

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39512
Docket No. SG-38931
09-3-NRAB-00003-050363
(05-3-363)

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific:

Claim on behalf of C. Windschitl, for one hour at his overtime rate of pay, eight hours at his straight-time rate of pay, one-half hours for his paid lunch period, and eight hours holiday pay, account Carrier violated the current Signalmen’s Agreement, particularly Rules 6, 15, 24 and Appendix X, when it failed to allow the Claimant to return to work on April 8, 2004, after serving a 30 day suspension. Carrier’s File No. 1401940 (S4-UP108). General Chairman’s File No. N 80 475. BRS File Case No. 13203-UP.”

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.

At the time this dispute arose, the Claimant was assigned to the position of Electronic Technician with headquarters at the Central Dispatch Center in Omaha, Nebraska. This dispute developed when the Carrier failed to allow the Claimant to return to work on April 8, 2004, after serving a 30-day suspension. The Claimant received a Notice of Investigation dated March 9, 2004 in connection with his alleged engagement in another business or occupation which possibly conflicted with the interests of the Carrier, in violation of Rules 1.6, 1.18, 1.15, and 1.19. On March 24, 2004, he entered into an agreement for a leniency reinstatement. Among the terms of that agreement were that he acknowledged responsibility for his actions and accepted dismissal as a result of those actions, but would be returned to service at a Level 3 Discipline status after serving a 30-day suspension. The March 24 agreement also stated,

“You will be required to meet with your Manager to reach a full and complete understanding as to the terms of this agreement, as well as future conduct and compliance with the Carrier’s rules.”

The agreement also stated that the Claimant “release[d] the Carrier and the Organization and its officers from any liability and/or responsibility in connection with not progressing, any claims on [his] behalf that would otherwise arise from this incident.” In addition, “Any and all claims filed in [the Claimant’s] behalf as a result of this incident will be withdrawn and dismissed in their entirety.”

On April 8, 2004, the Senior Manager Signal Operations requested the Claimant to report to work at 2:00 P.M. on April 8, one hour prior to the Claimant’s regularly-assigned starting time of 3:00 P.M. The Claimant did so, and met with his Manager. After the meeting, the Manager instructed the Claimant to go home and to return to work at his regular starting time the following day, Good Friday, April 9, 2004. The Claimant complied and worked his regularly assigned 3:00 P.M. to 11:00 P.M. shift. The Claimant also worked his regularly assigned shifts on April 10 and 11, 2004. However, the Carrier (1) failed to compensate the Claimant for one hour at his overtime rate of pay, for reporting to work one hour before his regular starting time on April 8, 2004 (2) failed to allow the Claimant to

work his regular shift on April 8 or to pay him eight hours at his straight-time rate of pay for that shift or one-half hour for his paid lunch period and (3) failed to compensate the Claimant eight hours' pay for the Good Friday holiday.

The Organization contends that the Carrier thereby violated Rules 6, 15, 24 and Appendix X. Rule 15(C) states in pertinent part, "Employees so called less than one (1) hour before their regular starting time will be paid one (1) hour at the time and one-half rate. . . ." Under this Rule, the Claimant should have been paid for reporting one hour early on April 8, 2004 as directed, the Organization reasons. Once the Claimant had met with his Manager, he had completed the terms of his 30 day suspension and was available to work his regular shift that day. Because Rule 6 provides that an employee's "regularly established daily working hours will not be reduced below eight per day," and Appendix X provides a paid one-half hour meal period for CDC Electronic Technicians like the Claimant, he was entitled to eight hours compensation plus compensation for lunch for the day. The Organization further reasons that because the Claimant's suspension began on March 9, he should have been allowed to work on April 8, the day before the Good Friday holiday, and having worked Good Friday and his regularly scheduled shift on the day following the holiday, he also should have been paid for the Good Friday holiday pursuant to Rule 24. Rule 24 states in pertinent part, "A regularly assigned employee shall qualify for the holiday pay provided in Section B hereof if compensation paid the employee by the Carrier is credited to the work days immediately preceding and following such holiday or if the employee is not assigned to work but is available for service on such days.

The Carrier responds that because the Claimant had not completed the requirements of his March 24 leniency reinstatement agreement by April 8, he was not available to work his regular shift that day, he was not called by his Manager to work that day, and the refusal to let him work his shift on April 8 did not violate the parties' Agreement. In addition, because the Claimant reported to his supervisor on April 8 not to work, but to comply with the March 24 leniency reinstatement agreement, he performed no compensable work and was not entitled to any pay for the hour-long meeting or for his shift on April 8. Because he did not and was not entitled to work the day before the holiday, the Carrier's refusal to pay the Claimant holiday pay did not violate Rule 24. The Carrier also asserts that the claim is not properly before the

Board because the parties never discussed it in conference, and because it is barred by the terms of the leniency reinstatement agreement.

We reject the Carrier's contentions that the claim is not properly before the Board. Although the leniency reinstatement agreement includes the Claimant's agreement that all claims relating to "this incident" will be withdrawn and that the Carrier and Organization are absolved from liability for not pursuing a claim over "this incident," the "incident" in question is the Claimant's alleged misconduct cited in the Notice of Investigation, the Carrier's response to the alleged misconduct, his dismissal, and the resolution of the issue with a leniency reinstatement. This claim for compensation for April 8 and 9 does not relate to those events. Instead, this claim asserts violations by the Carrier that resulted from its alleged failure to fulfill its obligations under the reinstatement agreement and to pay the Claimant after completion of the suspension. The terms of the leniency reinstatement agreement do not waive such a claim, nor a claim for compensation for the meeting described therein.

The Carrier also objects that the claim was never conferenced by the parties. Although failure to discuss a claim in conference is a procedural defect that may result in its dismissal (see Third Division Award 32224, and First Division Award 25334) correspondence in the record from the Organization describes the conferencing of this claim, and that evidence has not been overcome by the Carrier. Accordingly, we must assume that the conference was held, and reject the Carrier's procedural objection.

Turning to the merits, the Board finds that the crux of the issue is whether the Claimant's suspension began on March 9 (the date of the Notice of Investigation and a scheduled day off for the Claimant) or on March 10, the first of the Claimant's scheduled work days that he did not work. If the suspension began on March 9, then the Claimant's 30 calendar day suspension would have lasted through April 7. Once the Claimant had met with his Manager at 2:00 P.M. on April 8 to reach a full and complete understanding as to the terms of the leniency reinstatement agreement, as well as future conduct and compliance with the Carrier's Rules, as the leniency reinstatement agreement required, he would have been eligible and available to return to work at his regular starting time of 3:00 P.M. on April 8, and because he should have been allowed to work that shift (and did work his shift on the April 9 Good

Friday holiday and on his scheduled shift immediately following the holiday) the claim for holiday pay under Rule 24 would have merit. On the other hand, if the suspension began on March 10, the first of his regularly scheduled work days that he did not work, then April 8 would have been the 30th day of his suspension, and despite meeting with his Manager that day, he would not have been eligible to return to work until April 9, after the completion of his 30 calendar days' suspension, so there would be no basis for compensating him for his April 8 shift, the meal period, or for April 9 holiday pay.

When did the suspension begin? The leniency reinstatement agreement is silent on that point, referring only to "the Notice of Investigation issued on March 9, 2004." In the claim letter, the Local Chairman asserts that the "Claimant had been removed from service on March 9, 2004," and refers to the Notice of Investigation of that date, but the notice itself is not in the record. In its July 24, 2004 response, the Carrier asserted that the Claimant had not fulfilled the requirements of the leniency reinstatement agreement because the "Claimant's return to service after serving a thirty (30) calendar day suspension was contingent on fulfilling the requirements of [the March 24 leniency reinstatement agreement]." More important, in its October 17, 2004 response to the General Chairman, the Carrier acknowledged that the Organization "allege[s] that Claimant had been removed from service March 9, 2004 and subsequently served a thirty (30) calendar day suspension pursuant to the March 9 [sic], 2004 leniency agreement . . ." but attached annotated payroll records that show that the Claimant's "1st OOS" (first Out Of Service day) was March 10, and that his first work day thereafter was April 9, so that he had "30 days OOS" (30 days Out Of Service). There is simply no countervailing evidence from the Organization that the March 9 notice took him out of service as of March 9, as opposed to as of his next scheduled work day, March 10, as the payroll record reflects.

The Organization as the moving party has the burden of demonstrating that the Carrier committed the violations claimed. This means that once the Carrier presents evidence during on-property processing that contradicts a factual assertion by the Organization that is crucial to the claim, it is incumbent on the Organization to present evidence sufficient to refute the Carrier's evidence. Here, the Organization offered no evidence or argument to refute the payroll records referred to. As a result, the Board must assume that the suspension did not begin until March 10, and

concludes April 8 was the 30th day of his 30 calendar day suspension. The Board further concludes that notwithstanding his meeting with his Manager on April 8, the Claimant remained on suspension and unavailable to work until the end of that 30 calendar day period. In sum, the Organization failed to prove that the Carrier committed any violation by refusing to allow the Claimant to work on April 8. Therefore, the Claimant was not entitled to compensation for his regular shift on April 8, under Rule 6, or for his lunch that day under Appendix X, or holiday pay for Good Friday under Rule 24.

The Board further finds that under the terms of the leniency reinstatement agreement, the Carrier properly required the Claimant to meet with his Manager during the suspension period to satisfy the condition quoted above. Even though the leniency reinstatement agreement included the Claimant's stipulation that he had entered into it "with full knowledge and understanding of its terms," that stipulation did not satisfy the separate and broader requirement of a meeting with his Manager to review not only the leniency reinstatement agreement, but also his future conduct and compliance with Carrier Rules. The only question is whether, as the Organization asserts, the Claimant was entitled to compensation under Rule 15 in the amount of one hour at his overtime rate for that one-hour meeting. The Carrier objects that because the Claimant was called in merely to have the meeting that was a prerequisite to his reinstatement, not to perform any work, and because the meeting did not precede his regular starting time, because he was not available to work that day, he was not entitled to any compensation under Rule 15. The Organization responds that under paragraph 12 (b) of the Carrier's "Formal Discipline Policy – Upgrade," this meeting was "training and education pertinent to safety, rules compliance and orientation to local operations." However, the Organization pointed to nothing in Rule 15, a call-in provision, that requires compensation for the type of meeting contemplated under the leniency reinstatement agreement, nor one scheduled on a day that the employee is unavailable to work. For this reason, we deny the claim for compensation for the April 8 meeting, in addition to the rest of the claim.

Form 1
Page 7

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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 2nd day of February 2009.