

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37793
Docket No. MS-38046
06-3-03-3-458

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

PARTIES TO DISPUTE: (United Transportation Union
(San Joaquin Valley Railroad

STATEMENT OF CLAIM:

"A claim and grievance for San Joaquin Valley Railroad employee Nathan Zoolakis for reinstatement to service with seniority unimpaired and compensation for all time and credits lost and that all reference to this incident be expunged from his personnel 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.

On May 5, 2003 the Carrier dismissed the Claimant from its service twice. One dismissal was a result of an Investigation held at 10:00 A.M. on April 15, 2003. The second dismissal was the result of an Investigation held at 3:35 P.M. on the same date. The first Investigation was for falsifying the time sheet and the second was for insubordination.

The two letters of discipline are as follows:

“Reference formal hearings conducted in the office of the General Manager, San Joaquin Valley Railroad, 221 North "F" Street in Exeter, California on Tuesday April 15, 2003 in connection with your alleged failure to abide by operating rules and regulations adopted and published by San Joaquin Railroad.

This is to advise that after careful review of the transcript of this investigation, it was determined that you falsified your timesheet while working as Dispatcher on December 29th, 2002, resulting in the violation of the following parts of the General Code of Operating Rules and RailAmerica, Inc. Employee Handbook rules:

GENERAL CODE OF OPERATING RULES

Rules, Regulations and Instructions (1.3.1)

Carrying Out Rules and Reporting Violations (1.4)

Conduct (1.6)

Reporting and Complying with Instructions (1.13)

RAILAMERICA, INC. EMPLOYEE HANDBOOK

Section IV: Work Conditions and Hours

Time Reporting

As a result of the violation of the aforementioned rules and regulations, you are hereby dismissed from service of the San Joaquin Valley Railroad Company.”

and:

“Reference formal hearings conducted in the office of the General Manager, San Joaquin Valley Railroad, 221 North "F" Street in Exeter, California on Tuesday April 15, 2003 in connection with your alleged failure to abide by operating rules and regulations adopted and published by San Joaquin Railroad.

This is to advise that after careful review of the transcript of this investigation, it was determined that your actions towards your supervisor during a meeting on January 7, 2003 while you were performing your duties as Dispatcher constituted insubordination,

resulting in the violation of the following parts of the General Code of Operating Rules and RailAmerica, Inc. Employee Handbook rules:

GENERAL CODE OF OPERATING RULES

Rules, Regulations and Instructions (1.3.1)

Carrying Out Rules and Reporting Violations (1.4)

Conduct (1.6)

RAILAMERICA, INC. EMPLOYEE HANDBOOK

Section I: Conduct Towards Fellow Workers

As a result of the violation of the aforementioned rules and regulations, you are hereby dismissed from service of the San Joaquin Valley Railroad Company."

In Case No. 1, the Claimant was charged with stealing time by claiming a meal period for December 29, 2002. On January 7, 2003 a meeting was held to discuss the matter. The Claimant felt that he had been told not to take lunch and as such was entitled to the additional 20 minutes in accordance with the Schedule Agreement. The record is void of any evidence that the Claimant was trying to "steal" money. It was a simple time claim. The position of the Organization will be sustained.

In Case No. 2, the Claimant was found to be insubordinate. The Carrier argues that the claim was never appealed by the Organization on the property.

On August 12, 2003 the General Manager of the Carrier met with the General Chairman and told him that Case No. 2 had not been appealed by the Local Chairman. On August 13, 2003 the Carrier advised the Local Chairman that no appeal had been received.

In a subsequent meeting between the General Chairman and the General Manager the Organization offered to provide a copy of the appeal, but the Carrier said it was not interested in seeing the copy because it was standing by its position that the claim had not been appealed. A copy of the letter is made part of this record. The Organization submitted an Express Mail receipt dated June 30, 2003 with July 1, 2003 as date of delivery.

The Express Mail receipt does not indicate what was in the mail. However, when the General Chairman offered to produce a copy of the appeal the Carrier's refusal

puts it at peril. Whether a claim is timely presented or not, the Carrier is obligated to receive such and decline such appeal for whatever reason it feels fit to do so. It should be noted that both appeals were dated June 17, 2003.

As to the merits of Case No. 2, there is no evidence that the Claimant was disobedient to authority in the January 7, 2003 meeting.

It is clear from the record of both cases that the Carrier failed to meet its burden of proving that the Claimant violated its Rules.

However, there is doubt as to the timely appeal for Case No. 2. The Claimant has seven years of service with no previous discipline. By the same token we cannot totally ignore the alleged time limit violation.

Therefore, taking into consideration the possible time limit violation, the Board will restore the Claimant to service with seniority unimpaired, but without pay for time lost.

AWARD

Claim sustained in accordance with the Findings.

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 31st day of May 2006.

NRAB Third Division
Award Nos. 37793 & 37794
Docket Nos. MS-38046 & MS-38047

Labor Members' Dissent

In Docket No. MS-38046, the Neutral Member of the Board found "The record is void of any evidence that the Claimant was trying to "steal" money. It was a simple time claim." In Docket No. MS-38047, the Neutral Member of the Board found "there is no evidence that the Claimant was disobedient to authority in the January 7, 2003 meeting." In summary of the two cases, Neutral Member concludes, "It is clear from the record of both cases that the Carrier has failed to meet its burden of proving that the Claimant violated its rules."

In spite of exonerating claimant of all wrongdoing, Neutral Member fails to hold Carrier accountable for its actions based upon its pleading of procedural violation. The Labor Members are dismayed that the conventional level of proof is not acceptable in this case.

The initial appeal was submitted to the Carrier by Local Chairman's letter dated June 15, 2003. Carrier's receipt of Local Chairman's letter of appeal is confirmed by United States Postal Service Request Proof of Delivery at 1:33 p.m., July 1, 2003, Attachment 1 of Organization's Brief. Carrier authored letter dated August 13, 2003 to Local Chairman in which it was alleged that no appeal had been received; therefore, the discipline will stand. Upon receipt of his copy of the August 13 letter, General Chairman notified the Carrier that proof of delivery was available and he could provide a copy of the letter of appeal. Not only did the Carrier not request to see the proof of delivery, but it refused to accept a copy of the letter of appeal. All further response from the Carrier was to deny handling of the appeal.

It must be considered, why did the Carrier initiate its August 13 letter declaring that it had not received an appeal? When confronted by the General Chairman that proof a delivery was available, why was the Carrier not interested? Why did Carrier not request to see the proof? When the General Chairman offered to provide a copy of the letter of appeal, why did the Carrier refuse acceptance?

No Carrier reports to the Organization that it did not receive an appeal unless it is concerned about a timely response to that appeal. In such case, when the Organization confirms proof of delivery, the Carrier requests proof of delivery and then makes a timely response.

Carrier's actions in instant case are completely out of character. It is obvious that Carrier's position is a sham. Carrier had dismissed claimant on two separate issues and obviously had determined that it could further insure its dismissal of claimant by creating a procedural issue, thus having it both ways. The Neutral Member bought into this sham and relieved Carrier of its liability, returning claimant to service without pay for time lost. Like the Carrier's procedural issue, the decision herein is a sham.

The findings in this Award are unacceptable.


Kim N. Thompson, Labor Member