

BEFORE PUBLIC LAW BOARD NO. 6915

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
CANADIAN NATIONAL RAILROAD**

Case No. 1

STATEMENT OF CLAIM:

Appeal of the dismissal of Claimant W. Phetteplace and for Claimant's reinstatement to service with seniority and all other rights unimpaired and compensation for all time lost, because the Carrier improperly terminated the Claimant's seniority.

FINDINGS:

By letter dated November 29, 2004, the Claimant waived his rights to a formal investigation scheduled for November 30, 2004, in connection with charges that the Claimant had been absent from work, had failed to protect his position, and had failed to follow his supervisor's instructions regarding his absenteeism. By letter dated December 8, 2004, the Carrier acknowledged the Claimant's waiver, notified the Claimant that he was found guilty as charged, and directed the Claimant to contact the EAP. This letter further informed the Claimant that failure to follow and successfully complete any EAP directives or programs, or continued absenteeism, would result in the termination of the Claimant's employment without further investigation. On December 13, 2004, the Claimant signed an EAP agreement, which set forth certain criteria for the Claimant to retain his employment with the Carrier.

By letter dated January 20, 2005, the Carrier discharged the Claimant from his employment on grounds that the Claimant had failed to follow the EAP directives and/or mandated programs. The Organization thereafter filed a claim on behalf of the Claimant,

challenging the Carrier's decision to discharge the Claimant. The Carrier denied the claim.

The Carrier initially contends that the Claimant voluntarily agreed to fully comply with the terms and conditions of his waiver and the EAP agreement. The Carrier maintains that when the Claimant failed to fully comply with those terms and conditions, he voluntarily activated the self-executing provisions of those agreements that resulted in his automatic discharge.

The Carrier emphasizes that at the Organization's request, the Carrier agreed to extend the time for the Claimant to initially contact EAP. After the initial meeting was rescheduled numerous times, it ultimately was set for January 19, 2005. The Carrier asserts that the Claimant cancelled this meeting five minutes before it was to start, and he did not ask to reschedule. The Carrier further argues that the Claimant then lied about why he failed to meet the EAP counselor.

The Carrier goes on to assert that the Claimant's work record details a history of excessive absenteeism and tardiness, as well as work performance issues. The Carrier insists that it was the Claimant's own actions and/or inactions that resulted in his discharge for clear violation of Carrier rules and the waiver/EAP agreements.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Claimant contacted the EAP on the afternoon of his scheduled appointment, stating that he had not received a reminder call and wondering if he already had missed his appointment. The Organization asserts that

the Claimant was told that it would be no problem to reschedule his appointment, and the Claimant was provided with an appointment on February 3, 2005. The Organization emphasizes that the rescheduled appointment is documented in a statement from an EAP employee.

The Organization asserts that the Claimant did comply with the EAP agreement, but the Carrier nevertheless terminated his employment. The Organization insists that the Carrier's decision to discharge the Claimant was arbitrary and capricious, and the Claimant should be immediately reinstated to service with seniority and all other rights unimpaired, and with compensation for all wage loss suffered.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of failing to follow and successfully complete the EAP program. The record reveals that the Claimant was aware of the conditions involved in the EAP program and it is clear that the Claimant failed to live up to those conditions. The Claimant also missed scheduled appointments and thereby subjected himself to disciplinary action.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its

actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case had ample opportunity to comply with the program in which he was placed because he had failed to live up to other rules of the Carrier. The EAP program was an effort on the part of the Claimant and the Carrier and the Organization working together to attempt to save the Claimant's job. The Claimant failed to live up to the relatively simple requirements of that program. Therefore, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant's employment. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 6-26-06



CARRIER MEMBER

DATED: 6/26/06