

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32957
Docket No. MW-32613
98-3-95-3-1**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly offered and imposed a Companion Agreement on Messrs. E. L. Conley, Jr., E. A. Aguilar and J. D. Spencer in October, 1993 instead of complying with the applicable provisions of the August 5, 1983 Memorandum of Agreement (Carrier's File 940084 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimants' records shall be cleared of any reference to the Companion Agreement as well as any referral to dismissal."**

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 parties negotiated two alternatives to the traditional disciplinary approach to dealing with Rule G violations. The first, or "By-Pass" option, arose from an August 5, 1983 Memorandum of Agreement that established qualifying requirements and procedures to be followed. The second alternative, called the "Companion" option, emerged from an August 31, 1988 Agreement between the parties. The Companion Agreement also established qualifying criteria and procedures. In addition, the Companion Agreement created two specific forms to be used in connection with the option. The first document is a form letter to the affected employee to inform him or her of their qualified status as well as the program requirements. The second document is a short form whereby the affected employee makes an election to participate.

Although the two alternatives are similar in several ways, there is also a significant difference. Under the By-Pass option, the Rule G violation is not counted against the employee's work record and there is no discipline. Under the Companion approach, there is also no discipline, but the infraction becomes a matter of record.

It is undisputed that the three Claimants accepted the Companion option proffered by the Carrier, participated in and successfully completed the program, and were returned to service. Of course, they still have the infraction on their work records.

The claim here is that the Carrier failed to offer the By-Pass option and, instead, improperly offered the Companion option. The Organization contends the Claimants were eligible for the By-Pass option and were not offered it. Instead, the Carrier improperly offered Claimants only the Companion option.

Carrier raised several defenses to the claim. Among them were the contention that Claimants' situation did not fall within the spirit of the By-Pass option and that the employees knowingly and voluntarily elected the Companion option. Having fulfilled the Companion option requirements, the matter should be considered closed. In addition, Carrier contends the Organization failed to meet its burden of proof to show that Claimants should have been offered the By-Pass option. Finally, Carrier says the Companion option was the correct alternative to be offered the Claimants.

According to the Carrier, two fellow employees informed management about Claimants' apparent Rule G violation. The two employees were subject to discipline

themselves for other misconduct and apparently tried to shift some of the blame away by informing on the Claimants. In its correspondence on the property, Carrier characterized the two employees as "snitches" who were not motivated by a concern for the safety and well-being of the Claimants. Carrier, as a result, did not view the circumstances as a By-Pass situation. Instead, Carrier maintains the Companion option was the proper alternative.

The Organization, on the other hand, contends the By-Pass option is triggered whenever an apparent Rule G violation is reported by a co-employee. Moreover, the Organization asserts that the Companion option is only available to an employee after he or she has been dismissed. None of the three Claimants was ever dismissed. Indeed, none of the three even had an Investigation. The Organization cites Rule 12 for the requirement that no employee may be disciplined without an Investigation.

Regarding eligibility for participation, the By-Pass Memorandum of Agreement reads, in pertinent part, as follows:

- "1. If any Maintenance of Way employee believes that any other Maintenance of Way employee is in an apparent unsafe condition to work with, such employee may immediately contact a Carrier officer. If the Carrier Officer, upon investigation, determines there is an apparent Rule G violation, the employee shall be removed from service."

Upon review of the foregoing, we note that the eligibility paragraph of the By-Pass option does not explicitly require that the reporting employee have an altruistic motive for informing the Carrier officer. Instead, as the Organization contends, the language appears to broadly encompass any situation where the information comes to management from another BMW representative employee. This broad application is also consistent with the circumstances in Third Division Award 28845. In that case, which involved these same parties, two employees returned to their bunk car at 3:00 A.M. loud, boisterous and obviously drunk. Coworkers complained to their Supervisors the next morning when the two employees failed to show up for work. There was no unsafe condition in progress at the time and there was no altruistic motive underlying the report. Nonetheless, the Supervisor extended the By-Pass option to the affected employees.

The Companion option also has eligibility criteria. It reads, in pertinent part, as follows:

"Section 1. An employee who has been dismissed from service as a result of violating Rule 'G' may elect to participate in the Rule 'G' Rehabilitation/Education Program (Rule 'G' R/E Program or Program), provided: * * *" (Emphasis added)

The foregoing Agreement language establishes rather clearly that an employee must first be dismissed from service before he or she is eligible for the Companion option. Several other references in the Agreement reinforce this requirement. In addition, the associated form letter confirms that there must first be a proper dismissal. The first paragraph of the form letter begins as follows:

"As a qualifying employee who has been dismissed for a violation of Rule G, you may elect to participate in the Rule G Rehabilitation/Education Program. * * *" (Emphasis added)

Given the foregoing evidence, we are compelled to sustain the claim. If the By-Pass option had more restrictive eligibility criteria than is apparent from the plain language of the Memorandum of Agreement, it was incumbent upon the Carrier to establish them via probative evidence. It has not done so on this record. To the contrary, Third Division Award 28845 stands in opposition to Carrier's interpretation. Accordingly, we find that Claimants were entitled, on the facts of this record, to have been offered the By-Pass option. Moreover, it appears that it was incorrect for the Carrier to offer Claimants the Companion option. Carrier's proffer was not in compliance with the eligibility requirement of the Companion Agreement.

Our overall finding is not altered by Carrier's contention that Claimants voluntarily elected the Companion option. The By-Pass option was a collectively bargained Agreement. It is well settled that a Carrier may not vary or avoid the terms of such an Agreement by negotiating separately with individual employees.

From the instant record, it appears that Claimants would have undergone very similar, if not identical, participation in the Employee Assistance Program whether they entered via the By-Pass or Companion option. It is undisputed that Claimants successfully completed the program. That being the case, the proper remedy is to deem

them to have entered via the By-Pass option and have completed the program accordingly. Therefore, Part (2) of the claim is sustained as presented.

AWARD

Claim sustained.

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 23rd day of November 1998.