

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31165
Docket No. CL-30898
95-3-92-3-782

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

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

STATEMENT OF CLAIM:

"The Northern Indiana Commuter Transportation District
("District") claims:

1. Contrary to the Organization's assertions, the discipline imposed on Mr. Joseph Rzepnicki, as a result of an investigation held August 29, 1991, in connection with his failure to report for a formal investigation scheduled for August 15, 1992, (sic) was proper.
2. Contrary to the Organization's assertions, Claimant is not entitled to compensation and the disciplinary entry on his personnel record remains appropriate."

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.

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

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

On April 10, 1989 and January 30, 1991 Claimant suffered work-related injuries due to a fall while servicing a trash barrel and slipping upon an ice and snow accumulation, respectively.

An Investigation Hearing scheduled for August 15, 1991 for 5:00 PM was truncated by the absence of the District Chairman and the tardiness of the Claimant by some five or six minutes. However while Claimant was attempting to locate his representative, the Carrier had the Hearing concluded in a matter of minutes while the District Chairman was unable to phone the Hearing Officer because he had disconnected the phone in the hearing room. When reached the Hearing Officer refused to wait for the Organization's presentation even though the District Chairman was only minutes away from the Carrier's property.

It should be noted that this is a second discipline determination stemming from that aborted August 15, 1991 Investigation Hearing. This one led to a record suspension of 30 days pending for a year and 15 days of suspension actually served, both subject to be calculated in any future disciplinary determination. The rationale for this discipline was an alleged violation of NICTD's General Rule K-2, to wit: insubordination.

The Organization protests that Carrier's action was a gross abuse of discretion and disregard of the Agreement.

The Organization's position is focused on the 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 the unspecific charges. To continue the Hearing knowing that the District Chairman was attempting to phone in and attend in about 15 minutes constituted an outrage to due process and contractual rights of the Claimant.

In a companion case to this one, Third Division Award 31164, it was noted that since Mr. McLemore admitted he unplugged the phone and by his own account set a five minute waiting period for the District Chairman to appear before unilaterally proceeding to "conduct" the Hearing, the Board was in agreement with the Organization's position. There is simply no correlation between the off-the-record comments the Carrier representatives allege the Claimant uttered and conduct constituting insubordination by an employee in the performance of his or her duties.

Even if the proffered statements that: "They" were out to get him; he would not remain at the Hearing because it was a "kangaroo court" and Claimant would prevail at this (Board) level recouping any lost pay and rescinding any punishment are deemed true as proof against the Claimant they have no bearing on Rule K-2 because there

was not a direct order to do something put to the Claimant. Absent a direct command there cannot be insubordinate conduct. Claimant's feelings, thoughts or even his "body language" is not evidence of what is proscribed in Rule K-2.

Given the fact that Mr. McLemore was experienced if only slightly more so than the Claimant in investigative hearing protocol and coupled with the obvious role of the expected representative (Mr. Cushway) we conclude that the Claimant, no matter how boastful or conceited he spoke, was not insubordinate. There was no refusal to stay, leave, speak or proceed other than to ask on the record what was transpiring relative to his being represented. This is so basic to the notion of due process in collective bargaining as to not require elaborate dissertation.

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 26th day of September 1995.