

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36211
Docket No. MW-36366
02-3-00-3-608**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service and subsequent Level 5 and dismissal) imposed on Mr. C.L. Fernandez for alleged violation of Union Pacific Rule 1.6 in connection with charges that he failed to comply with instructions to report to work beginning Sunday, June 13, 1999 with the In-Track Welder Gang 4891 and made false statements concerning such instructions to UP Managers D. Humpherys, P. Egan and D. Rasdall was arbitrary, capricious, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File W-9948-163/1209027).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. C.L. Fernandez shall now have the discipline removed from his personal record and immediately be returned to service and appropriately compensated for the full time he has been unjustly withheld from service beginning June 16, 1999 and continuing.”**

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, a 20-year employee, had been placed on a weight lifting restriction after he suffered an on-duty injury. When the welding gang to which he was assigned was scheduled to move from Green River, Wyoming, to a new work location on the North Platte Subdivision, the Claimant and Organization Representative W. Morrow met on June 9, 1999 with Manager Track Projects P. Egan to request that the Claimant be permitted to remain temporarily at his Green River position, which required less strenuous and physically demanding work. According to Manager Egan's testimony, it was agreed that the Claimant could continue to report at Green River for approximately one week instead of going to his gang assignment.

The next day, Manager Egan's supervisor, M. Wright, notified Egan that the Claimant was needed on the welding gang and that he should report to the new location. The Claimant was so informed on Friday, June 11, 1999 by General Foreman D. Rasdall. The Claimant testified that he understood the new instructions and indicated that he would comply with those instructions by reporting as directed on Sunday, June 13, 1999.

There is no dispute that the Claimant failed to report to his gang assignment. Instead, he continued to report to Green River. The Claimant testified that he did so because he was confused about the location of his work assignment. Seeking clarification, he contacted Organization representative Morrow, who had not been informed of the change of assignment. Morrow confirmed that the Claimant was to report to work at Green River.

On Tuesday evening, June 15, 1999, the Claimant telephoned the Manager of Track Maintenance, D. Humpherys, and asked how he was going to be paid. Humpherys told him to contact Manager Egan.

The Claimant then contacted Manager Egan, asking how his time would be paid. Egan told the Claimant that he was supposed to be with his gang at the new location. The Claimant responded that Manager Humpherys had authorized him to continue to work at Green River.

The next day, the Claimant informed Humpherys that he had spoken with Egan; that Egan had indicated the Claimant was to stay at Green River; and that Foreman Dryer was to pay his time.

The Claimant was removed from service that same day and subsequently assessed a Level 5 (dismissal) discipline under the Carrier's UPGRADE policy as a result of a formal Investigation conducted on June 28, 1999. He was found guilty of failing to report for his assignment on the North Platte Subdivision as instructed and then lying to various Carrier Officers about where he was required to report for work.

The Organization maintains that the discipline must be overturned as an arbitrary and capricious exercise of the Carrier's discretion. The Organization submits that the Claimant conducted himself reasonably based on his belief that he had been authorized to remain at Green River performing work that was less physically demanding than the in-track gang. That was the agreement reached on June 9, 1999. Had Manager Egan attempted to communicate to the Claimant or his representative that he had rescinded that agreement, this misunderstanding would not have occurred, the Organization asserts. Instead, the Claimant was given conflicting orders that were confusing and inconsistent with his medical condition.

His statements to Carrier Officers must be viewed in that context and were not intended to be misrepresentations, the Organization argues.

The Organization further argues that the Claimant was entitled to be informed of the precise charges against him, including the Rules he allegedly violated. Having failed to cite any Rules either in the charges or in the transcript of the Investigation, the Carrier cannot now argue that the Claimant is guilty of violating Carrier Rules.

In addition, the Organization objects to the Carrier removing the Claimant from service before the Investigation. Although Rule 48(o) permits a supervising officer to remove an employee from service pending Hearing where serious and/or flagrant violations of Carrier Rules are apparent, this case does not fall within that category.

Finally, it is the Organization's position that there are mitigating circumstances which were not fully considered by the Carrier. The Claimant is a long-term employee. His actions were based on miscommunication rather than a deliberate "thumbing his nose" at the Carrier. The penalty of discharge was unduly harsh under these circumstances, the Organization maintains.

The Carrier argues that there is substantial evidence of the Claimant's wrongdoing and that its burden of proof has been met. The Claimant's only defense in this case is that he was confused about his work assignment, but the Carrier submits that there was no confusion as to where he was to report for work. Furthermore, the Claimant's so-called confusion does not explain his false statements to Carrier supervisors Egan and Humpherys.

Having established that the Claimant was guilty of the charges, the Carrier submits that there is no basis upon which to modify the penalty imposed. The Carrier's UPGRADE policy has been approved repeatedly by the Board. Because the Claimant's misconduct was a-level 5 offense, the penalty of discharge was fully warranted.

The Board needs no citation for the fundamental proposition that employees are expected to obey the orders of supervision. Based on our review of the record, it is clear that the Claimant did not heed that basic Rule. Despite his claim of confusion, the Claimant conceded that he understood the June 11, 1999 instruction to report to his gang. In fact, he indicated that he would report as ordered. His failure to do so was not a miscommunication; it was an intentional failure to report for work. While the Claimant may have felt that supervision was requiring him to perform work contrary to what had previously been agreed to, his responsibility was to report as ordered and then remedy the situation through the grievance machinery of the Agreement.

There are some mitigating circumstances surrounding this incident. The Claimant has 20 years of service with the Carrier and there is no evidence that his record is less than satisfactory. In addition, the physical difficulty of performing the assignment within the limits of the Claimant's medical restrictions had been recognized by the Carrier. That is why Manager Egan originally agreed to have the Claimant remain at Green River. Bearing these factors in mind, we may well have found that discharge was an abuse of the Carrier's discretion under all the circumstances.

However, the Claimant significantly exacerbated the situation when he decided to play one supervisor off another. By falsely telling Managers Egan and Humpherys that the other had given permission for him to remain in Green River, the Claimant clearly misrepresented the situation in an attempt to avoid his assignment and delay reporting to his gang. In the Board's view, this misconduct is an aggravating factor that outweighs any mitigating circumstances on the record.

The Claimant's misconduct was serious. The Carrier cited a legion of prior Awards upholding the penalty of dismissal under similar facts. Under Rule 48 (o), the Carrier is permitted to suspend an employee from service pending Hearing "where serious and/or flagrant violations of Company rules or instructions are apparent. . . ." This case is of a kind contemplated by the Rule, and, therefore, we reject the Organization's contention that Carrier's decision to withhold the Claimant from service violated the Agreement.

Finally, the Board does not agree that the Claimant was denied due process so as to vitiate the discipline in this matter. The failure to cite a specific Rule violation in the Investigation Notice and the Hearing did not amount to harmful error. The Carrier's charges - alleging that the Claimant failed to comply with instructions and made false statements to supervision - were sufficiently clear to put the Claimant and the Organization on notice of the substance of the allegations. The Organization failed to show that more was required from a contractual standpoint.

Based on all the foregoing reasons, we have no alternative but to find that the Carrier did not act arbitrarily or capriciously when it determined that the Claimant should be discharged.

AWARD

Claim denied.

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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 24th day of September 2002.

LABOR MEMBER'S DISSENT
TO
AWARD 36211, DOCKET MW-36366
(Referee Kenis)

Clearly, the Majority erred in this case and a Dissent is required.

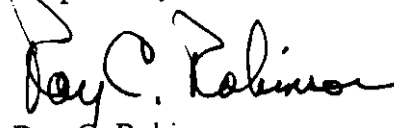
The record of this case reveals that the Claimant had been injured on the job and arrangements were made for his attending regular physical rehabilitation. This is no doubt that the Claimant, his supervisor Mr. Egan and Organization Representative Morrow met on June 9, 1999 and agreed that the Claimant would follow a specific course of treatment. That treatment was to allow the Claimant to remain near his home location at Green River, Wyoming for a period of one (1) week or more irrespective of where his assigned gang was working. Moreover, the record reveals that the Claimant was working light duty, issued a lifting restriction by his attending physician and taking prescribed medication.

Nevertheless, the very next day Mr. Egan's supervisor Mr. Wright, without consultation with Organization Representative Morrow, unilaterally rescinded the physical rehabilitation understanding and demanded that the Claimant report to Bridgeport, Nebraska over three hundred fifty (350) miles away from Green River, Wyoming. How was the Claimant able to meet the requirements of his rehabilitation when his work assignment was so far away? The answer is, he could not and furthermore, the Carrier obviously did not care. The record reveals that the work assignment at Bridgeport was going to be at least a seven (7) consecutive workday assignment of at least ten (10) hours a day. Such was hardly an assignment for an employee under light duty restrictions.

What is obvious from this record was that the Claimant was targeted by the Carrier because he had suffered a personal injury on the job. If there is any doubt that this Carrier targets employees who are injured on the job with harassment, one only needs to read this Award and it becomes crystal clear.

This Claimant was guilty of only one thing, that was agreeing to work light duty rather than just staying home to recuperate from his injury. After serving this Carrier for nearly twenty (20) years he deserved better treatment and the Majority should have recognized this fact. Sadly, the Majority did not do so and a Dissent is appropriate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson". The signature is fluid and cursive, with the first name "Roy" being particularly prominent.

Roy C. Robinson
Labor Member