Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11746
SECOND DIVISION Docket No. 11480
89-2-87-2-155

The Second Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Fireman and Oilers
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(The Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM:

1. That in violation of the current Agreement, Mr. B. Ballotti, Laborer, Pueblo, Colorado, was improperly removed from service on August 18, 1986.

2. That, accordingly, the Denver and Rio Grande Western Railroad Company be ordered to compensate Mr. Ballotti for all time lost commencing August 18, 1986 and continuing until returned to service.

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 employes 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 waived right of appearance at hearing thereon.

For sometime prior to the genesis of the Claim involved in this Docket, Carrier has had in place a policy of requiring return to work physical examinations of all employes who have been absent because of injury or illness. Alcohol and drug screens are a part of these examinations.

On May 21, 1986 Claimant injured his low stomach muscles while off duty causing him to be absent from work. When he presented Carrier with a release for duty notice from his personal physician he was told that he would have to be examined by a Company physician who administered a drug screen. The screen tested positive for cannabinoids. Claimant was notified that he failed his physical examination, that he would not be allowed to work his job and was directed to report to and cooperate with Carrier's Employe Assistance Counselor.

Claimant entered Carrier's EAP program and during the next several months was given additional drug screens all of which were returned positive. On November 19, 1986 Carrier's EAP Counselor recommended that he be considered for return to work. Claimant was not immediately reinstated because a dispute developed over Carrier's request that he waive his claim for pay. In mid-December 1986 Carrier informed Claimant that he was not required to waive his rights for pay as a condition of return to duty and he resumed his assignment on December 19, 1986.

The Organization contends that its Agreement was violated when Carrier held Claimant out of service without following the disciplinary notice and investigation procedures of Rule 11. It contends that Carrier did not have reasonable cause to require a urine test in the circumstances of Claimant's absence or injury. Also, such testing is not required by his job, which is not regulated by the Hours of Service Act. While raising fundamental questions on reliability and other aspects of the tests administered, the Organization argues that the level of cannabinoids reported to have been detected does not indicate impairment or suggest that Claimant was not capable of performing his job. Carrier, accordingly, was without a basis for a medical disqualification of Claimant.

Carrier contends that it has a moral and legal responsibility to provide its employes with a healthful workplace and has an uncontested right to establish minimum physical standards for employment. In meeting this responsibility it has made alcohol and drug screens a part of all Company physical examinations for all employes. These examinations are administered in situations of pre-employment, promotion or return to work when absent because of furlough, illness or injuries sustained both off the job and on duty. Withholding employes from service who are unable to pass drug and alcohol screens, in such circumstances, it is argued, is not a disciplinary matter but rather a situation of failure to meet Carrier's physical requirements, thus a situation of being medically unfit for duty.

Both sides, in support of their positions, have submitted a plethora of material, [various PLB and NRAB Awards, articles from medical journals and newspapers on drugs and drug testing and Federal and State Court decisions], which has been carefully reviewed. Additionally, during the time we have had this matter under consideration, the United States Supreme Court decided two cases bearing directly on the subject of drugs and drug testing in the railroad industry - Skinner v. Railway Labor Executive's Assn., 489 U.S. _____, _____ (1989) and Conrail v. Railway Labor Executive's Assn., 489 U.S. _____, _____ (1989) - of which we have taken judicial notice.

In Skinner, the Court, among other things held that the drug and alcohol tests mandated and authorized in certain circumstances and situations, by the Federal Railroad Administration, were reasonable under the Fourth Amendment even though there may be no suspicion that any particular employe was impaired. The Court opined that the Government's interest in regulating the conduct of railroad employes engaged in safety sensitive tasks presented a special need situation and that FRA regulations were designed not only to discern impairment but also to deter it.

In Conrail the narrow issue decided was whether the unilateral addition of drug testing in return to duty and/or periodic physical examinations was to be treated as a major or minor dispute under the RLA.

Careful study of the two decisions as well as full review of all of the material in the record support a clear conclusion that the investigation and discipline provisions of the Agreement, (Rule 11), were not violated when Carrier refused to certify Claimant was medically qualified to resume service until he was able to successfully supply a negative drug screen.

However in this case it is obvious that Claimant was held out of service beyond the date that he was medically qualified to resume service - November 19, 1986. For exactly one month after that date the reason that Claimant was not working was not lack of medical fitness, it was because Carrier was insisting that he waive any rights to pay during the period he was off because of his earlier medical disqualification. Carrier's insistence on a back pay waiver seems inconsistent with the basic concept here involved. It is one thing to hold an employe out of service because of a failure to meet medical standards. It is another to hold him out of service because he refuses to waive any right he may have to pay for the time out of service. Under these circumstances it is our view that Claimant was improperly withheld from service during this time. Claim denied for the period out of service prior to November 19, 1986 and sustained for eight hours pay for each work day between the period between November 19, 1986 and December 19, 1986 inclusive.

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 19th day of July 1989.