Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35613
Docket No. SG-35576
01-3-99-3-497

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern Railroad (KCS):

Claim on behalf of D. A. Newburn, for payment of all time lost and benefits and restoration of his seniority, as a result of his dismissal and for any reference to this matter to be removed from his record, account Carrier violated the current Signalmen's Agreement, particularly the Leniency Reinstatement Agreement dated June 18, 1997, and Rule 48, when it recalled the Claimant from his furlough and then dismissed him for failure to comply with the terms of his Leniency Reinstatement Agreement without meeting the burden of proving its charges. Carrier also violated Rule 48 when it failed to provide notice of the disallowance of the Organization's appeal within the time limits. Carrier's File No. K0699-5234. General Chairman's File No. 9811148. BRS File Case No. 11035-KCS."

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 employee 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 were given due notice of hearing thereon.

The Claimant was dismissed on April 14, 1998 for non-compliance with a Leniency Reinstatement Agreement. It is undisputed that the Claimant stopped attending monthly meetings with his Employee Assistance Program counselor after having been furloughed in November 1997. A program representative notified the Carrier of this fact by letter dated April 9, 1998. The letter reported that the counselor had not seen the Claimant since October 28, 1997. The Carrier, in turn, notified the Claimant on April 14, 1998 of the termination of his employment. At the time, the Claimant was in the process of returning to work via recall to service.

Although the parties have raised a number of contentions, their respective positions can be distilled to the following: The Organization and the Claimant maintain that the Leniency Reinstatement Agreement obligations were suspended, or tolled, during the period of the Claimant's furlough, a period of approximately five months. The Organization also maintains that the Carrier was responsible for instructing the Claimant if the obligations were to continue during furlough.

The Carrier, to the contrary, maintains that the Leniency Reinstatement Agreement was self-explanatory and did continue as long as the employer-employee relationship existed or the expiration of 12 months from August 19, 1997, whichever was the shorter duration. In addition, the Carrier maintains that the Claimant shouldered the sole responsibility for compliance. When the Claimant failed to comply, the termination of his employment was self-executing. Finally, the Leniency Reinstatement Agreement rendered the instant purported claim invalid ab initio.

This dispute also raises procedural cross-contentions that each party has defaulted for time limit violations.

The Claimant was previously dismissed on February 27, 1996 for violation of the Carrier's drug and alcohol Rule. By letter dated June 18, 1997, the Claimant was afforded the conditional opportunity to return to service on a leniency basis. The letter was signed by the Claimant and his General Chairman on July 2, 1997 and is referred to as the Leniency Reinstatement Agreement ("LRA"). The LRA required the Claimant

to enter the Employee Assistance Program promptly. It went on to provide, in paragraph 2, that the Claimant had to " . . . fully comply with the E.A.P. Counselor's recommendations for treatment and/or aftercare. . . ." The paragraph also went on to incorporate the counselor's recommendations into the LRA " . . . as though written herein."

In paragraph 3, the Claimant explicitly assumed the responsibility for furnishing the Carrier with documentation verifying his compliance with the counselor's recommendations.

Among other things, the LRA provided for random testing for five years and work attendance standards for two years. It also contained the following language:

* * *

> "In connection with the aforementioned conditions of reinstatement, it is further understood and agreed that should Mr. Newburn fail to comply with any part of such conditions during the period specified, such failure on his part constitutes a waiver of his rights to a formal investigation, as required by the current labor agreement."

* * *

> "Other than specifically stated above, it is further agreed that neither the Organization, nor Mr. Newburn, will progress any claims, nor attempt to reinstate claims previously waived, as the result of the Carrier's exercise of any of its rights contained in this Agreement."

* * *

The Claimant entered into a Return To Work Agreement ("RTWA") on August 19, 1997 with the E.A.P. counselor. Pertinent provisions of this agreement are as follows:

* * *

"1. I, David Newburn, agree to comply with all aspects of my Employee Assistance Program (EAP) treatment plan established by the EAP. This agreement will be in effect for the next 12 months.

* * *

or AA (amended by C.M.)

3. I agree to attend NA meetings once per week for the next 12 months. I will provide proof of NA attendance to my EAP counselor each month.

4. I agree to attend follow-up appointments with my EAP counselor. I will meet with my counselor for ½ hour minimum once per month for the next 12 months.

* * *

6. I agree that this agreement will be in effect for 12 months from today's date or the duration of my employment, whichever is earlier."

* * *

The background underlying the procedural cross-contentions begins with the claim submitted by letter dated June 4, 1998. The letter clearly shows that it was sent via certified mail with a return receipt requested. The Carrier denied the claim by letter dated July 28, 1998. On its face, the Carrier's denial letter also shows that it was similarly sent via certified mail with a return receipt requested. The Organization appealed by letter dated August 27, 1998. Unlike the previous correspondence, however, his letter shows no indication that certified mail was used. Indeed, although the parties' Submissions reflect several exchanges of correspondence beginning with the August 27 appeal, none of it reflects the use of certified mail.

According to the Organization, when no response was received to its August 27 appeal by December, it wrote the Carrier on December 22, 1998 that the claim must be allowed as presented per Rule 48 due to the lack of a timely Carrier response. Still

awaiting a response, the Organization wrote the Carrier again for the same purpose by letter dated February 8, 1999.

According to the Carrier, it maintains that it did timely respond to the August 27 appeal by letter dated September 25, 1998. A copy of this letter was sent to the Organization under cover letter dated February 23, 1999. The Carrier's cover letter went on to contend that it was the Organization that was in time limits default for failing to appeal until its December 22 letter. Thus both parties maintain that the other is in default.

After careful review, we find we must dismiss both procedural cross-contentions due to the presence of an irreconcilable conflict in material fact. On this record, both parties have offered evidence of timely compliance with the procedural requirements of Rule 48. Nothing in Rule 48 explicitly requires the use of certified mail evidence to demonstrate proof of mailing and receipt. Since the Organization departed from the use of certified mail with return receipts beginning with its August 27, 1998 appeal, it invited the Carrier to use the same channel of communication, i.e., regular mail. Accordingly, the Carrier is not obligated, on this record, to furnish the kind of proof of mailing and receipt associated with the use of certified mail. Under the circumstances, the evidence of record is sufficient to set up a conflict of facts that the Board is unable to resolve.

Turning to the merits, we must reject the position of the Organization and the Claimant. The language of the LRA and the RTWA are rather clear and unambiguous when they repeatedly state that the Claimant's obligations extend for the " . . . next 12 months." First, they do not state . . . next 12 months of service. Moreover, nowhere in the two documents is there any language whatsoever that explicitly excludes periods of furlough from the duration. The final consideration is the agreement by which the Claimant assumed responsibility for demonstrating compliance. If he had any questions about the proper means of compliance, it was his responsibility to seek clarification.

For the same reason, we do not find the Carrier's approximately five-month failure to detect the Claimant's non-compliance to be fatal to its position. The Claimant assumed the full responsibility for demonstrating compliance. Moreover, the terms of the LRA and RTWA are self executing. Therefore, when the Claimant missed his first meeting with his EAP counselor in November 1997 without an acceptable excuse, he became impermissibly non-complaint and triggered the termination of employment

features of the agreements. This record does not show the Claimant to have been prejudiced in any way by the Carrier's failure to detect the non-compliance.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of July, 2001.