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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33015
Docket No. MW-33152
99-3-96-3-580

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

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of employee L. J. Ohtola for alleged insubordination and conduct unbecoming an employee was arbitrary, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement [System File SPG-D-9427/12 (95-1089) CSX].**
- (2) As a consequence of the aforesaid violation, the Claimant shall be reinstated to service with seniority and all other benefits unimpaired 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.

The facts in this case are straightforward and largely undisputed. Claimant, an Assistant Foreman, was awarded a position as Foreman on a System Production Gang in February 1995. Shortly thereafter, he was disqualified for failing to demonstrate ability to perform the duties of that position.

On March 14, 1995, the Organization requested an Unjust Treatment Hearing on Claimant's behalf. By certified letter dated April 20, 1995, the Unjust Treatment Hearing was scheduled for April 26, 1995 at the Roadmaster's office in Garrett, Indiana. Two attempts by the post office to deliver Carrier's notification of the Unjust Treatment Hearing were unsuccessful, and that notice was returned as unclaimed. On May 5, Carrier sent another certified letter advising that the Unjust Treatment Hearing had been rescheduled for May 15 at the Organization's request and again directing Claimant to attend.

Claimant failed to appear for the May 15 Unjust Treatment Hearing, at which the Organization's Vice Chairman, the Carrier's Hearing Officer and its witnesses were in attendance, one witness having flown in for the occasion. After waiting approximately 30 minutes to be certain Claimant was not in the area, Carrier convened the Unjust Treatment Hearing, declared that Claimant had apparently elected not to participate, and brought the Unjust Treatment Hearing to a close. Shortly thereafter, the May 5 certified letter announcing the rescheduled Unjust Treatment Hearing was returned to the Carrier as unclaimed.

By letter dated May 22, 1995, Carrier ordered the Claimant to attend a formal Investigation on June 1, 1995 in Shelby, Kentucky, to discuss charges of conduct unbecoming an employee, insubordination and failure to call regularly for his mail. A postponement was mutually agreed upon, and the Investigation was ultimately held on August 15, 1995. Claimant was terminated effective September 1.

The Organization on appeal challenged the Carrier's right to consider an employee insubordinate for failing to appear at an Unjust Treatment Hearing, arguing that it is the Claimant's, not the Carrier's Unjust Treatment Hearing. The more appropriate response, it argues, would have been to simply advise the Claimant that his opportunity to challenge the Carrier's decision disqualifying him had been waived.

Carrier provides Awards in support of its position that once a claimant has invoked his contractual rights to contest his employer's actions, he may not simply ignore written notifications setting up the requested Unjust Treatment Hearing and choose not to attend without reasonable explanation. Any contrary formulation, it argues, offends normal instincts for order and, if adopted, would have the same effects it had in this dispute - it would simply frustrate Carrier's obligation to honor the claimant's request.

The transcript of the Investigation in this instance is extensive. There is no useful purpose in warming it up and serving it over again, although several aspects of it are worth noting. Carrier witnesses contended that the Claimant was verbally notified on May 8 and May 11 of the May 15 Unjust Treatment Hearing. Claimant testified that he had requested to have notification of the Unjust Treatment Hearing hand-delivered on the job in view of his work schedule and personal circumstances, including difficulty in securing his mail. His recollection of other details, including verbal reminders by Carrier and Organization officials, was not marked by its lucidity, a fact he attributed to his prolonged celebration of a divorce that became final on May 1.

Based upon our review of the record, the Board finds that the Carrier twice sent certified mail to Claimant directing his attendance at the Unjust Treatment Hearing he sought. His failure to claim those letters without valid justification was violative of Rule 500.¹ His failure or refusal to comply with the verbal directives of Gang Supervisor Nicholas - orders which the Board must accept as established fact in the absence of persuasive contrary evidence - was clearly not the product of any bona fide excuse. Foreman Bowers not only discussed the scheduled May 15 Unjust Treatment Hearing with Claimant, but expected him to be off work on that date for that reason. Claimant's willful disregard for these multiple notifications wasted his employer's time and resources unnecessarily.

That said, the Board finds much merit in the arguments advanced by both parties here. On the one hand, the Board is sympathetic to Carrier's position that deliberate refusal to cooperate in its efforts to address a grievance is a position blind to the fundamental rule of correlative rights and obligations. On the other hand, factual

¹ Rule 500 provides: "Employees must call for their mail regularly and must answer correspondence promptly."

circumstances differ case-to-case, and the Board has neither been asked nor would it conclude that failure to attend an Unjust Treatment Hearing is in each and every instance appropriate grounds for dismissal.

In this instance, Carrier produced substantial probative evidence that Claimant was aware of the pending May 15 Unjust Treatment Hearing and failed to claim official notice thereof. But the record is equally clear that insubordination is a major component of Carrier's charges, and that allegation has not been established. There is significant ambiguity regarding the instructions issued to Claimant by Gang Supervisor Nicholas, who was no longer employed at the time of Claimant's Unjust Treatment Hearing, but little doubt that Claimant was never aware that the Unjust Treatment Hearing site was to be 60 miles from his workplace. On this record, we conclude that Claimant's non-attendance is enigmatic and unjustified, but not technically insubordinate.

Under the circumstances, the Board finds that the Claimant's failure to receive notice of the Unjust Treatment Hearing was a result of his own attitude and dereliction, but that on this record there was not such relevant evidence of insubordination produced "as a reasonable mind might accept as adequate to support a conclusion." *See, e.g.,* Public Law Board No. 2382, Award 1; Third Division Award 24593. The claim must be sustained in part. Claimant shall be reinstated upon successful completion of Carrier's established return-to-work procedures with seniority unimpaired. The Board regards backpay as inappropriate under the particular circumstances of this case.

AWARD

Claim sustained in accordance with the Findings.

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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 25th day of January 1999.