

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32490
Docket No. MW-33449
98-3-96-3-971**

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

(CSX Transportation, Inc. (former Louisville &
(Nashville Railroad Company

PARTIES TO DISPUTE: (

(Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM:

- “1. Carrier unjustly dismissed former M NO & P Seniority District Track Subdepartment employee J. Washington (ID No. 187164), as a result of investigation held on May 8, 1996, relative to the May 1, 1996, charges of conduct unbecoming an employee and violation of CSX Transportation Operating Rule 501.
2. Claim seeks J. Washington’s reinstatement, repayment for all time lost, and removal of the charges from his record.”

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.

The Claimant was employed by the Carrier as a Track Repairman and at the time of his removal from service, he had established approximately 20 years of service.

In Third Division Award 30989, dated July 26, 1995, the Board found that the Claimant had been removed from service when he initially asserted that an injury he had suffered was not work related but subsequently filed a claim for benefits alleging that the injury was in fact work related. The Board further found that there was insufficient evidence that the Claimant deliberately intended to defraud the Carrier and, noting his prior record, ordered the Claimant reinstated within 30 days of the Award. In so doing the Board asserted that "... any further violations of a similar nature need not be tolerated by the Carrier."

The Carrier's Engineer Administration, Michael Thomas Cumbea, did not become aware of the Board's Award until sometime in mid-October of 1995. Once he did learn of the Award however, the processing of the Claimant's return to work commenced. Accordingly, the Claimant was medically qualified to return to work on October 31, 1995 and he met with Cumbea and other Carrier representatives on November 10, 1995 to review safety practices. The record reflects that during that meeting when Cumbea and the Claimant discussed the date on which he would return to work, the Claimant indicated that he wanted to provide notice to his current employer that he would be quitting to return to work for the Carrier. As a result, the Claimant returned to work on November 19.

Sometime after the Claimant returned to work, the Carrier's Employee Relations Department contacted Cumbea to inquire why the Claimant had not been returned to work within 30 days of the Award, apparently in an attempt to resolve a claim for reimbursement for the delay in complying with the Award. When Cumbea explained to Employee Relations of the Claimant's desire to give notice to his employer at that time, Employee Relations offered to the Organization to settle the claim arising out of the delay by compensating the Claimant for the difference in earnings between the amount he would have earned had he been reinstated in a timely fashion and his actual earnings during that same period. Subsequently, by letter dated February 20, 1996 the Organization accepted the Carrier's offer, noting however that the Claimant had no interim earnings during the period in question.

Once so advised the Carrier's Employee Relations Department again conferred with Cumbea who again asserted that the Claimant had told him that he did in fact work

during the period in question. Accordingly, Employee Relations again asserted to the Organization that the Carrier believed the Claimant had interim earnings during the period in question. In response, the Claimant provided a hand-written statement asserting that he did not work during the period between July 30 and November 20, 1995. The Claimant asked his wife to write the note because he cannot read and has a limited ability to write. However, the record shows that the Claimant understood what his wife had written. In reliance on that statement, the Carrier reimbursed him for the loss in earnings attributable to the delay in returning him to work.

Once he became aware of the payment to the Claimant, Cumbea contacted the Carrier's Police Department concerning the apparent contradiction. In turn an investigation was conducted where it was discovered that in fact the Claimant did work for a temporary service, Labor Ready, during the period in question. Subsequently the Claimant was charged with "conduct unbecoming an employee" for violating Carrier Rules which specify that employees must not be disloyal, dishonest, insubordinate, immoral, quarrelsome, vicious, careless or incompetent and prohibiting false statements and concealing facts. Ultimately, the Claimant was dismissed.

The Organization contends that the Claimant's dismissal should be reversed on several grounds. First, that had the Carrier timely complied with the original Award reinstating the Claimant the facts leading to his dismissal would have never arisen. Second, that the Claimant did not intend to deceive the Carrier, but was simply confused when he addressed the subject of his interim employment. Finally, the Organization relies upon the Claimant's long tenure of employment.

We reject each of the Organization's arguments. Although it is factually true that had the Carrier timely reinstated the Claimant the issue of compensation for the period of the delay, and hence the issue of his interim employment, might have never been known, that fact alone does not excuse the Claimant's conduct. At most it explains that conduct, but it cannot be a basis for overturning the dismissal for, in short, "two wrongs do not make a right." With regard to the issue of the Claimant's confusion and the absence of intent, we do not agree with the Organization's characterization of the record and the conclusions that can and should be drawn from it. Despite the fact that the Claimant asserted that he was confused and denied any intent to deceive, it is also clear from the record that he knew that he was being asked questions about his interim earnings because any such earnings would be deducted from any compensation he would receive from the Carrier. Moreover, despite this knowledge he answered untruthfully.

Similarly, we find no solace in the fact that the Claimant can neither read nor write, because the record clearly establishes that he knew and understood the contents of the note that his wife wrote for him in which he again made the false claim. From these uncontested facts we are led to the inescapable conclusion that the Claimant was fully aware of what he was doing. The final argument of the Organization turns on the Claimant's long record of service. These facts however do not provide a basis for reversing the dismissal. First, it is not the role of the Board to determine whether leniency is warranted. Second, the record clearly shows that the Claimant's prior dismissal raised the same concerns and the Board in that case made it clear that any subsequent similar misconduct would not be dealt with in the same fashion. That same misconduct forms the basis for the dismissal herein and, in light of the prior Award, cannot and should not be dealt with in the same way.

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 23rd day of February 1998.