

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36729
Docket No. CL-36665
03-3-01-3-254**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(Indiana Harbor Belt Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood (GL-12735)
that:

- (a) Carrier acted in an arbitrary and capricious manner when it unjustly assessed discipline of dismissal on Mr. Robert L. Holiday, Jr. on June 13, 2000.
- (b) Claimant's record be cleared of the charges brought against him on May 22, 2000.
- (c) Claimant be restored to service with seniority and all other rights unimpaired and he be compensated for wage loss sustained in accordance with the provisions of Rule 36(e).”

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 and another employee engaged in an altercation on the property on May 22, 2000. Both were removed from service, and an Investigation was conducted on May 31, 2000 on charges of conduct unbecoming an employee and being argumentative and disruptive. The Claimant was found guilty and dismissed from service on June 13, 2000. The dismissal was appealed as being excessive, and, as a result of the Claimant's entry into the Employee Assistance Program and the processing of the instant claim, the Carrier agreed to enter into a Reinstatement Agreement with specified conditions. Such Agreement was dated December 5, 2000, and was signed by the Claimant and his Organization representative. Its terms included a requirement that the Claimant undergo a reinstatement physical on December 6, 2000 and complete and pass a medical examination including a drug and alcohol test, and that the Claimant agrees to comply with all Rules, policies and procedures of the Carrier. The Reinstatement Agreement contained the following language:

"Mr. Holiday's failure to comply with the above conditions shall render this letter of understanding null and void, of no application and Mr. Holiday will revert to a dismissed status."

By report dated December 12, 2000, the Carrier was notified that the Claimant tested positive for both cocaine metabolites and phencyclidine (PCP) in his urinalysis. On the same date, it notified the Organization that, because the Claimant had failed to satisfactorily complete the two noted conditions of the Reinstatement Agreement, he would remain in dismissed status. The case was appealed to the Board after such action.

The Carrier argues that there is substantial evidence in the Investigation to prove the charges against the Claimant and to show that he became the aggressor of the confrontation after reporting the matter to the Trainmaster. It relies upon Second Division Award 8349 as support for the proposition that altercations are held by the Board to be sufficient evidence of conduct unbecoming an employee.

The Carrier states that the penalty was neither excessive nor arbitrary under the circumstances of the case because the Claimant could have been charged with assault and arrested for his conduct. The Carrier contends that it voluntarily negotiated the terms of an acceptable reinstatement to allow the Claimant another chance to comport with its Rules and regulations, that such Agreement was signed and confirmed by both the Organization and the Claimant, and that, under its terms, the Claimant's failure to comply with the listed conditions revoked the reinstatement offer and properly reverted him to dismissed status. The Carrier notes that the Claimant's positive drug test violated two of the specific conditions of his Reinstatement Agreement, which should be upheld by the Board without reference to the original reason for his dismissal, citing Public Law Board No. 4269, Award 411; Public Law Board No. 6123, Award 4; Third Division Award 32340 and First Division Award 25268.

The Organization contends that the original dismissal was excessive and that such severe penalty was arbitrary and capricious. It asserts that, the Claimant having reverted to his dismissed status due to his failure to comply with the terms of the Reinstatement Agreement, the Carrier still bears the burden of proving the charges for which he was removed in June 2000.

This claim raises the issue of whether the Carrier properly relied upon the terms of a Reinstatement Agreement to revoke its offer to reinstate the Claimant to service after he had been dismissed on June 13, 2000 as a result of an Investigation conducted on May 31, 2000. Upon a careful review of the record, the Board initially notes that it consistently upholds voluntary Agreements of this type where the conditions imposed appear to be reasonable and were understood and agreed to by the employee, and has, in fact, imposed similar conditions in a reinstatement order. See, e.g. Third Division Award 32340, First Division Award 25268; Public Law Board No. 6123, Award 4 and Public Law Board No. 4269, Award 411.

Because the instant Reinstatement Agreement became null and void by its terms upon the Claimant's failure to meet its stated conditions, but did not specifically waive the Claimant's entitlement to appeal his original dismissal, we also address the merits of that action. A review of the underlying Investigation transcript provides substantial evidence that the Claimant was guilty of the charges for which he was initially dismissed. We can find no basis for determining that the

Carrier was arbitrary and capricious in the imposition of the penalty of dismissal for this serious offense, or that it abused its discretion, and we will uphold its action herein. See Third Division Award 31625 and Second Division Award 12690.

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 17th day of September 2003.