

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12763
Docket No. 12576
94-2-92-2-98

The Second Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railway Carmen - Division
(Transportation Communications International
(Union
(
(Denver & Rio Grande Western Railroad Company

STATEMENT OF CLAIM:

"1. That Carman M. R. Nigro was unjustly discharged from the service of the Denver & Rio Grande Railroad Company in violation of the Rules of the Controlling Agreement, as a result of a formal investigation held on June 17, 1991.

2. That the Denver & Rio Grande Railroad Company violated Rule 32 wherein claimant was not afforded a fair and impartial investigation.

3. That accordingly, Mr. Nigro be reinstated to service with pay for all time lost and all rights and benefits unimpaired."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all of the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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 waived right of appearance at hearing thereon.

On June 10, 1991, Claimant was notified of an investigation, to be held June 17, 1991, concerning Claimant's "alleged insubordination by failing to comply with directive of Superintendent . . . to cooperate with the Employee Assistance Counselor." The investigation was held, as scheduled, and on June 26, 1991, Claimant was dismissed from service.

The Organization contends that Carrier failed to prove the charge against Claimant. The Organization relies on Claimant's testimony that he contacted the Employee Assistance Counselor every time he was requested to do so, that he did not refuse to sign an agreement for treatment, and that he did not receive communications from the counselor in a timely manner because they were not properly addressed. The Organization argues that Claimant's testimony was not refuted in this regard and that Carrier failed to have the counselors testify at the hearing. The Organization argues that Claimant was denied a fair hearing.

Carrier contends that the evidence proved Claimant guilty of the charges. Carrier observes that it could not call the counsellors to testify because to do so would undermine the confidential nature of the employee assistance program. Carrier characterizes Claimant's testimony as merely providing a litany of excuses for Claimant's failure to cooperate with the employee assistance program. Carrier observes that although Claimant denied that he refused to enter into the employee assistance agreement, Claimant also testified that he could not comply with the agreement because of his work at a restaurant and other conflicting demands on his time.

On December 11, 1989, as part of a return-to-duty physical examination, Claimant was given, and failed, a drug screen. Consequently, on December 14, 1989, Claimant was notified of his positive drug test and directed to contact and cooperate with Carrier's Employee Assistance Counselor within seven days.

On September 13, 1990, the Employee Assistance Program Director reported to the Superintendent that Claimant had contacted him on December 18, 1989 and indicated a desire to get some things straightened out in his life and to meet at a later date. The EAP Director further reported that they met on January 3, 1990, and February 14, 1990, that nothing had changed, and that the director outlined a program for Claimant. Finally, the director reported that Claimant stated he would get back in touch with the counsellor, but that as of September 30, the director had not heard from Claimant.

On June 4, 1991, the EAP Counselor wrote Claimant advising him that she had not heard from him since she had sent him the agreement for treatment. She further advised Claimant that she was considering him non-compliant and was closing his case.

Claimant testified that he complied with every request to meet with the EAP personnel. He maintained that the June 4, 1991, letter was sent to his mother's address, even though Claimant had previously advised the counselor of his change of address.

Claimant denied refusing to enter into the treatment agreement.

The evidence however, showed that Claimant did not enter into a treatment agreement. Furthermore, Claimant testified that he was running a restaurant that he owned and that because of those duties he did not contact the EAP Director after February 14, 1990. According to Claimant, the EAP Director left it up to Claimant to decide when to begin the program. Claimant further testified that because of his duties with the restaurant and his lack of a car, he found aspects of the proposed treatment program unreasonable because he could not comply with them.

Thus, although Claimant denied failing to cooperate with the EAP program and testified to constant telephonic communication with his counselor, his own admissions and his testimony as to his specific reaction to the proposed treatment program corroborate the statements in the letters that Claimant failed to contact the EAP Director after February 14, 1990, and failed to return the treatment agreement to the EAP Counselor. Thus, the evidence established that Claimant failed to comply with the Superintendent's directive to cooperate with the EAP program.

Our review of the record discloses no evidence to support the Organization's claim that Claimant was denied a fair investigation. Accordingly, the claim must be denied.

AWARD

Claim denied.

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 Second Division

Dated at Chicago, Illinois, this 17th day of November 1994.