

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 29819
Docket No. CL-30310
93-3-92-3-78

The Third Division consisted of the regular members and in addition Referee Robert T. Simmelkjaer when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union)
(CSX Transportation, Inc. (former Chesapeake and Ohio Railway Company))

STATEMENT OF CLAIM: "Claim of the System Committee of the Organization (GL-10656) that:

- (A) The Carrier violated the terms of the Clerical Agreement when on December 19, 1990, Mr. Vincent Benz was wrongfully discharged from the service of the railroad as a result of an investigation held on December 6 and 10, 1990, in the 20th Floor Conference Room, 100 N. Charles Street, Baltimore, Maryland 21201.
- (B) That Clerk V. Benz be restored to service with all seniority rights and other rights unimpaired, and he shall be compensated at an amount equal to what he would have earned, including daily wages, subsequent increases, overtime, and holiday pay. Further, his record be expunged of all charges, that he be compensated for all amounts paid for medical expenses for himself and his dependents, and he be reimbursed for all premium payments he incurred to purchase substitute health and life insurance, due to the Carrier's administration of this unjustified discipline."

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 arrested, while off-duty, on November 23, 1990. He was subsequently charged with possession with intent to distribute cocaine, possession of drug paraphernalia, possession of Xanax and maintaining a common nuisance. Claimant was released from custody on bond. A newspaper article which appeared in the Baltimore Sun on November 24, 1990 identified the Claimant, described the circumstances of his arrest and the charges filed against him.

The Carrier informed the Claimant by letter dated November 29, 1990, that he was charged with "...conduct unbecoming an employee in that you were arrested on November 23, 1990, incarcerated and charged with..." [above cited]. An Investigative hearing was conducted on December 6 and December 10, 1990. Subsequent to the Investigation, Claimant was informed on December 19, 1990, that "the discipline assessed is suspension from service pending review of the final disposition of your pending criminal charges at which time final discipline will be rendered."

Prosecution of the criminal charges against Claimant were indefinitely postponed by the Maryland State's Attorney by notice dated May 2, 1991. On September 6, 1991, the District Court placed Claimant's case, with his consent, on the "STET" docket which meant that Claimant gave up his right to a speedy trial and the criminal charges could be opened, by the Court, at any time within one year.

Upon complete review of the evidence presented, the Board finds that the Carrier conducted a fair and impartial hearing as required under the Clerical Agreement. Claimant was notified of the charges, represented and allowed to present witnesses, cross-examine witnesses and make any statement relative to the charges. The hearing was completed on December 10, 1990, and a decision issued on December 19, 1990.

The Board further finds that the indefinite suspension of Claimant, commencing December 10, 1990, was improper and not in compliance with Rule 27. The Carrier's technical violation of the rule is mitigated, however, by its reasonable suspicion that Claimant was involved in substance abuse. In similar cases, the hearing has been adjourned, pending the outcome of the criminal trial.

Several additional procedural issues raised by the Organization have been considered, however, the Board concludes that the case is best adjudicated on its merits.

The Carrier's Investigation supports the charge of conduct unbecoming an employee. The Carrier's reliance on the police statements, including evidence that various illegal drugs and drug paraphernalia were confiscated from Claimant's residence supported the charge.

The record further indicates that Claimant was "operating" what could be described as a "crack house." During the police search of his residence, the Claimant's phone rang continuously, with those calling inquiring about drug purchases. Subsequent to one such conversation, a married couple arrived at Claimant's residence and purchased cocaine from one of the undercover agents. Claimant was suspended, pending the outcome of his criminal prosecution.

The Board further finds that the Carrier's offer to Claimant of reinstatement on July 5, 1991, "subject to entering and successfully completing the Carrier's drug/alcohol rehabilitation program" ended the period of suspension from December 10, 1990 through July 5, 1991. Claimant's rejection of the reinstatement offer resulted in his dismissal from service.

Claimant's arrest and the evidence adduced pursuant to the search of his residence provided substantial evidence of his drug abuse as well as provided grounds for the Carrier's concern that his continued presence might interfere with the orderly conduct of its business. The police report also indicated that Claimant had various drug paraphernalia for his own personal use with one home-made pipe having his name on it. In addition, there were partially smoked marijuana cigarettes and another device containing burned cocaine residue.

With respect to the dismissal of the criminal case against Claimant by virtue of nol prosse, Third Division Award 26780 is noteworthy.

"The fact that criminal charges brought against Claimant were ultimately terminated upon entry of nolle prosequi also cannot change the result. The standard of proof in criminal proceedings and proceedings before this Board are substantially different. Fourth Division Award 4412. Further, our examination of the record evidence satisfies us that the Carrier has met its burden in this proceeding irrespective of the outcome of the criminal proceeding, which we note, was merely a determination that Claimant would not be

criminally prosecuted further rather than a determination that Claimant was not guilty."

Given the clear and convincing evidence of Claimant's drug involvement coupled with his voluntary, but unsuccessful, treatment in an EAP from December 10, 1990 through January 9, 1991, paid for by the Carrier, it was not unreasonable for the Carrier to require further assurance that he no longer had a serious chemical dependency.

It is undisputed that the Carrier has the right to discipline employees for offenses which occur during an employee's off-duty time, particularly when such conduct can adversely affect the working climate for other employees. As stated in Second Division Award 8001:

"The question raised by Petitioner's defense has been decided by the Board in numerous cases. It is well established that a company may discipline an employee for off duty violations, especially those involving drugs and abuses of alcohol, and that such violations need not show damages...."

A similar view was expressed in Third Division Award 24728:

"The use of drugs, or the dealing in drugs, is considered a serious offense in the railroad industry, usually resulting in dismissal. See Second Division Awards 8205, 8237, Award 8 of Public Law Board No. 1324, and Third Division Awards 24356, 23264, 22530 and 22547.

See also Second Division Award 8001, and Third Division Awards 23410 and 24608."

With respect to the Carrier's offer of conditional reinstatement, prior Board decisions provide appropriate guidance such as First Division Award 15319:

"...we are bound by the principles long recognized on this Division that it is not the province of this Board to pass upon the credibility of witnesses in the first instance, to weigh the evidence or to undertake to resolve conflicts; that if there is substantial evidence to support the Carrier's determination, we are without power to disturb it by substituting our own

judgment; and that we cannot set aside the Carrier's findings unless there is no evidence whatsoever to support the charge or unless there is a clear showing of bad faith or a gross abuse of discretion."

In addition, the Board finds the foregoing record meets the standards of the substantial evidence rule which were succinctly stated in a First Division Award 12952 as follows:

"It must be true that the evidence at least must have sufficient substance to support a reasonable inference of fact as distinguished from a possibility or an unsupported probability."

The Board notes Claimant was suspended from the service on December 19, 1990, and on July 5, 1991, by agreement with the District Chairman and was granted the opportunity to return to service with the understanding that he enter and successfully complete Carrier's drug/alcohol rehabilitation program. Claimant rejected the opportunity of returning to service.

Based upon the record before us, we direct that Claimant again be offered reinstatement to the service, consistent with his seniority standing, with all contractual rights unimpaired, but without compensation for time lost as a result of his suspension. Claimant's reinstatement shall be contingent upon him entering and successfully completing Carrier's drug/alcohol rehabilitation program.

A W A R D

Claim sustained 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 29th day of September 1993.

**LABOR MEMBER'S CONCURRENCE AND DISSENT TO
THIRD DIVISION AWARD 29819, DOCKET CL-30310
(REFEREE R. T. SIMMELKJAER)**

The Case at bar requires Concurrence and Dissent. We are in agreement with the Neutral wherein he determined that the Claimant should be reinstated to service with seniority and all other rights unimpaired, but we separate from the Majority Opinion and vigorously Dissent to the determination that his return to service is without compensation for time lost and is contingent upon him entering and successfully completing Carrier's drug/alcohol rehabilitation program.

On page 2 of the Award the Referee correctly concluded:

"The Board further finds that the indefinite suspension of Claimant, commencing December 10, 1990, was improper and not in compliance with Rule 27."

Unfortunately that violation of Rule 27 is waived aside in the following sentence which stated:

"The Carrier's technical violation of the rule is mitigated, however, by its reasonable suspicion that claimant was involved in substance abuse."

Because of the aforementioned statement we find it necessary to vigorously Dissent to the Referee's cavalier disregard of Rule 27. Rule 27 (a) states.

"...The investigation and decision will be confined to the specific charge or charges, and the decision will be rendered within ten (10) days after completion of the investigation..." (Underlining our emphasis)

Rule 27 is explicit, it requires that all discipline will be rendered within ten days after the completion of the Investigation. If is not open for interpretation with respect to the Carrier's contractual obligation to render a decision within the prescribed time limits. Nothing in the Rule allows or even considers a partial decision, to be increased, added to, or made final at some undetermined future date. Any additional or final discipline assessed later than ten days following the hearing is untimely.

In addition Rule 27 does not contemplate a suspension of undeterminate length, particularly where, as here, that suspension became tantamount to permanent dismissal. It is of note that even contrary to what the Carrier stated in their suspension letter of December 19, 1990, they never issued another final letter of discipline. Instead they chose to let their undeterminate suspension stand thus leaving the Claimant in limbo. No reasonable Board of Arbitration or Court of Law should ever endorse any undeterminate suspension as being legitimate. Unfortunately this decision incorrectly does such by pleading mitigating

circumstances. Mitigation is not a defense or proper reason to disregard agreed to time limit provisions which are mandatory. The bottom line is the Claimant was dismissed under the pretense of a suspension. Once the Neutral determined that Rule 27 was violated the case should have been settled without even addressing the merits. Claimant should have been reinstated with full backpay and all rights unimpaired so as to protect the integrity of the Agreement.

To further compound the error of this Award on page 2 in the fourth paragraph the Referee set forth a discussion of the "STET" docket as it relates to this dispute, but fails to go far enough to explain that the Claimant was not found guilty of any charges. In fact in a letter of June 5, 1991, (Employee Exhibit "B" page 2) the Assistant State's Attorney wrote the following:

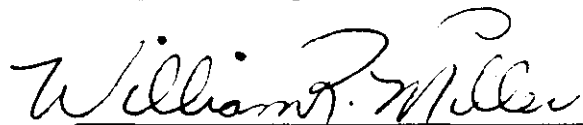
"Please be advised that Mr. Benz has not been convicted of any crime related to these charges."

Last, but not least the Referee's determination to force the Claimant through the Carrier's alcohol/drug rehabilitation program is inappropriate and illogical. The Carrier never offered any proof in this dispute that the Claimant was suspected or accused of having a substance abuse problem nor was he charged with such.

The only thing the Referee correctly concluded was that the Claimant should be reinstated to service with seniority and all other rights unimpaired, but in every other aspect of the dispute he has erred.

For the foregoing reasons Award 29819 requires Concurrence and Dissent.

Respectfully submitted,


William R. Miller

Date: September 29, 1993

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S CONCURRENCE & DISSENT
TO
AWARD 29819, DOCKET CL-30310
(Referee Simmelkjaer)

The Labor Member complains that Rule 27 does not contemplate indefinite suspension, which may or may not be true. However, in the instant docket the record before the Board reveals that the suspension was of a determined length as set forth in Carrier's letter of December 19, 1990, which reads in pertinent part:

"The discipline assessed is suspension from service pending review of the final disposition of your pending criminal charges at which time final discipline will be rendered."

The record before the Board in this docket also reveals that the pending criminal charges against the claimants were placed on the "STET docket" May 2, 1991, by the Circuit Court for Anne Arundel County, Maryland. This action had the effect of placing claimant's criminal charges in deep freeze, but could be removed and pursued by the state at any time within one year of May 2, 1991.

The record further discloses that the Organization's General Chairman notified the Carrier by letter dated May 15, 1991, that:

"As of May 2, 1991 final disposition of these charges was decided."

and requested conference on its pending claim.

Following discussion of the claim in conference, Carrier reviewed the disposition of criminal charges and on July 5, 1991, terminated the suspension of claimant. On the same day, by agreement with the Organization's District Chairman, claimant was afforded the opportunity to return to service subject to "...entering and successfully completing the carrier's drug/alcohol rehabilitation program." Claimant rejected the offer, and thus continued to remain out of service.

Labor's allegation that claimant was dismissed under the pretense of a suspension is not supported by the record. All during his suspension, claimant held an employment relationship with the Carrier and continued to do so throughout the handling of the dispute before this Board.

Based upon the indisputable record, it is obvious that Rule 27 was not violated by the Carrier and claimant was not damaged.

Labor's assertion that forcing claimant to enter Carrier's alcohol/drug rehabilitation program was inappropriate and illogical as Carrier never offered any evidence of claimant having a substance abuse problem ignores the finding by the Majority that:

"Given the clear and convincing evidence of Claimant's drug involvement coupled with his voluntary, but unsuccessful, treatment in an EAP from December 10, 1990 through January 9, 1991, paid for by the Carrier, it was not unreasonable for the Carrier to require further assurance that he no longer had a serious chemical dependency."

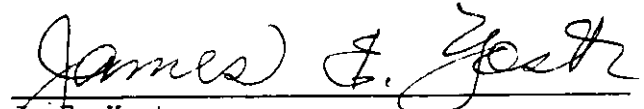
In conclusion we point out that Labor has misconstrued what the Board said in the concluding paragraph of Award 29819 when it states:


"The only thing the Referee correctly concluded was that the Claimant should be reinstated to service with seniority and all other rights unimpaired..."


as evidenced by the clear and specific language in the last paragraph of the Award which for ready reference reads:

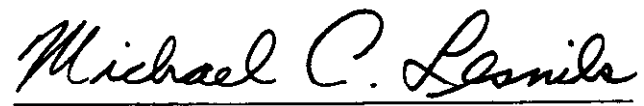
"Based upon the record before us, we direct that Claimant again be offered reinstatement to the service, consistent with his seniority standing, with all contractual rights unimpaired, but without compensation for time lost as a result of his suspension."

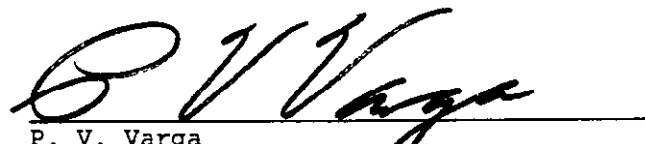
The findings of the Majority in Award 29819 are built on a sound foundation, and no dissent can undermine it.


J. E. Yost


M. W. Fingerhut


R. L. Hicks


M. C. Lesnik


P. V. Varga