissed effective July 16, 1992.

Therefore, when Award 30250 was adopted, ordering Carrier to reinstate Claimant because of Carrier's failure to establish substantial evidence of Claimant's guilt in the first instance, he was not reinstated because he had been dismissed on July 16, 1992 for insubordination.

The letter of April 28, 1992 is significant. The relevant paragraph is quoted below:

"The conditions of Mr. Jenkins' reinstatement are that 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. Mr. Jenkins is instructed to report to Homewood, Illinois, within fourteen (14) days from the date of this letter. Mr. Jenkins is also instructed to call ***, advising when he will report to Homewood, Illinois. Failure to follow the above instructions could result in further disciplinary action."

In reading the aforequoted excerpt from Carrier's letter of April 28, 1992, it is the opinion of this Board that it contains instructions for Claimant to report. He had 14 days from the date of that letter to do so. He did not report for no other reason than he believed the conditions of assuming his seniority rights was incorrect.

This Board has no intention of determining if Claimant has a full range of displacement rights or if he is restricted to the Extra Board at Homewood, Illinois. The precedent of obey now and grieve later is most apt in this situation. Claimant should have returned as instructed, and thereafter pursued his perceived Agreement rights through the grievance procedure.

Under the circumstances, this Board is of the opinion the Carrier had the right to discipline the Claimant. Having so ruled, the Board now must address the discipline assessed.

Claimant had over 14 years of service with only one other brush with authority and that happenstance was resolved in Claimant's favor in Third Division Award 30250. Contrary to Carrier's insistence that the dispute resolved in Award 30250 was an entirely different matter, this Board believes there may have been separate charges, separate Investigations and separate disciplinary actions, but it is obvious the Board in Award 30250 had for consideration Carrier's letter of April 28, 1992, which is the center piece of this dispute. In fact, the Carrier understandably used that letter and Claimant's refusal to return to service to argue for mitigation of damages and was successful. This letter and Claimant's refusal to report as instructed had, as of June 1994 when Award 30250 was adopted, cost Claimant in excess of two years salary.

The Board is sympathetic to Claimant's confusion concerning the intent of Carrier's April 28, 1992 letter, particularly when he received the following which is excerpted from Carrier's letter of July 16, 1992:

"For your violation of the above, the previous offer of reinstatement contained in *** letter of April 28, 1992 is retracted and you are hereby dismissed."

It is, however, significant to note that portion of Award 30250 and that Board's opinion of the April 28, 1992 letter:

"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." (underscoring added)

In view thereof, this Board is of the opinion that Claimant is to be reinstated to service with seniority and all other rights unimpaired.

Claimant has been out of service since January 17, 1992 (when both disputes are considered). In view of Claimant's clean record, and considering the type and degree of the insubordination, the period from July 16, 1992, until the date he should have been reinstated after Award 30250 was adopted is sufficient discipline. Claimant is to be compensated for all time lost commencing the last day Carrier was authorized to return him to service following Award 30250 until he is reinstated following the adoption of this Award.

The compensation, however, is as provided in the Agreement. The matter of reimbursement for any health and welfare expenses he may have encountered is denied.

The Board does not, to reiterate, offer any opinion as to what seniority rights Claimant may have when he returns. If he does not agree, he has the right to pursue his grievance pursuant to the Railway Labor Act, but he cannot delay his return to enhance his compensation.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

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 8th day of June 1995.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 30904

DOCKET NO. CL-32026

NAME OF ORGANIZATION: (Transportation Communications
International Union

NAME OF CARRIER: (Illinois Central Railroad

This matter has been returned to the Board on the request of the parties for an interpretation. The Carrier states that it reinstated Claimant prior to Third Division Award 30250, thus it complied with Award 30904.

The only fallacy in Carrier's specious argument is that Claimant was not on the payroll until July 3, 1995. When Claimant ignored Carrier's instructions to report to work as outlined in its letter of April 28, 1992, the Carrier charged Claimant for being insubordinate and dismissed him. The Carrier also argued the dismissal adjudicated in Award 30904, was an entirely separate matter than the issue resolved in Award 30250. The parties to this dispute and the Board treated the issues as being separate actions. The Board found in Award 30904 that Claimant was insubordinate, but modified the dismissal by ordering Claimant's reinstatement and payment for time lost commencing the date he should have been reinstated following the adoption of Award 30250 until ultimately reinstated following the adoption of Award 30904. In other words, Claimant is to be paid lost earnings from July 8, 1994 to but not including July 3, 1995.

Referee Robert L. Hicks, who sat with the Division as a neutral member when Award 30904 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of April 1996.