

Special Board of Adjustment 928
Case No. 143
Award No. 143
System Docket No. OC-BLE-SD-873D

Parties to the Dispute:

Brotherhood of Locomotive Engineers
and
National Railroad Passenger Corporation (AMTRAK)

Statement of the Claim:

"Claim of Amtrak Passenger Engineer C. K. McComb for the rescinding of the discipline imposed of '[t]ermination from service effective immediately' as stated in the decision letter of October 21, 1992 under the signature of Western Division Transportation Superintendent, Lonnie R. Stearns and restoration to service with seniority and vacation rights unimpaired, with full compensation for time lost, full credit toward vacation entitlement and health and welfare benefits during the period held out of work."

Opinion of the Board:

Claimant was hired by Carrier as an Engineer on September 3, 1987. He had previously been employed (first as an assistant signal maintainer, then as a brakeman, and then as an engineer) by the Burlington Northern Railroad from April 4, 1976, until he accepted severance and he resigned from the Burlington Northern, and he was subsequently hired by AMTRAK.

On September 13, 1988, Claimant allegedly violated Carrier's Rule "G" while he was subject to service on the Engineers' Extra Board at Shelby, Montana. Rather than face a disciplinary investigation in this matter, Claimant signed a Rule "G" Waiver on October 29, 1988, the pertinent terms and conditions of which are as follows:

"I admit that I violated Rule G as charged. I understand that I am being withheld from service without pay except for medical, vacation, compensatory time, or other benefits to which I am entitled, pending my successful completion of treatment as recommended by the Employee Assistance Program Counselor or his/her designated representative. I agree to contact the EAP Counselor within 10 days from the date I sign this waiver and that should I fail to do so, I will accept discipline of dismissal for the above violation of Rule G.

Since March 1, 1986, I have not participated in EAP as a result of a Rule G violation nor have I participated in an EAP program without completing the program as recommended by the EAP Counselor.

Additionally, I further understand that after successfully completing the initial treatment plan recommended by the EAP Counselor, I will be dismissed from service unless I comply with the following stipulations:

1. Maintain periodic contact with the EAP counselor for a 2 year period after successfully completing the initial treatment program.
2. Adhere to the aftercare plan prescribed by the EAP Counselor.
3. Pass a complete medical examination upon completion of the initial treatment program.
4. For cases involving the use of drugs or alcohol, submit to and pass a test by urine or breath sample respectfully, each calendar quarter for a period of two years."

In accordance with Item No. 2 of the aforestated Rule "G" Waiver, the terms of the aftercare program which were prescribed for Claimant by the EAP Counselor in this matter were as follow:

- "1) Must contact EAP Counselor twice monthly.
- 2) Must attend Alcoholic Anonymous meetings at least twice weekly with a sign in record returned to the EAP counselor monthly.
- 3) Must notify the EAP counselor immediately of any change of address and phone number.
- 4) Will be drug and alcohol tested at least four (4) times a year."

According to the record which has been presented herein, it appears that Claimant successfully completed his initial alcohol dependency treatment program; and he was reinstated to service.¹

On October 24, 1989, while still subject to the aforestated Rule "G" Waiver agreement, Claimant was allegedly observed consuming an alcoholic beverage when he was allegedly marked up on the Shelby crew base passenger engineers' Extra Board and he was subject to call for duty. Claimant was dismissed from Carrier's service in this particular incident on November 28, 1989, for violation of his Rule "G" Waiver agreement. Said dismissal was appealed; and subsequently, Claimant was returned to work by Carrier on a last chance, leniency basis on January 24, 1990. The pertinent terms and conditions of Claimant's latest above described reinstatement which were contained in Carrier's January 24, 1990 reinstatement offer letter to Claimant, which was directed to Organization and was ultimately accepted by Claimant, were as follows:

"... (I)n consideration of your presentation on the claimant's behalf, and based on the particular facts and circumstances involved in this case, we are willing to afford the claimant a last opportunity to prove that he can be a reliable employee, willing to comply with the requirements and responsibilities of his position as a passenger engineer.

Accordingly, claimant will be restored to service with full seniority, but without payment for the time lost, which shall be considered as a suspension without pay, and subject to the following conditions:

1. Claimant will be required to submit to and satisfactorily pass a return to duty physical examination, as well as any examination that may be required on Operating Rules, Air Brake, etc.

¹ Claimant, it appears, underwent treatment for his alcohol dependency at Los Encinas Hospital in Pasadena, California. The dates of said treatment, the details thereof, or the date of Claimant's subsequent return to service have not been included in the record which has been presented herein.

2. Prior to marking up for duty, claimant will be required to contact the EAP Counselor to arrange for a meeting to discuss continuation and compliance with the aftercare program referred to in his Rule "G" Waiver.

It is unclear in the hearing record whether Claimant actually ever performed service after he was reinstated on January 20, 1990, or whether he entered and/or received treatment in his prescribed aftercare treatment program (Carrier's Submission, p. 4; and Carrier's Ex. #4). On February 23, 1990, Claimant was furloughed by Carrier due to a lack of work.

Once again, the record is unclear as to the extent and degree of Claimant's efforts, if any, regarding his participation in an aftercare treatment program during the period of his furlough.

Claimant was recalled to service by Carrier on October 4, 1991. As is the custom and practice on this Carrier, employees who are recalled from furlough, particularly those who are subject to a Rule "G" Waiver, are required to submit to a return-to-duty physical examination, which includes a drug/alcohol screen and a chemical dependency evaluation. Claimant was sent by Carrier to a facility in Kalispell, Montana, for his return-to-duty drug/alcohol screen and chemical dependency evaluation. Claimant's test results were negative.

Upon initially receiving notification from the drug/alcohol facility in Kalispell, Montana that Claimant's urinalysis test result was negative, Carrier's Western Division EAP Counselor, Clarence Casey, was prepared to release Claimant to return to active duty. At that point, however, Mr. Casey received a copy of a newspaper article (source and date of publication, and name of sending party have not been identified in the hearing record) which indicated that Claimant had been arrested on November 13, 1991 for driving

while intoxicated.² Consequently, Mr. Casey directed that Claimant undergo a further, more extensive examination. Claimant complied with this request; and a second evaluation was conducted, this time, however, at a different drug/alcohol treatment center in Portland, Oregon. It appears that the results of this most recent evaluation were also negative; but, despite that fact, however, Mr. Casey made several recommendations for Claimant's more extensive evaluation and possible additional treatment as well.

Claimant apparently contacted all of the evaluation providers who had been suggested by Mr. Casey; but Claimant was rejected by all of those programs because he could not guarantee payment for the treatment. It appears that Claimant had been without health insurance coverage since his furlough in February of 1990.

Organization contacted EAP Coordinator Casey; and it appears that Organization and Mr. Casey agreed to investigate the possibility of Claimant's participation in alternative, low cost or no cost treatment programs. Apparently, however, Mr. Casey's decision to work with Claimant/Organization in seeking alternative treatment programs was overruled by his (Casey's) supervisors. In a letter dated June 5, 1992, Mr. Casey advised Claimant as follows:

"On several occasions I have made recommendations for treatment and you have not complied with my requests. Therefore, I am giving you a ten days notice that unless you contact Glazier View Hospital for the purpose of seeking meaningful treatment, you will be in violation of your Rule G Waiver and your case will be turned over to your supervisor for disciplinary action."

² The newspaper article, in its entirety, stated as follows: "Chester McComb, 35, of Whitefish was arrested Nov. 13 on a third charge of DUI, no proof of insurance, driving with a revoked license, and failure to dim lights. He was released on bond."

Claimant, it appears, did not contact the Glazier View Hospital, as directed by Mr. Casey; and on July 9, 1992, Mr. Casey so advised Carrier's District Superintendent, K. Laird.

As a result of the aforestated incident, in a certified letter dated July 10, 1992, Claimant was directed by Carrier to attend a formal investigation on July 15, 1992, which was to be held,

"... to ascertain the facts and determine your responsibility, if any, in connection with the following charge:

Violation of stipulation #2 of your Rule 'G' Waiver, in that you were recalled from a home terminal furlough on October 04, 1991, and since that time you allegedly have failed to follow the instructions for your aftercare plan prescribed by Clarence Casey, (Western Division, EAP Counselor)."

Said investigation was postponed on several occasions for various reasons; and was finally conducted and concluded on October 13, 1992, with Claimant present and offering testimony.

Pursuant to the holding of the aforestated investigation, in a certified letter dated October 21, 1992, Claimant was apprised by Carrier that he had been adjudged as guilty as charged; and that, as a result, he was to be dismissed from Carrier's service, effective immediately.

Claimant's dismissal was appealed by Organization; and, for reasons which will be developed more fully hereinafter, said Appeal was denied by Carrier. The matter was further appealed by Organization throughout all of the remaining steps of the parties' negotiated grievance procedure. Thereafter, the matter was then appealed to arbitration by Organization; the undersigned Board was properly constituted and authorized to hear and decide this matter; and pursuant to hearing, the matter is now properly before this Board for resolution.

Organization presents a number of procedural and merits arguments in its defense of Claimant in this matter.

Procedurally, Organization contends that Claimant's formal investigation was not conducted in a fair and impartial manner as is contractually required. In this regard, Organization asserts that Claimant fulfilled the two (2) years requirement of his Rule "G" Waiver of October 29, 1988, and thus he should have been returned to work without qualification when he was recalled from furlough by Carrier on October 4, 1991. However, according to Organization, Carrier manipulated the events which are involved in this case, in order to insure Claimant's dismissal. Therefore, Organization contends that any requirement assessed by the EAP Coordinator in this matter against Claimant to comply with the terms of Claimant's Rule "G" Waiver, as well as Item #2 of the agreed upon aftercare agreement, expired with the expiration of the Rule "G" Waiver agreement itself on October 29, 1990. Such conduct on Carrier's part, Organization maintains, "...is reprehensible and defeats the spirit and intent of a fair and impartial investigation rule."

Turning to the merits portion of its case, Organization proposes, as an equity argument, that it is patently unfair to require Claimant to comply with the terms directed by the EAP Coordinator in this matter if those terms are impossible for Claimant to meet. Accordingly, Organization maintains that Claimant, who was on furlough since February 23, 1990, and did not have any health insurance coverage, was financially incapable of complying with the additional evaluation/treatment requirement which was directed by Mr. Casey.³ This fact was acknowledged by Mr. Casey himself in his

³ Claimant maintains that the cost of such additional evaluation/treatment would have been approximately \$10,000 to \$15,000 (Tr. p. 38).

testimony which was given at Claimant's formal investigation (Tr. pp. 19-21). Moreover, Organization further notes that, recognizing that Claimant did not have the funds necessary to meet the additional evaluation/treatment requirements, Mr. Casey, over an eight (8) months period of time, attempted to work with Claimant to find a suitable solution to this problem. Still yet further, Mr. Casey also indicated in his testimony that he was willing to continue to work with Claimant in order to achieve the additional evaluation and treatment, but that his (Casey's) concerns were overruled by his (Casey's) superiors.

Carrier counters Organization's major contention in this dispute by asserting that the terms of the Rule "G" Waiver are meant to cover a two (2) years period of "working time" rather than two (2) "calendar years" as Organization maintains. Accordingly, Carrier asserts that this particular interpretation/application means that the Rule "G" Waiver is suspended any time the covered employee is on vacation or on furlough. In the instant case, therefore, Carrier maintains that in June of 1992, Claimant was still covered by the terms and conditions of his October 29, 1988 Rule "G" Waiver agreement because Claimant had been on furlough from February 23, 1990 through October 4, 1991, when he was recalled; and Claimant had not yet reported for service since he had not yet been approved to return by his EAP Counselor. In support of this particular point, Carrier cites the following three (3) arbitration awards involving AMTRAK and three (3) other employee organizations: Public Law Board No. 3783, Award No. 223; Public Law Board No. 4788, Award No. 13; and Public Law Board No. 3783, Case No. 270.

Carrier next argues that it has a high duty to insure that its work force is sober. This is particularly true, Carrier argues, since AMTRAK is solely

engaged in the transportation of people. Given its high duty to maintain a sober work force, especially a sober engineering work force, Carrier argues that, in the instant case, Management was faced with a situation wherein Claimant repeatedly violated Carrier's Rule "G"; he signed a Rule "G" Waiver agreement; subsequently to said signing, Claimant had another Rule "G" violation, and he was reinstated on a last chance leniency basis; and he had consistently and adamantly refused to work with his EAP Counselor's request that he (Claimant) seek additional evaluation and treatment for his alcoholism condition after his recall from furlough. Consequently, Carrier concludes that Claimant's dismissal was assessed for just cause; and thus, said dismissal should remain undisturbed.

The Board has carefully read, studied and considered the complete record which has been presented in this case, and we can find no evidence to support Organization's general contention that Claimant's formal investigation was not conducted in a fair and impartial manner as is contractually required. Additionally, we make no judgment regarding Mr. Casey's credibility as also suggested by Organization in its argumentation. In this regard, it has long been held in railroad arbitration that the Carrier is the ultimate trier of facts; and, therefore, is entitled to make credibility determinations subject to a review of the record by a Board so authorized. This Board has reviewed Mr. Casey's hearing testimony and the evidence of record as a whole, and we find that substantial evidence exists to indicate that Mr. Casey testified truthfully and credibly in this matter.

Continuing, the Board further finds that Carrier's interpretation of the applicable time period of a Rule "G" Waiver is also supported by the record. Despite the fact that Claimant's October 29, 1988 written Rule "G" Waiver agreement made no specific mention that said Waiver would continue beyond

an absolute two (2) years calendar period, or that an employee's furlough, vacation or extended leave of absence would not be counted in the applicability period of said Waiver, Carrier, nonetheless, puts forth logical arguments, as well as arbitrable precedent, in support of its contention that the subject two (2) years period means two (2) "working years" rather than two (2) "calendar years". Accordingly, a Rule "G" Waiver, which is designed to compel an erring employee's compliance in an aftercare treatment program for a specific period of time while that employee is employed, would serve no purpose if it was signed and then, for whatever reason, (i. e. - furlough, vacation, etc.) the designated employee did not participate in the program for the requisite two (2) years period of time. Under such a set of circumstances, the entire benefit of the waiver (i. e. - the employee's agreement and commitment to participate in a treatment/ aftercare program for a substantial period of time) would be lost.

The aforestated interpretation/application, apparently, was also understood by Claimant in the instant case, since Claimant did not object to Carrier's requirement that he seek additional evaluation and/or treatment when initially directed to do so by Mr. Casey subsequent to Claimant's recall from furlough by Carrier on October 4, 1991.

Given that both parties by their actions appear to have understood that the two (2) years Rule "G" Waiver time period meant two (2) "working years" rather than two (2) "calendar years," the Board concludes that Claimant, at the time of his recall, was still subject to the requirements of the applicable Rule "G" Waiver agreement which Claimant signed on October 29, 1988.

Having made the preceding determination, the Board, nonetheless, finds that we must agree with Organization's additional equity argument that Claimant must be able to comply with the additional terms of his further


evaluation and treatment which were prescribed for him by the EAP Counselor. Although the Rule "G" Waiver agreement which Claimant signed, requires Claimant to comply with any additional evaluation/treatment plan which might be prescribed by an EAP Counselor, any such prescription, however, must be achievable by the participant. The record in the instant case demonstrates that Claimant made numerous attempts to seek the additional evaluation/treatment as directed by Mr. Casey. The record also shows that Claimant was rejected by every treatment facility which was recommended to him by Mr. Casey; and that Claimant was furloughed for approximately a year and one-half (1½) prior to his recall, and he had no health insurance which would cover the cost of the additional Carrier required evaluation/treatment. This latter fact, apparently, was recognized by Mr. Casey, since the record shows that he (Casey) attempted to deal with Claimant's lack of funds problem. All of these facts, considered as a whole, persuade the Board that equity in this matter requires that Claimant be given a chance to comply with Mr. Casey's additional evaluation/treatment terms.

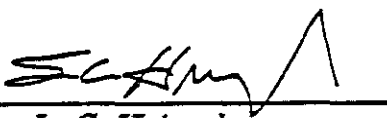
In support of the above posited determination, it is manifestly unfair to require an employee to perform an impossible task, and then base that employee's subsequent dismissal upon his/her failure to accomplish the requisite task. For this reason, therefore, we conclude that Carrier's decision to dismiss Claimant from service because he failed to obtain additional evaluation/treatment -- which he attempted to do, but could not complete due to circumstances beyond his control -- is an abuse of managerial discretion. Accordingly, we will direct that Claimant be reinstated with full seniority, and full rights and benefits restored; but without back pay. We will not award back pay in this matter because Claimant was not otherwise available

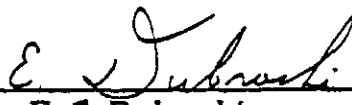
for service since he had not yet passed his return to employment drug and alcohol screens to the EAP Counselor's/Carrier's satisfaction. In addition, despite Claimant's numerous unsuccessful efforts to obtain additional evaluation/treatment as required of him by Mr. Casey, which have been discussed previously hereinabove, Claimant has failed to adequately explain why he did not make contact with Glazier View Hospital as he was specifically directed to do by Mr. Casey. Such an undertaking on Claimant's part, it would appear, even though fruitless, nonetheless, would have placed him in compliance with Mr. Casey's June 5, 1992 letter, thereby possibly eliminating this entire controversy.

Award:

Claim sustained in accordance with the above.


John J. Mikrut, Jr.
Chairman and Neutral Member


L. C. Hriczak
Carrier Member


E. J. Dubroski
Organization Member

Issued in Columbia, Missouri on April 2, 1994.