

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 42788
Docket No. MW-43447
17-3-NRAB-00003-160157

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

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier’s dismissal of Claimant R. Serafin, by letter dated August 4, 2014, based on allegations that he violated CSXT General Operating Rule 100.1 and the terms of his EAP treatment plan was arbitrary, unwarranted and in violation of the Agreement (System File D21811514/2014/175395 CSX).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Serafin must be immediately returned to service with all matter relative to these charges rescinded and be compensated for all losses suffered.”

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.

Claimant first began service for the Carrier on May 14, 2007. He was dismissed on May 1, 2013 as the result of a positive breath alcohol test administered on March 18, 2013 due to “reasonable suspicion.” The Organization progressed a grievance concerning Claimant’s dismissal to Public Law Board No. 7529. In Award No. 35, dated December 18, 2013, that Board determined that Claimant’s dismissal was excessive and reduced it to “a suspension without pay for time served and with seniority and other benefits restored.” In doing so, the Board wrote:

“. . . Claimant’s return to service is on a “last chance” basis. In other words, a lapse in judgment by Claimant will lead to a termination of the employment relationship. Prior to returning to duty under this arrangement, Claimant must be cleared by Carrier medical or other appropriate personnel designated by the Carrier. In accordance with these findings and conclusions culminating in Claimant’s “last chance” return to duty, the claim is sustained.”

On January 15, 2014, the Carrier sent Claimant a notice by Priority Mail directing him to contact Larry Mason, Manager EAP, within five days of his receipt of the letter to schedule an EAP evaluation. U.S. Postal Service tracking records reflect that delivery of the letter was attempted on January 17, 2014, and a notice was left by the letter carrier. By February 13, 2014, according to the Postal Service tracking record, the letter had been unclaimed and it was returned to the Carrier.

On March 18, 2014 Rebecca R. Hogamier, a Substance Abuse Counselor for the Washington County Health Department, sent EAP Manager Larry Mason the following letter regarding Claimant:

“Randy A. Serafin was assessed on April 11, 2013, following a positive reasonable suspicion alcohol breath test. This violation of the Department of Transportation Federal Drug and Alcohol Testing rules occurred on March 18, 2013.

It was recommended that he complete 26 hours of individual co-occurring counseling, one hour, one time a week. As of March 18, 2014, he has failed to complete these recommendations, please be advised that at this time this status with the SAP evaluation is Non-Compliant with treatment recommendations.

I certify that I am not employed by, nor do I receive remuneration from, nor do I have financial interest in the above named treatment provided program. I certify I am a qualified Substance Abuse Professional, and that I have knowledge of and clinical experience in the diagnosis and treatment of alcohol and controlled substances use and related disorders. I certify that I provided a comprehensive face-to-face assessment and clinical evaluation of this employee.”

On June 2, 2014 the Carrier issued Claimant the following letter by Express Priority Mail:

“Reference the letter dated January 15, 2014 advising you that you had been reinstated to service as a result of PLB 7529 Award 35, in which you were directed to contact Larry Mason, Manager EAP, within five (5) days of receipt of the letter at 410-366-6252 to schedule an EAP evaluation. You contacted Larry Mason and you were given instructions to contact a CSX Network Substance Abuse Professional (SAP).

This will serve as your notification to attend a formal investigation at 0900 (CSX Time), on Tuesday, June 17, 2014 at Baltimore Division Office, 722 Virginia Avenue, Cumberland, Maryland, with you as principal. The purpose of this formal investigation is to determine the facts and place your responsibility, if any, in connection with information received on May 28, 2014 from the Director, CSX EAP and Vocational Rehab Services that you are non-compliant with EAP service recommendations. CSX has not received any documentation that supports you have complied with instructions from the SAP or required EAP activities.

In connection with the above incident, you are charged with failure to follow instructions and possible violations of CSXT Operating Rules 100.1 and the terms of your EAP treatment plan.”

According to Postal Service tracking records, this mail piece was available for pickup by Claimant on June 3, 2014, but was returned to the Carrier on June 10, 2014 as unclaimed. On June 12, 2014, the Carrier, by Priority Mail, informed Claimant that the investigation had been postponed until July 15, 2014, by agreement with the

Organization. Tracking records show that this mail piece went out for delivery on June 14, 2014, and a notice was left by the letter carrier.

When the investigation was convened on July 15, 2014, Claimant was not in attendance. It was established that the letters were all sent to Claimant's address of record. Attempts to contact him by phone were not successful. Consequently, the investigation was conducted in absentia. Following the investigation, Claimant was dismissed from service, effective August 4, 2014.

Based upon the record before the Board, we are satisfied that the Carrier has met its obligation to notify Claimant of the investigation. That obligation was met when the Carrier placed the notices, addressed to Claimant's address of record, in the U.S. Mail. Tracking records confirm that the notices were mailed and that attempts were made to deliver them to Claimant. An employee cannot frustrate the discipline process by failing to accept delivery of the correspondence. Furthermore, employees are required to inform the Carrier of any change of address. The record reflects Claimant filed a change of address with the Carrier on July 18, 2014, three days after the investigation. We find that the Carrier was privileged to conduct the investigation despite the fact that Claimant was not in attendance.

Upon our review of the record of the investigation, we find that the Carrier had substantial evidence to support its charge against Claimant. He was instructed to make contact with the Carrier's EAP Manager and comply with whatever recommendations were made. Not only was this an instruction issued by the Carrier, it was also the condition of his return to work by Public Law Board No. 7529. He did not comply with those instructions. We consequently find that his dismissal in this case was neither arbitrary nor excessive.

In reaching this decision, we have not given consideration to the Organization's contention that Claimant eventually satisfied the EAP requirements, and there was no harm to the Carrier by the delay. That information was provided by the Organization by letter dated February 10, 2015. To understand the Board's position, it is important to understand the role we play. Our charge is to determine whether Claimant's dismissal was a violation of the Agreement. To make such a finding, we must evaluate the record of his investigation and whether that record supports the Carrier's charge. The Carrier's action must be based upon the investigation, and it is not privileged to consider evidence that was not brought forth at the investigation, where it would be subject to cross-examination. In the same manner, we cannot consider evidence that the Organization did not present at the investigation. This is a distinguishing feature

of arbitration in the railroad industry, as opposed to other arbitrations where the arbitrator conducts a de novo hearing.

The Board understands that this may be a harsh result to Claimant, who apparently has taken steps toward rehabilitation, which are commendable. But the Organization's argument on his behalf can best be described as a request for leniency, which is the sole prerogative of the Carrier and is beyond our authority.

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 28th day of November 2017.