

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 Electrical Workers
(Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM:

1. That under the current Agreement, Mechanical Department Electrician R. L. Woods was unjustly treated when he was dismissed from service on September 29, 1986, following investigation for alleged violation of Rule "G" of the General Rules and Regulations of the Southern Pacific Transportation Company (Western Lines).

2. That accordingly, the Southern Pacific Transportation Company be ordered to restore Electrician R. L. Woods to service with all rights unimpaired, including service and seniority, vacation, payment of hospital and medical insurance, group disability insurance, railroad retirement contributions, and loss of wages; including interest at the rate of ten percent (10%) per annum.

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.

On April 18, 1985, Claimant was furloughed from Carrier's Los Angeles Locomotive Maintenance Plant. In January 1986, he was recalled from furlough and was required to complete a six page medical history form which included a consent for a urine specimen drug and alcohol screen. On January 27, 1986, he completed his return to duty examination and tested positive for cannabinoids. Shortly thereafter he was notified to attend an Investigation on a charge that he was in violation of Rule G. Claimant was also given an opportunity to participate in Carrier's Employee Assistance Program but he was unable to do so. Later an Investigation was held on the Rule G charge following which Claimant was terminated.

The Organization contends that the termination was procedurally flawed in addition to being arbitrary and capricious.

The Carrier contends that the results of three tests that were used in this matter establish beyond a reasonable doubt that Claimant had recently used marijuana, thus he was in violation of its revised Rule G. Carrier also contends that it offered Claimant an opportunity to participate in an EAP program but he did not avail himself of the chance.

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 employee was impaired. The Court stated that the Government's interest in regulating the conduct of railroad employees 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. Conrail does, though, comment upon the dialogue between treating employee drug use as a disciplinary concern or a medical concern. Some may interpret the Court's remarks in this area as endorsement, at least initially, favoring rehabilitative treatment. In the circumstances of this case, an initial attempt of rehabilitative treatment seems a more appropriate disposition than permanent dismissal.

Accordingly, we will order that Claimant's dismissal be treated as a medical disqualification and that he be given thirty days within which to enroll in Carrier's EAP program. If Claimant successfully completes this program, within an acceptable time frame, he shall be returned to service with seniority and other rights unimpaired but without compensation for time lost.

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Docket No. 11486
89-2-87-2-121

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 26th day of July 1989.