

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30125  
Docket No. MW-28856  
94-3-89-3-257

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(  
(St. Louis Southwestern Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it allegedly dismissed Track Laborer L. Perez for alleged failure to protect his assignment subsequent to March 27, 1986 and for alleged failure to comply with the conditions of his reinstatement. (System File MW-88-68-CB/475-7-A.)
2. The Claimant shall be reinstated with all benefits and seniority rights unimpaired, his record cleared of the incident involved here and he shall be compensated for all wage loss 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 employe or employes involved in this dispute are respectively carrier and employe 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.

The facts of this case are entirely undisputed. Claimant was a Track Laborer on the Kansas City Division. His seniority dated from November 3, 1980. Claimant was dismissed on September 24, 1985, for violation of Rule G. A September 13, 1985 test revealed alcohol in Claimant's system. Rule G explicitly prohibits employees from being under the influence of alcohol while on duty or on Company property.

Claimant returned to work on a conditional reinstatement basis on February 3, 1986. By letter dated January 24, 1986, the Division Engineer informed Claimant that the Carrier had

"...received word that you have successfully completed your alcohol and/or drug rehabilitation program and are okayed to return to work. Enclosed is a copy of a form to be completed by yourself and returned to me. Please see that the form is signed and returned immediately. You are to report for duty February 3, 1986, at Dalhart, Texas at 7:00 a.m."

The conditional reinstatement, which was signed by the Superintendent, provided as follows:

"It has been agreed that you will be returned to duty on a conditional basis with seniority unimpaired and that you are agreeable to the following conditions:

1. You must totally abstain from alcohol and other drugs.
2. You must participate in a rehabilitation program as agreed to with the Employee Assistance Counselor, and attend AA and/or DA meetings as prescribed and furnish verification of attendance.
3. You will submit to random unannounced alcohol and/or drug tests.
4. You must refrain from failing to protect your assignment and failure to report for duty must be substantiated and verified.

Any violation of the above may result in termination of your employment.

If you are agreeable to the conditions outlined, please sign and return to me."

There is no evidence that Claimant signed the conditional reinstatement. The copy of that document which is in the record is not signed.

Claimant's EAP placement was with the Amarillo Council on Alcoholism and Drug Abuse. Claimant worked from February 3, 1986, through March 27, 1986. After March 27, 1986, he did not report to work for over two years, until July 18, 1988.

Meanwhile, the Carrier was notified on April 4, 1986, that Claimant had not contacted the Amarillo Council on Alcoholism and Drug Abuse during the prior week. On June 20, 1986, the Carrier was notified by the United States Department of Justice-Immigration and Naturalization Service ("INS") that Claimant would be deported to Mexico on July 8, 1986, from Kansas City, Missouri.

Claimant was removed from service on March 27, 1987. The personnel document implementing the removal states that Claimant was "leaving service." The form stated the reason for leaving service as "Deported to Mexico." However, Claimant was continued on the seniority roster following his removal from service.

On July 18, 1988, Claimant reported to the Carrier's office and advised that he had obtained a "green card." He requested to be allowed to work. The Carrier refused to grant that request and the instant claim was filed on August 2, 1988.

The Carrier argues that Claimant was not withheld from service as alleged by the Organization. Rather, the Carrier asserts that Claimant was removed from service because he failed to comply with his conditional reinstatement, which required, inter alia, that he refrain from failing to protect his assignment and that he attend his rehabilitation meetings as required. According to the Carrier, Claimant's service was terminated under the provisions of the conditional reinstatement, and, as a result, he did not hold any seniority with the Carrier when he reappeared on July 18, 1988. The Carrier also argues that the Claim was not timely filed.

The Organization contends that the Carrier presented no probative evidence that Claimant removed himself from service or that he failed to comply with the terms of his reinstatement. The Organization further maintains that the Carrier violated the Agreement by dismissing Claimant without affording him a fair and impartial investigation as required in Article 14. In addition, the Organization alleges that the Carrier violated Article 14 by failing to promptly advise Claimant and the General Chairman of the specific charge faced by Claimant.

The Board carefully examined the record and considered the Submissions of the Parties. The Board concludes that the Carrier properly removed Claimant from service when he failed to comply with the provisions of the February 3, 1986 conditional reinstatement.

With respect to the Carrier's assertion that the Claim was not timely filed, the Board notes that this defense was not raised on the property. As a result, that argument cannot be considered by the Board.

However, with respect to the merits of the claim, the Board concludes that the Carrier must prevail. Article 14(A)(1) provides that:

"An employee who has been in service sixty (60) days or more shall not be dismissed or disciplined except as provided in this agreement without a fair and impartial investigation. They may, however, in serious cases, be held from service pending such investigation.

An employee charged with an offense shall be promptly advised in writing of the specific charge."

Claimant certainly had been in service more than 60 days as of his last day of work on March 27, 1986. However, the Board agrees with the Carrier that Article 14 does not apply in the instant case. In Third Division Award 28361, this Board held that "a return to dismissed status [under a conditional reinstatement agreement] between Claimant and Carrier is not the same as dismissal."

As in this case, the Claimant in Award 28361 failed to adhere to the conditions of his reinstatement and was returned to dismissed status. In Award 28361, the employee tested positive for marijuana. A condition of his reinstatement was that he "totally abstain from alcohol and other drugs." That Award stated that "[f]ailure to continually meet the terms of the Reinstatement allowed Carrier to return Claimant to dismissed status."

After noting that Article 59 of the Agreement in that case stated that "an employee .... shall not be disciplined or dismissed without a fair and impartial investigation," this Board concluded as follows in Award 28361:

"...We are asked herein the question of whether the same Rule [59] affords Claimant an Investigation when he is returned to dismissed status for violating the signed Conditional Reinstatement Agreement. The signed Agreement between the Claimant and Carrier requires mutual rights and guarantees. The Carrier agreed to return Claimant to work and Claimant agreed not to use drugs. We find that Claimant's violation allows Carrier to return him to dismissed status without an Investigation, as Claimant had already been dismissed, making Rule 59 inapplicable.

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The Board holds that Rule 59(a) is not the proper vehicle in that a return to dismissed status between Claimant and Carrier is not the same as dismissal. Rule 59 contemplates an Investigation prior to discipline or dismissal. As Claimant had already been dismissed there is nothing in the language of Rule 59 that is applicable. By signing the Conditional Reinstatement Agreement the Claimant had no additional Agreement rights under Rule 59 to an Investigation before being returned to dismissed status. Claimant has been returned to dismissed status for violation of a signed Conditional Reinstatement Agreement." (Emphasis added.)

As noted, there is no evidence that Claimant signed the conditional reinstatement document in this case. In that respect, the facts of the instant case differ from those in Award 28361, since the Claimant there "signed the Conditional Reinstatement which allowed his return to duty."

The Board nonetheless concludes that, under the facts presented in this particular case, the absence of a signed reinstatement agreement does not invalidate the Carrier's actions. The Division Engineer requested Claimant to sign that document in a letter dated January 24, 1986. That was the same letter in which he directed Claimant to return to work on February 3, 1986.

Claimant did return to work on February 3, 1986, and worked until March 26, 1986. He also began to participate in the rehabilitation program required in the reinstatement document. Both parts of the bargain were being carried out. The conduct of both Claimant and Carrier before March 27, 1986, thus demonstrates that both parties recognized that the reinstatement agreement was valid and binding on both parties, even though Claimant had not signed the document.

The conditional reinstatement document at issue here does not specify that Claimant waived the Article 14 Investigation and notice protection as part of his reinstatement. However, that was also true in Award 28361. ("The Conditional Reinstatement Agreement ... has no language which waives a future Investigation.") As in Award 28361, Article 14 rights did not apply to the return to dismissed status because no "dismissal" occurred. Therefore, no waiver of those rights was necessary.

The Organization argues that this case is controlled by Third Division Award 27704, in which this Board held that "[r]ights under Article 48, Unjust Treatment, and Article 14 are too important to be waived by inference." In that case, the employee was terminated without an Investigation after being reinstated "with seniority and

other rights unimpaired" from a Rule G dismissal. This Board invalidated the dismissal on the grounds that no Investigation was conducted.

The Board concludes that Award 28361 governs the instant case rather than Award 27704. Award 27704 did not involve a conditional reinstatement, unlike both Award 28361 and the instant case. In Award 27704, the employee was terminated when he failed the drug portion of "the Carrier's usual return-to-work physical" on recall to work.

However, the reinstatement agreement in Award 27704 did not contain any express language conditioning continued employment on the employee's future conduct. Nothing in that reinstatement agreement provided that the employee could be returned to dismissed status if he did not pass the return-to-work physical. Instead, the agreement simply provided that the employee "will be required to pass the Carrier's usual return-to-work physical and may be required to undergo additional drug screening during the twelve-month period following his return to service."

Under those circumstances, then, this Board held that an explicit waiver of Article 14 rights was required. In contrast, the reinstatement document in the instant case explicitly states that "It has been agreed that you will be returned to duty on a conditional basis with seniority unimpaired ... Any violation of the above [conditions] may result in termination of your employment." (Emphasis added) The reinstatement agreement in Award 28361 similarly provided, according to the Board's description, that "[f]ailure to continually meet the terms of the Reinstatement allowed the Carrier to return Claimant to dismissed status." Award 27704, therefore, does not apply to the instant case.

The other cases on which the Organization relies in its Submission are not persuasive. None of those decisions involved the conditional reinstatement of an employee who had been previously dismissed. In particular, in Third Division Award 28158, no reinstatement agreement existed and the employee was not warned that his employment was subject to termination if he did not complete the employee assistance program.

As noted, in both Award 28361 and the instant case, the reinstatement document did not automatically return the employee to dismissed status if the conditions for reinstatement were not met. Rather, that decision was left to the Carrier. In such instances, "[t]he Organization has a right to demand in each case that the return to dismissed status is based on fact. The Carrier must have

the facts to support its actions." This standard ensures that the Carrier will not abuse its discretion in this regard.

After carefully considering the facts in the instant record, the Board concludes that, as in Award 28361, "the Carrier's action was fully warranted." Claimant violated two conditions of his reinstatement. The reinstatement document stated that Claimant "must participate in a rehabilitation program as agreed to with the Employee Assistance Counselor, and attend AA and/or DA meetings as prescribed and furnish verification of attendance." It is undisputed that the Carrier was notified on April 4, 1986, that Claimant had not contacted the Amarillo Council on Alcoholism and Drug Abuse during the prior week, in violation of that condition of reinstatement.

In addition, the reinstatement document stated that Claimant "must refrain from failing to protect your assignment and failure to report for duty must be substantiated and verified." However, Claimant failed to report for work after March 27, 1986. He had apparently been arrested by INS, and on June 20, 1986, the INS notified the Carrier that Claimant would be deported to Mexico on July 8, 1986, from Kansas City, Missouri. He therefore failed to protect his assignment, in violation of that condition of reinstatement. The fact that Claimant reappeared more than two years later does not cure that violation.

The Board therefore concludes that Carrier did not violate the Agreement by returning Claimant to dismissed status without using the procedures in Article 14. The Board further concludes that Carrier did not abuse its discretion in returning Claimant to dismissed status under the facts revealed in the record.

The Board also concludes that the fact that Claimant was maintained on the seniority list after March 27, 1987, is not controlling. That was obviously an oversight that did not indicate that the Carrier had decided not to exercise its discretion under the reinstatement agreement to return Claimant to dismissed status when he violated the reinstatement conditions.

The Organization objected that several of Carrier's exhibits to its Submission had not been presented on the property. However, the contents of those documents were specifically referred to in the correspondence on the property. As a result, the Organization was not prejudiced when the Carrier submitted the exhibits themselves to this Board. In addition, the Board notes that it does not rely on the Carrier's assertion that Claimant would not have been available for service after October 12, 1988. As a result, the fact that this contention was not raised on the property does not affect the outcome of this matter.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Catherine Loughrin /lw  
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 4th day of April 1994.