

The Third Division consisted of the regular members and in addition Referee Paul C. Carter when award was rendered.

(Transportation Communications International Union  
PARTIES TO DISPUTE: (  
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood  
(GL-10244) that:

1. Carrier violated TCU Agreement when on the date of November 7, 1986 it dismissed Ms. Beverly Buckman, St. Louis, Missouri from service on the date of November 7, 1986 following investigation held November 3, 1986. Claimant had been withheld from service effective September 3, 1986.

2. Carrier's action in this case violated the Agreement expressly Rule 18 and related Rules contained therein in issuing such discipline which was harsh, excessive, unwarranted and an abuse of discretion due to the facts and circumstances as brought out in the investigation.

3. Carrier shall now be required to reinstate Claimant Ms. Beverly Buckman to service with pay for all time lost, seniority, vacation and all other rights unimpaired effective September 3, 1986 the date Claimant was withheld from service and to continue each workday thereafter until corrected and the record of investigation held November 3, 1986 and all references thereto be removed from her personal 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 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.

Prior to the occurrence giving rise to the dispute herein, Claimant, with a seniority date of October 7, 1968, was employed as a Correction Accounting Clerk in Carrier's Interline Accounting Department at St. Louis, Missouri.

The Claim before the Board alleges a violation of the Agreement when Carrier dismissed Claimant from service on November 7, 1986, following an Investigation conducted on November 3, 1986.

The record shows that on August 18, 1986, Claimant's personal physician wrote a letter "To Whom it May Concern" stating that Claimant "is suffering from an acute anxiety reaction due to stress" and recommended a leave of absence for Claimant for one week. Claimant returned to work on August 25, 1986. Following several discussions between Claimant and Carrier's Director-Interline Accounting and his subordinate, on September 3, 1986, the Director-Interline Accounting, issued a letter withholding Claimant from service, the letter reading in part:

"Upon your return to work, observation of your actions while on duty caused us to be concerned over your personal welfare.

Since you have refused to voluntarily participate in our Employee Assistance Program, I must now withhold you from service effective this date pending final evaluation from Dr. E. C. Bevilaqua, Medical Director under Section III, Paragraph 2, of the Union Pacific Railroad Form 2501, Physical Examination Rules.

Please contact Mr. Jim Risinger, Counselor Employee Assistance Program, telephone number 622-2950, Room 100, Missouri Pacific Railroad Building, 210 North 13th Street, St. Louis, Missouri. He will offer full support to draw this effort to a conclusion"

On October 3, 1986, Carrier's Assistant Medical Director wrote Claimant:

"Reference your request that I confer with your physician, Dr. T. C. Vargas, in an attempt to resolve the dispute concerning your ability to return to work.

Upon receipt of an evaluation of your condition by a Company designated specialist, a final determination concerning your ability to return to service will be made by this office. If the final determination by this office is contrary to Dr. Vargas' recommendation, a conference will be arranged to discuss your condition."

On October 7, 1986, Carrier's Director-Interline Accounting directed Claimant to report to the Behavioral Health System Center at St. Louis, Missouri, at 1:00 PM on October 14, 1986, for an evaluation and determination as to when she could return to active service.

On October 23, 1986, the Director-Interline Accounting instructed Claimant to report for formal Investigation on October 29, 1986:

"... to develop the facts and place responsibility, if any, in connection with your failure to obtain an evaluation of your condition by a Company designated Specialist on Tuesday, October 14, 1986."

The Investigation was postponed and conducted on November 3, 1986. On November 7, 1986, Claimant was dismissed from Carrier's service for failing and refusing to comply with instructions issued by the Director-Interline Accounting on October 7, 1986.

Rule 18 of the applicable Agreement contains the usual provisions for a fair and impartial Investigation, and the right of appeal through the designated channel up to and including the highest officer designated by the Carrier to whom claims and grievances may be appealed. A copy of the transcript of the investigation conducted on November 3, 1986, has been made a part of the record. The Director-Interline Accounting was the Carrier's principal witness in the investigation. The record also contains memoranda prepared by the Director-Interline Accounting and the person who was later the conducting officer of the Investigation held on November 3, 1986, concerning their participation in various confrontations with Claimant prior to withholding her from service on September 3, 1986, and the investigation of November 3, 1986.

Without discussing what was developed in the Investigation of November 3, 1986, we are concerned with the contentions of the Organization as to the manner in which the Investigation was conducted and the appeal procedure provided Claimant following her dismissal. The record shows that such issues were raised in the on-property handling of the dispute. The record shows that the hearing officer at the Investigation and the witness for the Carrier had jointly participated in various decisions concerning Claimant prior to the Investigation. It cannot properly be held that either had a strictly impartial role in the matter. (See Fourth Division Award 2518, and First Division Award 21046.)

The record also shows that the officer who preferred the charge against the Claimant, and was the principal and only witness for the Carrier at the Investigation, was the Carrier officer to receive the appeal of Claimant's dismissal. Thus, the appeal officer was, in fact, in a position to weigh or pass on his own evidence, which procedure, in our opinion, deprived the Claimant of a fair and impartial appeal as contemplated by Rule 18 of the Agreement. (See Third Division Awards 24547, 24476, 17156; Second Division Award 7921.)

Based on the record, the Board finds and holds that the dismissal of Claimant from service on November 7, 1986, cannot be sustained. Her rights under Rule 18 of the Agreement were violated.

The record contains a letter addressed to the Organization by the Carrier on September 1, 1987, confirming a conference of August 24, 1987. The letter reads in part:

"Simply stated, if the Claimant wishes to return to service all she needs do is to comply with the instructions of Dr. Richling's letter of October 3, 1986.

Dr. Richling stated:

'Upon receipt of an evaluation of your condition by a Company designated specialist, a final determination concerning your ability to return to service will be made by this office. If the final examination by this office is contrary to Dr. Vargas' recommendation, a conference will be arranged to discuss your condition.'

On November 12, 1987, Carrier's Assistant Medical Director recommended that Claimant be returned to work without restrictions, and on November 30, 1987, Claimant was notified that she was released to return to work. In its Submission, the Carrier states that Claimant did return to work in the Inter-line Accounting Department at St. Louis, Missouri.

The Claim will be sustained to the extent of awarding that Claimant be paid for time lost from date of dismissal, November 7, 1986, to date of the conference on August 24, 1987, with compensation computed in accordance with Rule 18(H) of the Agreement. We do not consider that time lost by Claimant subsequent to August 24, 1987, as properly chargeable to the carrier.

This Board has issued numerous Awards recognizing the Carrier's inherent right to determine the physical condition of its employees, and has the right to depend upon the advice of its Chief Medical Officer in such matters. (See Third Division Award 25417 and others cited therein.) We have also held that medical disqualification is not considered discipline (Third Division Award 25801). However, we do not consider such Awards as being applicable in the present case. As previously stated, the issue involved herein is the dismissal of Claimant from service following the Investigation held on November 6, 1986.

This Award is based strictly on the record in this particular dispute, and is not to be considered as a precedent in any other case involving the physical disqualification of any employee.

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Award No. 27729  
Docket No. CL-28317  
89-3-88-3-81

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 2nd day of March 1989.