

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31142
Docket No. CL-31740
95-3-94-3-173

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

(Transportation Communications
(International Union
PARTIES TO DISPUTE: (
(MidSouth Rail Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Organization (GL-11025) that:

1. Carrier violated Rule 33, among others of the working Agreement, as well as the Prevention Program Companion Agreement between the Parties when it removed Clerk W. A. Mitchell, Sr., Ridgeland, Mississippi, from service of the Carrier on May 29, 1991, pending a formal investigation, and subsequently dismissed him from the service of the Carrier on May 20, 1993.
2. Carrier shall now be required to return W. A. Mitchell, Sr. to service, and to compensate W. A. Mitchell, Sr. for all time lost beginning May 29, 1991, when pulled from service pending a formal investigation, this would include all hospital and medical insurance cost, which Carrier suspended May 31, 1993, and his record be cleared of this investigation."

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 waived right of appearance at hearing thereon.

After Carrier discovered that the Police arrested and charged Claimant with a drug charge, pursuant to the Discipline Rule, he was suspended from Carrier's service on May 29, 1991.

On April 9, 1993, Claimant was served with a Notice of Investigation, which was timely held and then he was dismissed.

The Organization challenged the discipline on two grounds:

- 1 - the notice of charges was untimely and
- 2 - Carrier was in violation of the "PREVENTION PROGRAM COMPANION AGREEMENT and "THE RULLE-G-BYPASS AGREEMENT."

Regarding the notice, it was timely and the suspension proper under the terms of the language of the Rule.

Rule 33(a) allows suspension for ****vicious conduct****. Being a drug dealer is vicious conduct. Rule 33(b) of the Agreement allows Carrier to withhold setting the charges until after the criminal trial. Therefore, the suspension on May 29, 1991, was in accordance with the Rule and the serving of the notice almost two years later, after Claimant was sentenced, was, likewise, in accordance with the Rule.

Regarding the Rule G By Pass Agreement and the Prevention Program Companion Agreement, the Organization argued that by the very language of the Agreement, Claimant, when he was dismissed, should have been allowed to enter the program which, if successful, would have permitted his return to service.

The Carrier has argued that the Agreement is applicable only to users and is not applicable to those convicted of selling illegal drugs, such as Claimant.

It is to be noted that Claimant not only was dismissed because of violation of Rule G which prohibits "The possession, sale or use of any illegal drugs or controlled substances while on or off duty***" but also for violation of Rule H which reads in pertinent part:

****serious violations of the law, are prohibited.****"

Claimant was arrested, indicted and plead guilty to the possession of cocaine with the intent to sell. This is a serious violation of the law.

The Prevention Program Companion Agreement reads, in pertinent part, as follows:

"1. ***An employee who has been dismissed from service as a result of violation of Rule G may elect to participate in the Rule G Rehabilitation/Education Program*** provided:

(c) ***the incident giving us the dismissal did not involve significant rule violations other than Rule G.***"

As per the Agreement language and Claimant's discharge for violations of Rule G and Rule H, Carrier did not violate the Agreement when they refused Claimant the opportunity to invoke the protection of the Companion Agreement.

Regarding the two year suspension and then dismissal as being double jeopardy, the Board does not agree. Carrier has the Agreement right to suspend, under certain circumstances, and the Agreement right to wait for the sentencing before serving notice. Carrier does gamble on the conviction of Claimant and has a considerable liability built in even before the Investigation. Had the claim been sustained compensation could very well be ordered commencing from the first day of suspension until returned to service. Again, the suspension was in accordance with the Rules.

This Board will not interfere with the discipline assessed. Claimant's dismissal will stand.

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.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of September 1995.