

NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION

Award No. 24422  
Docket No. 44079  
95-1-93-1-C-4609

The First Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers  
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(Chicago and North Western Transportation  
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STATEMENT OF CLAIM:

"The Brotherhood of Locomotive Engineers, General Committee of Adjustment requests the Board reinstate Engineer J. A. Ribar, N. E. #2 District, to service of the Chicago and North Western with full seniority and vacation rights and compensation for all time lost.

Claimant was dismissed from service following an investigation held at Milwaukee, Wisconsin on September 10, 1992 on the following charge:

'Your responsibility for your insubordination when you failed to return to work by Thursday, August 13, 1992 as instructed in letter dated August 3, 1992.'

Copy of transcript attached as Employees' Exhibit A. Claim premised upon BLE Schedule Rule 41, copy attached as Employees' Exhibit B."

FINDINGS:

The First 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.

The parties to said dispute were given due notice of hearing thereon.

Claimant began his service with Carrier as a Yardman on July 20, 1973. Claimant's initial assignment, work location, and job progression thereafter are not at issue in the instant proceeding, and thus will not be addressed further in this Award.

At the time of the occurrence of the incident which is the focus of the instant proceeding, Claimant was assigned to the Milwaukee, Wisconsin Engineers' Extra Board.

On June 10, 1992, Claimant performed service as an Engineer on Job 01, which was a switch engine job on duty at 7 AM at Carrier's Butler Yard in Milwaukee.

Claimant's last day of service as an Engineer with Carrier was on June 10, 1992. After work, later that same day, Claimant contacted Carrier's Crew Caller and requested permission to lay off work the next day in order to attend Court in a criminal proceeding in which he was the charged defendant. Claimant's request was granted.

On June 11, 1992, Claimant attended the aforesaid Court proceeding; and he pleaded guilty to charges of sexual assault of a child. As a result of said guilty plea, the Court sentenced Claimant to four years in prison; stayed a five years prison term on a second criminal charge of first degree sexual assault; and ordered Claimant to serve five years probation which was to follow the successful completion of the prison term in the first charge.

According to Carrier, on June 12, 1992, Claimant's Local Organizational Representative contacted Carrier's Crew Caller, and informed him (Crew Caller) that Claimant was in the hospital; and requested that Claimant be allowed to lay-off until further notice. Said request, apparently, was granted. However, on the following day, June 13, 1992, Carrier received notification by an unidentified source of Claimant's above described criminal conviction; and thereupon, Carrier denied Claimant any additional lay-off privileges requested through his Local Organizational Representative.

On July 9, 1992, Carrier sent Claimant a certified letter which, in pertinent part, stated as follows:

"Our records indicate that your last day of compensated service was June 10, 1992. Therefore, you are hereby directed to report for service no later than Monday, July 20, 1992....

If you are unable to report back to service due to medical reasons, you are to supply this office with documentation from your personal physician indicating diagnosis, prognosis and length of disability. This information must be furnished prior to the date indicated above.

In addition, if you are unable to return to service for any reason, you must apply for a formal Leave of Absence by calling Mary Lou Smith at 1-800-274-3939, Ext. 4516.

Failure on your part to return on July 20, 1992, or to furnish the necessary information if unable to return, will subject you to a formal investigation as a result of insubordination to these instructions."

Claimant submitted an "Application for Leave of Absence" dated July 6, 1992. Said Application indicated that the reason for the request was "Serving Prison Sentence," and that the requested leave period was from "6-11-92 to 6-11-93."

In a certified letter dated August 3, 1992, Carrier informed Claimant that his request for a Leave of Absence was "not approved"; and that he was to return to work by August 13, 1992. Said letter further advised Claimant that,

"Failure on your part to return on date specified above, will subject you to a formal investigation as a result of insubordination to these instructions."

As a result of Claimant's incarceration, he was unable to report for duty as directed. There is no evidence in the hearing record to indicate that Claimant contacted Carrier at any time in the interim.

In a certified letter dated August 20, 1992, Claimant was directed by Carrier to attend a formal investigative hearing on August 21, 1992, which was to be held to investigate,

"Your responsibility for your insubordination when you failed to return to work by Thursday, August 13, 1992 as instructed in letter dated August 3, 1992."

Said investigative hearing was postponed and rescheduled for September 10, 1992, at which time the hearing was convened. Claimant did not attend said hearing, but was represented by his Local Organizational Representative. Claimant's wife was also in attendance at the hearing; and she offered testimony indicating that she did not believe that her husband was guilty of the felony charge of sexual assault of a child. Also admitted into evidence at the investigative hearing was a letter, which was written by Claimant, which essentially was a plea for mercy to Carrier on Claimant's part. In that same letter, Claimant also stated that he was a 19 years employee with a good operating record with Carrier; and that the reasons for his not reporting for work as directed "... are completely out of my control ... I am not being insubordinate by choice ... (and) ... I am simply a victim of circumstances ..." Claimant further indicated in that same letter that he was being punished "... for something I did not do ..."; and if dismissed from Carrier's service, his wife and mother would suffer because they are both dependent upon him for support.

Pursuant to the conclusion of said investigative hearing, in a letter dated September 16, 1992, Claimant was advised by Carrier that he had been adjudged as guilty as charged; and that, as a result, he was to be dismissed from Carrier's service effective immediately.

Claimant's dismissal was appealed by Organization; and, for reasons which will be developed more fully hereinafter, said appeal was denied by Carrier. The matter was further appealed unsuccessfully by Organization throughout all of the steps of the parties' negotiated grievance procedure. Thereafter, the matter was then appealed by Organization to arbitration; and pursuant to hearing, the matter is now properly before the Board for resolution.

In order that the background portion of this Award may be complete, the record which has been presented herein shows that Claimant was released from prison on or about September 13, 1993, after serving approximately one year and three months of his four years imposed sentence; and Claimant is currently on parole as directed by the Court in its original sentencing of Claimant.

The Organization's basic contention in this dispute is that the evidence of record herein does not establish that Claimant was guilty of "insubordination" as charged by Carrier; and, therefore, his resultant dismissal was improper, and should be rescinded. In support of the aforestated contention, Organization asserts that the Webster's Dictionary defines the word "insubordination" as "... unwilling to submit to authority."

Accordingly, Organization maintains that Claimant was not insubordinate in the instant case because he surely would have complied with Carrier's instruction to report for duty on August 13, 1992, but for his incarceration; and that Claimant could not have willfully disobeyed Carrier's order to return to work if he was physically incapable of actually carrying out that particular order.

Continuing, Organization next argues that Claimant was improperly notified of the pendency of his September 10, 1992 investigative hearing. In this regard, Organization notes that the U.S. Postal Service certified return receipts which accompanied Carrier's original hearing notice/postponement letters/dismissal notice which were sent to Claimant in accordance with Rule 41 of the parties' controlling Agreement, were not signed for by Claimant; but instead, were signed for by Claimant's wife. Therefore, according to Organization, Carrier failed to afford Claimant his full measure of Agreement due process by improperly notifying him of the Investigation as is contractually required, thus resulting in his improper dismissal.

Lastly, Organization argues that the following factors should serve to mitigate Claimant's dismissal in this situation: Claimant was a 19 plus years employee with Carrier; he has a good operating record; he paid his debt to society; he guilty plea in the criminal charge(s) was made due to Claimant's naiveté of the legal/justice system and his reliance upon the erroneous advice of his legal counsel; he is now out of prison and fully capable of returning to work; and Carrier is in need of qualified engineers, and has made a substantial investment in the training of Claimant.

Carrier contends that Claimant was indeed guilty of insubordination in this matter, which is a violation of Rule 607; and that, as a result, he was justly and properly dismissed by Carrier for that infraction. In support of this contention, Carrier asserts that arbitral precedent in the railroad industry clearly supports the proposition that employees who are incarcerated may be dismissed by Carrier for failure to protect their employment which constitutes insubordination (Public Law Board No. 3083, Award 17; First Division Awards 24207 and 23869; and Third Division Award 24353).

Additionally, Carrier also argues that Claimant had been previously dismissed by Carrier for possession of a controlled substance on Carrier's property and for possession of a firearm and ammunition on Carrier's property. Carrier maintains that even though Claimant's dismissal in the previous case was reduced to a 120 days suspension (Public Law Board No. 3083, Award 16), Claimant's disciplinary record is far from exemplary as alleged by Organization in the instant case.

The Board has carefully read, studied and considered the complete record which has been presented in this case, and we are persuaded that Carrier's basic position, as reviewed hereinabove, is correct, thus warranting our upholding of Carrier's decision to dismiss Claimant from his service with Carrier. Accordingly, we find that Claimant was, in fact, guilty of insubordination by failing to return to work on August 13, 1992, as directed by Carrier. In support of the aforestated conclusion, the Board is of the opinion that Carrier, as an ongoing business, has the right to expect its employees to report for duty ready, willing and able to perform a full day's service. To this end, there is no contractual requirement which obligates Carrier to approve an employee's request for a leave of absence.

Moreover, in addition to the above, regarding Organization's assertion(s) that Claimant was not guilty of insubordination as charged, the Board notes that in order to be found guilty of insubordination, Carrier must give an employee a clear and direct order within its managerial authority; and the employee must be able to carry out said order. Even though Claimant arguably would have complied with Carrier's direct order to report for duty on August 13, 1992, but for his incarceration, arbitral precedent, nonetheless, holds that incarceration is, in fact, a voluntary act; and Claimant, therefore, voluntarily failed to comply with Carrier's direct order.

Given that we have determined that Claimant is guilty of insubordination, we must next consider whether the assessment of the penalty of dismissal herein was excessive. Suffice it to say that it has long been held in the railroad industry and other industries as well, that insubordination on the part of an employee can be a summary dismissal offense. This is particularly true, such as in the instant case, when Claimant is specifically on notice that a particular act of insubordination will result in his/her immediate dismissal.

In this regard, it is significant to note that on October 21, 1988, Carrier promulgated the following disciplinary policy which is pertinent in the instant case:

#### "DISCIPLINE SYSTEM

\* \* \*

Dismissal From Service

This method of discipline will be used in the most serious cases such as, but not limited to, employees found guilty of insubordination, stealing, violation of Rule G, grossly negligent conduct, or dangerous conduct on duty. In other cases, if the employee has previously received both a five day suspension and a ten day suspension, this method of discipline will be used the third time the employee is found guilty of an offense."

It is clear, in the instant case, that Claimant was put on notice by Carrier that his failure to report for work as directed would constitute insubordination which, in turn, would result in his dismissal.

Still yet further, a review of Claimant's prior disciplinary record establishes that Claimant had been previously found guilty of impermissible possession of both a controlled substance and a firearm and ammunition on Carrier's property resulting in his suspension from service as directed in Public Law Board No. 3083, Award 16. In short, Claimant has indicated a propensity toward major rules violations in the past; and, as a consequence, any suggestion of mitigation of Claimant's dismissal based upon equity is considered to be inappropriate in the instant case.

As the final point of consideration in this analysis, Organization's contention concerning the alleged impropriety of Claimant's hearing notice must also be rejected since Claimant, in effect, participated in the Investigation which was held on September 10, 1992, by the offering of his written plea for mercy to Carrier for consideration. Moreover, there was no objection raised at the hearing by any party concerning the sufficiency or adequacy of said hearing notice.

Given the above reasons, the Board concludes that the pending claim is unmeritorious; and thus will be denied.

AWARD

Claim denied.

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O R D E R

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 First Division

Dated at Chicago, Illinois, this 30th day of March 1995.