

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29776
Docket No. MW-29685
93-3-91-3-34

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc. (former Seaboard
(System Railroad)

STATEMENT OF CLAIM: "Claim of the System Committee of the
Brotherhood that:

- (1) The dismissal of Extra Gang Foreman M. H. Brant on March 16, 1990 for alleged unauthorized and fraudulent use of a Company credit card was arbitrary, capricious, without just and sufficient cause and excessive [System File 90-52/12(90-380) SSY].
- (2) The Claimant shall immediately be returned to service with seniority and all other rights unimpaired and he shall be compensated for all wage and fringe benefit loss suffered as a result of the Carrier's actions."

FINDINGS:

The Third 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.

Claimant was employed as an Extra Gang Foreman at Holly Hill, South Carolina, and had ten years of seniority with the Carrier. His service and discipline record was clear except for one letter of reprimand which was issued in 1986.

On October 11, 1988, Carrier determined that between October 4 and 10, 1988, Claimant had been involved in six separate instances of credit card fraud wherein he used his Carrier issued credit card to obtain cash and other non job-related items for his own use. When confronted by the Roadmaster with this information, Claimant immediately and readily admitted that he had, in fact, used the Carrier issued credit card for the items in question. Claimant acknowledged that he was at that time drug dependent and was using the money obtained to support his dependency. The total dollar amount of this credit card misuse was \$776.00.

Following the confrontation by the Roadmaster, Claimant, on October 12, 1988, made restitution of the full money amount to the Carrier and immediately established contact with Carrier's Employee Assistance Program Counselor and was immediately enrolled in the Carrier sponsored drug and alcohol treatment program.

Subsequently, on October 14, 1988, Carrier issued a Notice of Investigation on the charge of fraudulent use of a Company credit card. The Hearing on the charges was postponed by agreement of the parties until March 2, 1990. At that time, Claimant was present, represented and testified on his own behalf. Following the completion of the Hearing, Claimant was notified by letter dated March 15, 1990, that he was dismissed from Carrier's service. The dismissal was appealed on Claimant's behalf through the normal on-property grievance procedures and, failing to reach a satisfactory resolution thereon, has come to this Board for final and binding adjudication.

There is no question from this record that Claimant was, in fact, guilty as charged. He admitted that he had improperly used the Company credit card. The Organization in its handling of this case both on the property and before this Board has not contested the guilt or seriousness of the charge. Rather the thrust of the appeal has been that permanent dismissal in this case is an excessive administration of discipline. Carrier, of course, has argued that dishonesty deserves dismissal and that subsequent restitution is not mitigation of the proven, admitted offense. Both parties have presented Awards of this and other Boards which support their respective positions.

Over the years, much has been written about the purpose of discipline and the authority of Boards such as this to modify discipline. It has been properly held that Section 3 Railway Labor Act Boards may not substitute their judgment for that of the Carrier in the assessment of discipline. And yet, there exists a plethora of Awards in which such Boards have modified discipline where, in the judgment of the Board, the discipline as assessed by the Carrier exceeded the generally accepted purpose of discipline

which is "to rehabilitate, correct and guide employees in the proper performance of their assigned tasks" (Third Division Award 19037).

Carrier correctly points out that dishonesty in any form is a dismissible offense and this Board does not challenge or otherwise question that position. However, Carrier also sponsors and advocates a program which is intended to rehabilitate drug and alcohol offenders presumably to restore such offenders to useful railroad service. In this case, Claimant acknowledged his drug dependency and accepted and used the Carrier sponsored rehabilitation program. Carrier permitted him to do this BEFORE it held its Hearing on the charges of dishonesty. This Board is forced to ask to what purpose was the seventeen month rehabilitation delay before the Hearing if not to determine whether Claimant was worthy of and/or willing to take the action necessary to demonstrate that he was, in fact, interested in continuing a career in the railroad industry.

The Hearing transcript contains acknowledgements by Carrier's Roadmaster that Claimant had, in his opinion, gotten his act together and tacitly implied that, in his opinion, Claimant could return to productive railroad service. The Claimant himself in the Hearing record acknowledged his responsibility relative to his previous mis-use of his time and talents. He took full advantage of the Carrier sponsored rehabilitation program. He stayed with the program and apparently successfully completed it. He displayed a sense of remorse and contrition for his past actions and indicated an apparent sincere desire to have one more chance.

On the basis of the fact situation as is found in this particular case, this Board does not believe that any permanent injury will be done to the proper and generally accepted tenet that dishonesty deserves dismissal if Claimant is permitted to demonstrate the Carrier's sponsored Employee Assistance Program does, in fact, work to rehabilitate and correct undesirable behavior by employees and thereby preserve Carrier's investment in the rehabilitation program as well as in the training which has gone into the individual employee. It is, therefore, the decision of this Board that permanent dismissal of this Claimant was excessive and that he should be reinstated to service with seniority unimpaired, but without any compensation for the period of time during which he has been out of service. That period of time will stand as discipline for the admitted violation.

This reinstatement is, of course, subject to Claimant's ability to successfully pass whatever examinations, both physical and job related, are normally and customarily required by the Carrier. In addition, Claimant must understand that this is his

Form 1
Page 4

Award No. 29776
Docket No. MW-29685
93-3-91-3-34

final opportunity to demonstrate to the Carrier and to himself that he does, in fact, "love the railroad career" and that he "can be a benefit to the company" as he indicated in the Hearing record. Any further incidents of aberrant behavior in this regard will result in total and permanent dismissal. This decision does not, and is not intended to, create any precedent which would be applicable to any other case on this or any other property.

A W A R D

Claim sustained of in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 20th day of September 1993.