

**The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.**

**STATEMENT OF CLAIM:**

**Claim on behalf of M. R. Pauley for reinstatement to service with all rights and benefits unimpaired and compensation for all lost time, account Carrier violated the current Signalmen's Agreement, particularly Rule 47, when it dismissed the Claimant from service, without meeting the burden of proving its charges in connection with an investigation held on October 20, 1998 and without a fair and impartial investigation. Carrier File 15(98-352). BRS File Case No. 11231-SCL."**

**Parties to said dispute were given due notice of hearing thereon.**

At the time of the events leading to this matter, the Claimant had 18 years of service with the Carrier and had established seniority as a Signaller. According to the on-property record, the Claimant was involved in an off-property incident on July 7, 1998. Pursuant to that incident, and as a result of an Investigation held on August 7, 1998, at which the Claimant was charged with conduct unbecoming an employee and absence from work without proper authority as a result of his incarceration stemming from his arrest on charges of domestic violence, General Manager D. G. Orr dismissed the Claimant effective August 17, 1998.

On August 17, 1998, the Director of Labor Relations conditionally reinstated the Claimant pursuant to the terms of a Leniency Reinstatement Agreement, which provided, in relevant part, that:

“For a period of one (1) year from your reinstatement, you will be on probation, during which time you will be required to meet with an EAP Manager at least once a quarter. You will also be required to work under a Signal Foreman’s supervision for (1) year. During this time if you violate any rules pertaining to the conduct unbecoming an employee, you will revert to dismissal status.” (Emphasis added)

While there is no evidence that the Claimant signed the Leniency Reinstatement Agreement (the copy of that document which is in the record is not signed) the Board, nevertheless, concludes that inasmuch as the Claimant returned to service on or about August 18, 1998, all parties, including the Organization, have recognized by their subsequent actions that the Leniency Reinstatement Agreement was valid and binding.

By letter dated October 2, 1998, General Supervisor Signal Maintenance M. C. Chorpening directed the Claimant to report for a formal Investigation to be held on October 8, 1998. He was charged with insubordination, conduct unbecoming an employee of CSXT, and engaging in uncivil and threatening conduct. The Carrier asserted that the Claimant failed to comply with the terms and conditions of his August 17, 1998 Leniency Reinstatement Agreement, by (1) refusing to bid to a bulletined position working under supervision, (2) failing to satisfactorily participate in the Carrier’s Employee Assistance Program and (3) threatening to bodily harm Supervisor G. B. Griffin on August 8, 9, and 10, 1998.

In letters dated October 6 and 16, 1998 the Carrier and the Organization mutually agreed to postpone the Investigation until October 20, 1998. On November 3, 1998, General Manager D. G. Orr notified the Claimant that as a result of the Investigation he had been

found guilty of the charges in violation of Operating Rule 501 and was returned to dismissed status.

In a letter dated November 30, 1998 General Chairman J. S. Strickland appealed the General Manager's decision to Director Employee Relations J. H. Wilson based on the contention the Carrier not only failed to prove its charges against the Claimant, but also showed little interest in finding the true facts when it did not call all witnesses to testify at the Investigation. The Organization requested that the Claimant be reinstated to service. The Director Employee Relations denied the appeal on December 10, 1998.

The Organization claims that (1) the discipline was unjust, (2) the Carrier failed to provide the Claimant with a fair and impartial Investigation, (3) the Carrier failed to prove any of its charges levied against the Claimant and (4) the Claimant complied with the Leniency Reinstatement Agreement and did not violate any Rules.

Conversely, the Carrier argues that the Claimant violated Rule 501 and failed to comply with the requirements of his Leniency Reinstatement Agreement. According to the Carrier, not only did the Claimant fail to meet with his EAP counselor, he also failed to bid on a position requiring direct supervision and threatened another employee on three occasions.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accordance with what we might or might not have done had it been ours to determine, but to pass upon the question whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325, as well as Third Division Award 21299.)

However, this case presents a unique set of circumstances. As noted above, the on-property record clearly reflects that the Claimant returned to service pursuant to a Leniency Reinstatement Agreement. A significant line of precedent emanating from this Board supports the proposition that a probationary employee who violates the terms of his or her Leniency Reinstatement Agreement is subject to reverting to a dismissed status without the benefit of a formal Investigation. We support that line of precedent. Notwithstanding the foregoing, for reasons not set forth in this record, the Carrier opted to direct the Claimant to report for a formal Investigation. The problem with the case

record before the Board is the unexplained absence of the Investigation transcript. Pursuant to the Board's Uniform Rules of Procedure the Carrier is charged with the responsibility of providing the disciplinary transcript. Its failure to do so under these unique circumstances is fatal. Accordingly, we are compelled to overturn the discipline emanating from the Claimant's October 20, 1998 ill-fated Investigation.

Due solely to the Carrier's procedural error the Claimant has another "last chance" opportunity to prove himself a worthwhile employee to the Carrier. We note that at the time of his dismissal, the Claimant still had nine and one-half months remaining to serve under the terms of his August 17, 1998 Leniency Reinstatement Agreement. Because those nine and one-half months have yet to be fulfilled, the Claimant shall be reinstated with seniority unimpaired, except as noted below, with backpay for the time withheld from service subject, of course, to the deduction of outside earnings, provided he:

- (1) passes the usual and customary return-to-work physical examination,
- (2) fully participates in the Carrier's Employee Assistance Program for a period of nine and one-half months commencing with the date he returns to work, with such program including, as a minimum, anger and stress management counseling with a Clinical Psychologist and
- (3) exercises his seniority to a position requiring direct supervision by a Signal Foreman for the nine and one-half month period.

During the nine and one-half month EAP period the Claimant will be considered a probationary employee and will be subject to random drug and alcohol testing at times chosen by the Carrier. If the Claimant fails to comply with any of the terms and conditions set forth above and/or refuses to take drug or alcohol tests as requested, or tests positive on such tests, such will be grounds for automatic permanent dismissal without necessity of a formal Investigation.

#### AWARD

Claim sustained in accordance with the Findings.

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**Award No. 35499**  
**Docket No. SG-36045**  
**01-3-00-3-85**

**ORDER**

**This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.**

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of Third Division**

**Dated at Chicago, Illinois, this 21st day of June, 2001.**

Labor Member's Concurring and Dissenting Opinion  
Third Division Award 35499  
Docket No. SG – 36045

At the onset the only acceptable portion of this Third Division Award is the bottom line. The decision that the Claim should be sustained is not only correct but follows a long line of decisions by this Board. As noted in Third Division Award 23015, Referee, Rodney E. Dennis stated as follows:

**“Since, in such cases, Carrier bears the burden of proof and since the facts needed to carry that burden are elicited at a hearing, it is important that this board have the transcript of the hearing before it in order to make a proper determination in the case.**

**Absent that information, this board has no recourse but to uphold the claim on the basis that carrier has not carried its burden of proof, based on the record it submitted for this board's consideration.”**

It must be noted that in this instant case, the Carrier totally relied on a formal investigation wherein, they found that: “Testimony introduced in the investigation clearly proves that you were insubordinate in that you failed to comply with your leniency re-instatement because you did not bid on any bulletined position working under supervision and that your threats to do bodily harm to a fellow employee was conduct unbecoming an employee....” The Carrier argued before the Board that Claimant's leniency re-instatement was self-executing and Carrier need not have held an Investigation. While this argument may have some soundness, Carrier forfeited this option and totally relied on the formal investigation as the reason for dismissing the Claimant.

The Carrier is well aware that it has the responsibility of providing the Board a copy of the transcript of the Investigation. In this instant case, the Carrier failed to do so. At first blush one could assume that Carrier was justified in dismissing the Claimant. However, there is another side to this story. The Organization vehemently challenged Carrier's determination of guilt, wherein, it was argued that:

“...The facts of this investigation do not prove that Mr. Pauley was insubordinate or that he did not satisfactorily participate in the carrier's Employee Assistance Program. From the evidence presented in this investigation, it is impossible to say that Mr. Pauley did not carry out the instructions of this EAP councilor (sic). ...Therefore any charge of insubordination could not be sustained by the evidence as presented in this investigation.

Further, Mr. Pauley was not insubordinate when he did not bid on any bulletined positions in such a short period of time. He was not instructed to make a bid on the bulletin that was currently open, although he did try to gain knowledge as to

where the open positions would be and was unable to obtain that information through the normal channels available to him. ...The letter of re-instatement does not (sic) say when Mr. Pauley had to make a bid or that he had to make a bid at all."

"As for the charges of threatening bodily harm to a fellow employee, the Carrier has entered what is no more than a 'Soap opera' tape."

"The Carrier has shown little interest in finding the true facts in this matter by not requiring the so called 'witness' to testify at the investigation. Mr. Pauley's rights were flagrantly violated by the carrier. Mr. Pauley was not able to cross examine the 'witness', nor was anyone other than Mr. Richardson who conducted the interview on tape. It cannot be determined through this so called 'testimony' if it is in fact the truth or even faintly associated with the truth. Mr. Childers refusal to testify should be reason enough to drop the charge of 'conduct unbecoming an employee' and return Mr. Pauley to work."

It doesn't take a genius to conclude that the record is rife with conflicting contentions regarding innocence or guilt of the Claimant. The Board acting as an appellate body, can only make that determination by reviewing the transcript of the Investigation. Absent that information, the Board was duty bound to uphold the claim on the basis that Carrier failed to carry its burden of proof, based on the record it submitted for this Board's consideration.

One could wonder why the Organization is lamenting over a case that was sustained by the Board – after all the Claimant was returned to work with full back pay. The problem with this Award is that the Board went beyond its legal and moral responsibilities and interjected its own brand of justice by determining that even though the Carrier failed in its burden of proof the Claimant was guilty.

As evidence, the Board ascended into an arena that goes beyond its function to act as an appellate Board. Not only did it determine that the Claimant was actually guilty, irrespective of the evidence before it, it fashioned its own brand of justice by expanding upon the Leniency Reinstatement Agreement. Such action is not only an injustice to the Claimant, it causes grievous injury to the integrity of the Board.

Based on the foregoing, as Labor Member of this Board I am compelled to concur with the remedy, but must also strenuously object to the Board's decision to address the merits of this dispute. Based on the handling of this dispute on the property, the only conclusion that can be drawn is that the Claimant was innocent of the charges against him.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "C.A. McGraw".

C.A. McGraw, Labor Member Third Division