Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11412
SECOND DIVISION Docket No. 11394
88-2-87-2-37

The Second Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

Parties to Dispute: (Sheet Metal Workers' International Association
(
(Southern Pacific Transportation Company (Western Lines)

Dispute: Claim of Employes:

1. That in violation of the governing Agreement, the Southern Pacific Transportation Company did arbitrarily and capriciously suspend and later dismiss Sheet Metal Worker John A. Hunter following an investigation held on January 3, 1986.

2. That further in violation of the Agreement, Sheet Metal Worker John A. Hunter was not afforded a fair and impartial hearing as required by Rule 39 of the Agreement controlling here.

3. That accordingly, the Southern Pacific Transportation Company should be directed to compensate Claimant for all time lost at the pro-rata that he was improperly withheld from service. That Claimant be made whole for any and all rights, benefits or privileges which would have accrued to him had it not been for the discipline assessed and further that all references to the discipline be stricken from his personal record.

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.

Claimant is a Pipefitter with a service date of July 18, 1978. As a result of charges dated December 20, 1985, Investigation held on January 3, 1986, and letter dated January 28, 1986, Claimant was dismissed from service for violation of Carrier Rule G.

On December 2, 1985, Claimant was given a physical examination after being recalled to work from a furlough that commenced in August, 1982. The exam included tests for drugs based upon a urine sample. Claimant returned to work on December 3, 1985, and worked a normal schedule through December 16, 1985. Claimant was suspended from service on December 17, 1985, pending outcome of a formal Hearing on the allegation that the drug tests given prior to his return to work indicated a positive result for the presence of cannabinoids. According to the Carrier's Submission, the tests performed prior to Claimant's removal from service and dismissal were the "Radioimmunoassay (RIA) and enzyme immunoassay (EIA)." Further, according to the Carrier's Submission, "[o]n March 19, 1986, the original specimen was tested at Roche Biomedical Laboratories using the Gas Chromatograph/Mass Spectrometer (GC/MS) and tested positive for cannabinoids at a level of 126 nanograms per milliliter (ng/ml)." Notwithstanding the results of the tests, Claimant denies usage of drugs.

Rule G states, in pertinent part:

> "The illegal use, possession or sale while on or off duty of a drug, narcotic or other substance which affects alertness, coordination, reaction, response or safety, is prohibited."

Initially, we have examined the transcript of the Hearing and we do not find that Claimant was denied a fair Hearing.

The parties agree that at the time of the physical examination, Claimant was returning from a furloughed status. The fact that Claimant was not actually working when the physical examination was given does not, as the Organization argues, require a sustaining of this Claim under the rationale that while Claimant was on furlough he was not subject to the Carrier's Rules. It is well-established that the employment relationship is not severed by the fact that an employee is in a furloughed status. See Third Division Award 26390 and Awards cited therein. Further, we find nothing in this record to show that under the circumstances of this case the requirement that Claimant submit to the physical examination given as a result of his being recalled from furlough (which furlough lasted in excess of three years) was either arbitrary or capricious.

With respect to the procedure utilized in obtaining the specimen and making the tests, we find nothing in the record to suggest, as the Organization infers, that the sample used in the tests was not, in fact, Claimant's or that the sample was otherwise improperly handled. Because the sample remained in the same physical location (the physician's office) for several hours does not, without more, equate to a showing that the procedure utilized had questionable safeguards.

The record facts established on the property in this case show that based upon the results of a positive showing on initial drug screens, Claimant was dismissed for a Rule G violation. By citing in its Submission to literature discussing the validity of the kinds of tests at issue herein, which tests were used by the Carrier in making its determination that Rule G was violated, the Organization questions the validity and reliability of the results of the drug screens given to Claimant. The Carrier, on the other hand, tells us in its Submission that the follow-up, quantitative verifying exams conducted subsequent to the RIA and EIA screens disclosed the presence of substantial levels of cannabinoids. However, we are unable to consider either the test validity argument made by the Organization or the results of the quantitative tests asserted by the Carrier since neither of those positions was specifically and sufficiently raised on the property. With respect to the validity and reliability of the tests, as was stated in Third Division Award 26394, where the overall validity and reliability of these kinds of tests are not appropriately raised on the property, we cannot consider those arguments when the matter is brought before this Board. The argument timely raised by the Organization in this matter contested the safeguards used during the tests and not the overall validity and reliability of the screens. Similarly, and as correctly argued by the Organization, we cannot consider the results of the quantitative follow-up tests alluded to by the Carrier in its Submission because those results were also not a part of the record on the property.

Therefore, taking into account the totality of the record and the facts and arguments that we can appropriately consider, we are of the opinion that substantial evidence exists to support the Carrier's determination that Claimant violated Rule G. Again, the narrow set of facts in this matter which were properly raised on the property show that Claimant was given a physical examination including drug screens, which tests demonstrated a positive result of cannabinoids. Since we are unable to consider the validity and reliability of the tests used, these are the facts upon which this Award is confined. Rule G's prohibitions are broad and the use of the drug at issue in this case falls within the specific prohibitions of that Rule.

The fact that Claimant denied usage of drugs; was permitted to work for several days prior to being removed from service; or that the Carrier may have known the results of the initial tests for several days prior to taking action, does not detract from the showing made by the Carrier in this case that a Rule G violation existed. Our standard of review limits us to a determination of whether or not substantial evidence exists in the record to support the Carrier's determination. On the basis of this record, and for the specific reasons set forth above, that demonstration has been made.

Finally, the Organization's reliance upon Special Board of Adjustment No. 925, Award No. 22 does not change the result. The Rule at issue therein prohibited employees from reporting to work "under the influence" of drugs. The terms of Rule G quoted above in this matter are broader prohibiting "use, . . . while on or off duty of a drug, . . . which affects alertness . . . ." See Third Division Award 26394, supra.

However, with respect to the amount of discipline imposed, and again, considering the status of this record and further considering that Claimant has successfully completed a rehabilitation program, we are of the opinion that dismissal in this case was excessive. We shall therefore require that Claimant be returned to service with seniority unimpaired but without compensation for time lost.

A W A R D

Claim sustained in accordance with Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

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