

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Port Terminal Railroad Association

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

(1) The dismissal of C. D. Henten for alleged failure to comply with Probationary Reinstatement Agreement dated May 5, 1986, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.

(2) As a consequence of the violation referred to within Part (1) hereof, the Claimant shall be reinstated with seniority and all other rights unimpaired and he shall be paid for all wage loss suffered, including holidays and any overtime which would have accrued to him had he not been dismissed."

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 employees 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.

The Claimant, a Laborer with nine years of service, was dismissed for violating Rule G. As a result of an agreement between the Claimant and the Carrier, he was reinstated to service in accordance with a Probationary Reinstatement Agreement executed May 5, 1986. To effectuate the program, the Claimant and the Carrier entered into an agreement which required, in part, that he comply for twelve months with the terms of a Rehabilitation/Education Program prescribed by the EAP Counselor. The agreement included a provision that, "[i]f, at any time during the twelve (12) month period ... the employee fails to follow the course of treatment established by the counselor the employee shall be removed from the Program. If the employee has been returned to service, he ... shall, without the necessity of further disciplinary proceedings, be removed from service and revert to the status of a dismissed employee."

Claimant dropped out of the rehabilitation program after six months and, after being dismissed on November 13, 1986, was reinstated to service by letter dated May 11, 1987, subject to a new twelve-month probationary period.

Seven months after his second reinstatement, Claimant again dropped out of the rehabilitation program. The Carrier's efforts to ascertain his status were unsuccessful; and, on March 16, 1988, the Carrier again dismissed him from service under the terms of the Probationary Reinstatement Agreement.

The Organization protested Claimant's dismissal. At the Investigation Claimant testified that he had dropped out of the program because car trouble rendered him unable to attend the meetings. No documentation or other supporting evidence was submitted. He stated that he was unable to use public transportation because he was unfamiliar with the routes. Claimant was able, during the period, to obtain transportation to and from work.

The Carrier argues that the Claimant failed to comply with his clear obligations under the Bypass and Companion Agreement, even after having been given a second opportunity to do so. It asserts that he simply lacked commitment to the program, since he did find transportation to protect his assignment during the period. The Carrier urges that he must suffer the consequences of non-compliance.

The Organization argues that Claimant did not actually receive the letter notifying him that he would be dismissed if he failed to report within ten days until after expiration of that period. It argues that Claimant did not, in fact, violate the May 1986 Agreement, since it asserts that Claimant's obligation to participate in the program expired twelve months after the initial probationary period established pursuant to the May 5, 1986 Agreement. It asserts that there was no mutual assent to the extension of time for participation in the rehabilitation program. The Organization asserts that Claimant did not receive a fair and impartial Hearing, since he was not charged with violating the rules he was found to have violated and since the deciding official was also the first level of appeal. The Organization argues, finally, that the penalty of dismissal was excessive.

The Board is not persuaded by the Organization's argument that Claimant's obligation to participate in the program expired at the end of the twelve month period following the May 5, 1986 Reinstatement Agreement. When Claimant dropped out of the program the first time, he was dismissed and, when reinstated, was subject to the condition that he return to service on a probationary basis for a period of twelve months and work, during that period, with the EAP and comply with the terms of the Rehabilitation Agreement. The Organization did not object to the new twelve month period; but, instead, accepted Claimant's reinstatement. When Claimant accepted reinstatement under the conditions offered by the Carrier, he became bound to comply with those conditions. Indeed, he acknowledged at the investigatory hearing his obligation to remain in the program twelve months following his reinstatement.

Completion of rehabilitation and aftercare serves important medical, as well as policy functions for employees who have violated Rule G. Those functions are not served if the employee treats the program casually and drops out and back in. The Carrier is well within its rights to condition reinstatement on completion of a full, uninterrupted twelve months in the Program.

The Board is not persuaded by the Organization's procedural arguments. Even if it is assumed that the Carrier was obligated under the self-executing Probationary Reinstatement Agreement to undertake investigation prior to dismissing Claimant, it is clear that the Carrier made all reasonable efforts to notify Claimant of his proposed dismissal, while Claimant failed his obligation to keep the Carrier apprised of his status and whereabouts. Claimant testified that, even when he received the Carrier's letter, his only response was to call the Carrier twice; when he received no answer at the office, he made no further efforts to contact the Carrier until he received the letter notifying him that he had been dismissed.

Neither is the Board persuaded by the Organization's argument that the Claimant was not notified that he was charged with violating Rules 84, 85, and B. He was charged with failure to comply with the terms of the Reinstatement Agreement, with which he was obliged to comply. Those charges, if proven, clearly violate the cited rules.

The Board is directed to no requirement that the officer who conducts the hearing make the decision, nor that the appeal be to a different official, where, as here, the Carrier's staff is small and the deciding official is the Superintendent of Transportation. None of the procedural arguments raised warrant overturning the Carrier's action.

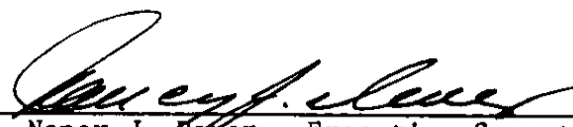
The Carrier reinstated the Claimant on two previous occasions and offered him the opportunity to demonstrate good cause for giving him yet a third opportunity. Claimant had been charged with violating Rule G, agreed to obtain help through the program, and agreed, further, that if he violated his course of treatment, he would be dismissed without the necessity of further disciplinary proceedings. He twice violated his obligation to remain in the program. The Board is similarly unpersuaded that the penalty was excessive.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of August 1990.