

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12521
Docket No. 12488
93-2-92-2-46

The Second Division consisted of the regular members and in addition Referee Kay McMurray when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/
(Division TCU
(
(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

- "1. That the Kansas City Southern Railway Company violated the agreement, particularly Rule 29, when Carman G. L. Cruz was removed from service without a fair and impartial hearing.
2. That accordingly, the Kansas City Southern Railway Company be ordered to return Carman Cruz to service and be paid for lost time and restore all his negotiated benefits."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

The Organization's position in this case relies on its claim that the Carrier violated Rule 29(1) of the controlling agreement which reads in pertinent part:

"Rule 29(1). No employee shall be disciplined without a fair hearing by the Carrier...."

However, the record reveals that Claimant, was in a much different contractual position than that envisioned by the Rule which the Organization seeks to apply as a defense. Claimant had been previously dismissed for a violation of Rule G. That Rule reads in part:

"An employee may be required to provide a urine sample as part of a company medical examination. Any evidence of alcohol or illegal drug, narcotic, or other controlled substance in the urine, as indicated by a test of the urine sample, will be considered a violation of this rule...."

During conferences with respect to that discharge the Carrier agreed, on a leniency basis, to return Claimant to service if Claimant and his Organization would agree to certain requirements as set forth in a "Return to Work Agreement." An agreement was reached, and all parties approved the stipulations by signing the document. Consequently, after passing the Carrier's required examination, Claimant was returned to service on June 30, 1989.

That agreement provided in pertinent part:

"5. Mr. Cruz must give the Carrier the undisputed right to randomly test him for drug use for a period of two (2) years following the date he is reinstated to service...

7. Mr. Cruz must not violate the Carrier's Rule G during the remainder of his employment with the Carrier.

In connection with the aforementioned conditions of reinstatement, it is further agreed that should Mr. Cruz fail to fully comply with any part of such conditions during the period(s) specified, he waives his right to a formal investigation, as required under the Rules of the current agreement, with the understanding that he will be removed from service and returned to a dismissed status...."

Under the provisions of the foregoing agreement, Claimant was tested for drug abuse on October 11, 1990. He failed the test and was informed by letter on October 18, 1990, that in accordance with the provisions of the Leniency Return to Work Agreement he was being removed from service and returned to a dismissal status. Accompanying the letter was a copy of the laboratory report from a qualified test facility along with a copy of the Chain of Custody Document used to ascertain proper handling of the specimen. Rule G was violated and the Carrier's action was in accordance with the leniency agreement.

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By a long list of Awards, this Board has held that violation of a properly executed Leniency Return to Work Agreement is proper cause for dismissal. The reason for such action was simply and succinctly described in Special Board of Adjustment No. 884, Award 146.

"A Last Chance program can only work if, in fact, that is the last chance. Claimant was given her opportunity, unfortunately she was not wise enough to take advantage of it."

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 3rd day of March 1993.