

The Second Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: ((International Brotherhood of Electrical Workers
(CSX Transportation, Inc. (Formerly Louisville and
Nashville Railroad Company)

STATEMENT OF CLAIM:

1. That the CSX Transportation (formerly Louisville and Nashville Railroad Company) violated the controlling agreement, particularly Rule 34, when they arbitrarily dismissed Electrician N. T. Williams from service under date of September 11, 1985, without providing him his right to an investigation as provided for under the rule; Radnor Shop, Nashville, Tennessee.

2. That accordingly, the CSX Transportation (formerly Louisville and Nashville Railroad Company) be ordered to compensate Electrician N. T. Williams as follows and beginning August 8, 1985 until returned to service:

- (a) Reimbursed for all monetary losses;
- (b) Vacation rights and seniority rights unimpaired;
- (c) Health and Welfare benefits.

FINDINGS:

The Second Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employes 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.

On July 24, 1985, Public Law Board No. 3762 issued an award returning Claimant to service with the Carrier at Carrier's Radnor Shop in Radnor, Tennessee. As part of the physical examination in connection with his return to service, Claimant submitted to urinalysis. The urine test showed

a positive result for marijuana. On September 1, 1985, Carrier notified Claimant that under the provisions of the Public Law Board Award that returned Claimant to service, Claimant was dismissed from service because of the positive urinalysis results. The Organization thereafter filed a claim on Claimant's behalf, challenging both the accuracy of drug test results and Carrier's dismissal of Claimant.

This Board has reviewed the record in this case; and we find that after the Claimant was reinstated on July 24, 1985, by the Public Law Board, he immediately became eligible for all of his contractual rights--including the Rule 34 right of an investigation upon being disciplined. Public Law Board 3762 specifically stated in its award that, "It is our decision to reinstate Claimant to his former position with seniority intact" Once that decision was issued on July 24, 1985, Claimant immediately once again became an employee of the Carrier with all of his rights under the Collective Bargaining Agreement.

It is true, as the Carrier argues, that the award of the Public Law Board made Claimant's continued employment after his reinstatement conditional upon participating in the Employee Assistance Program, maintaining regular time and attendance, and remaining drug-free. However, those conditions were to go into effect only after the Claimant was reinstated, and that occurred on July 24, 1985.

It is also true that the Carrier has every right to require a physical examination for its employees who are first hired or who are returning to work. The Carrier was well within its rights when it required the Claimant to take a physical prior to his actual return to service. According to the Carrier, the Claimant failed to pass the physical because the Claimant's urinalysis showed evidence of cannabinoids. The Carrier also contends that the evidence of cannabinoids demonstrated Claimant's failure to remain drug-free, which was a condition of his continued service. That may be true; but pursuant to the Collective Bargaining Agreement, specifically Rule 34, if the Carrier wanted to permanently relieve Claimant from service as a result of the urinalysis findings after he was reinstated by the Public Law Board, Claimant had a right to a fair investigation.

The Public Law Board decision did not in any way remove Claimant's rights under the Collective Bargaining Agreement after his reinstatement. Certainly, the Carrier had more ability to impose dismissal given the strong language of the Public Law Board's Award. But, when the dismissal was actually imposed, the Public Law Board decision did not take away Claimant's rights under Rule 34. By the very language of the Public Law Board, it had no authority to do so. Section 9 of the Public Law Board Agreement signed by the parties on June 26, 1984, reads as follows:

"The Board shall not have jurisdiction of disputes growing out of requests for change in rates of pay, rules, and working conditions, and shall not have authority to change existing agreements governing rates of pay, rules, and working conditions, and shall not have the right to write new rules."

Hence, the Public Law Board had no authority to take away Claimant's right to an impartial investigation.

Finally, the Carrier argues that it returned to the neutral, and he interpreted the Carrier's action as correct pursuant to his award. However, the record reveals that the Public Law Board was never tendered the issue of the denial of Claimant's Rule 34 rights, but only had properly before it the original termination of the Claimant on June 27, 1983. This Board finds that contrary to the Carrier's argument, the Claimant was reinstated to employment pursuant to the award of the Public Law Board; and although he was never returned to service, the Claimant was still an employee and entitled to the benefits under the contract.

With respect to the remedy in this case, this Board is without authority to actually order reinstatement since the Claimant never received a clean bill of health from the Carrier, which is within its authority to require a physical examination; and, furthermore, an investigation pursuant to Rule 34 has never taken place subsequent to the second termination. This Board therefore finds that the claim shall be sustained in part. The Carrier had no right to not afford the Claimant an investigation after it refused to return him to work after his physical examination. This Board orders that the Carrier immediately convene an investigation into the action taken by the Carrier in refusing to return Claimant to work after his reinstatement by Public Law Board 3762 and after his failure to pass the physical. At that investigation, Claimant shall be permitted to present all evidence of the inaccuracy of the urinalysis, as well as any other evidence which he feels supports his right to reinstatement and which he was not allowed to present at the time of his dismissal. With respect to the other relief sought by the Organization, it is denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 6th day of July 1988.

CARRIER MEMBERS'
CONCURRING AND DISSENTING OPINION
TO
AWARD 11507, DOCKET 11331
(Referee Meyers)

We concur with the Majority's opinion that:

"...Carrier has every right to require a physical examination for its employees...who are returning to work....

...this Board is without authority to actually order reinstatement since claimant never received a clean bill of health from the Carrier, which is within its authority to require a physical examination,..."

We vigorously disagree with the following findings of the Majority:

1. The Public Law Board Award conditionally reinstating Claimant to service and its subsequent interpretation affirming Carrier's actions in not reinstating Claimant for his failure to abide by the conditions of his reinstatement was not final and binding on the parties to this dispute.
2. This Board has jurisdiction to rule on the merits of this dispute.
3. Carrier must hold a hearing wherein Claimant would be obligated to prove the original urinalysis was inaccurate.

First, this Board has consistently and repeatedly held that it cannot and will not rehear claims that have been resolved by this Board or by Public Law Boards.

Secondly, this Board chose to ignore both the Award of the Public Law Board reinstating Claimant conditionally and that Board's interpretation of its Award which reaffirmed that Carrier's handling was in accordance with the purpose and intent of the conditional reinstatement. The only forum vested by Congress with jurisdiction to review and set aside Awards of this

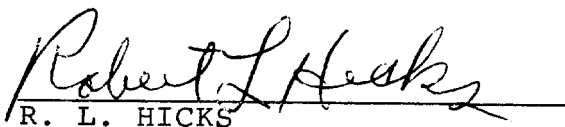
Board, or Public Law Boards, is the federal district court. This Board does not have jurisdiction, under the Railway Labor Act, to set aside another Award. Thus in Murray v. Consolidated Rail Corporation, 736 F.2d 322 (6th Cir. 1984), the issue framed by the Court of Appeals was,

"...whether Murray may collaterally attack the PLB Award before the NRAB, or whether he must first pursue judicial review of the PLB's decision under Section 153 First(q). We believe that Congress has indicated that such challenge be appealed directly to the district court."

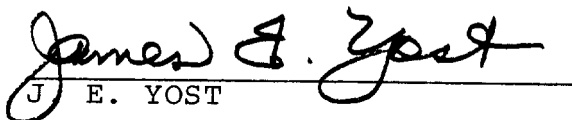
The Court concluded:

"We decline the opportunity to frustrate Congress' primary goal by conferring upon employees the right to challenge the award of one board before the other." (Emphasis in original)

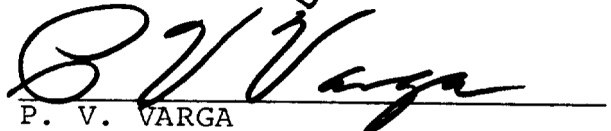
Furthermore, the Majority's findings that Claimant was disciplined without the benefit of a hearing as provided in Rule 34, is likewise flawed as Claimant was not disciplined, but was simply refused the right of reinstatement for failure to meet the Carrier's physical requirements.


R. L. HICKS


M. C. LESNIK


J E. YOST


M. W. FINGERHUT


P. V. VARGA

LABOR MEMBERS'
CONCURRING AND DISSENTING OPINION
TO
Award No. 11507, Docket No. 11331
REFREE MEYERS

We concur with the Majority's opinion that:

"...The Public Law Board decision did not in any way remove Claimant's rights under the Collective Bargaining Agreement after his reinstatement.

...Hence, the Public Law Board had no authority to take away Claimant's right to an impartial investigation."

However, we firmly question the remedy allocated in the findings. Precedent setting awards of this Board have consistently prescribed that a Collective Bargaining Agreement is a joint undertaking of the parties with duties and responsibilities mutually assumed. Where one of the parties violates that Agreement a remedy necessarily must follow. To find that Carrier violated the Agreement and assess no penalty for the violation is an open invitation to the Carrier to continue and refuse to observe its obligations.

Furthermore, refusal to compensate Claimant for his loss of earnings over such a lengthy period of time is not only violative of precedent awards, but is also morally unjust. Carrier's unilateral breach of the Agreement

without appropriate penalty can only lead to additional infractions of contract obligations.

R. E. Kowalski

R. E. Kowalski, Labor Member

R. A. Johnson

R. A. Johnson, Labor Member

M. Filipovic

M. Filipovic, Labor Member

D. A. Hampton

D. A. Hampton, Labor Member

B. T. Proffitt

B. T. Proffitt, Labor Member