

The Second Division consisted of the regular members and in addition Referee Donald E. Prover 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, Inc. (formerly Louisville and Nashville Railroad Company) violated the controlling agreement effective September 1, 1943, as amended, in particular but not limited to Rule 34, when Carrier unjustly upheld the September 11, 1985 dismissal of Electrician N. T. Williams in an unfair and partial hearing held Tuesday, August 23, 1988, including Carriers failure to comply with Public Law Board No. 3762 sustaining Award No. 2 adopted July 24, 1985.

2. That accordingly the CSX Transportation, Inc. (formerly Louisville and Nashville Railroad Company) be ordered to reinstate Electrician N. T. Williams to service with all seniority rights and benefits unimpaired and compensated for all wages lost in order to make the employe whole.

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 was an electrician that had been employed by the Carrier in the Radnor Shops, Nashville, Tennessee. He was dismissed June 27, 1983, following an investigation on June 7, 1983. Subsequently a claim was submitted to Public Law Board 3762. Public Law Board 3762 issued an Award on July 24, 1985, reading, in part, as follows:

"Based on all of the information before this Board, it is our decision to reinstate Claimant to his former position with seniority intact but without pay for lost time or benefits. This reinstatement is on a last-chance basis and carries with it the condition that Claimant enroll in Carrier's Employee Assistance Program, that he continue in the day-to-day program, that he remain alcohol and drug free, and that he maintain regular time and attendance.

Claimant should be aware that if he fails to meet the requirements of this award, he will most assuredly be permanently removed from Carrier's service."

On August 8, 1985, the Claimant submitted to a urine drug screen in connection with his return-to-service physical examination. A laboratory analysis made by International Clinical Laboratories showed a positive finding of "cannabinoid," commonly referred to as marijuana. The method used in the analysis is called an "Emit" test. On September 11, 1985, the Claimant was notified he was permanently removed from Carrier's service. The Employees took exception to this ruling and submitted a claim to the Board. Second Division Award 11507 stated in part, as follows:

"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."

In accordance with the forequoted directive the Carrier advised the Claimant under date of August 2, 1988, to attend an investigation. The letter reads, in part, as follows:

"In this connection, you are charged with failure to remain drug free in violation of the conditions for your continued employment placed upon you by Award No. 2 of Public Law Board No. 3762. These charges stem from the results of the urinalysis made in connection with your return to duty physical examination conducted on August 9, 1985, which showed positive evidence of cannabinoids.

At this investigation you shall be permitted to present all evidence of the alleged inaccuracy of the urinalysis, as well as any other evidence you feel supports your right to reinstatement.

You are responsible to arrange for witnesses and/or representation, if desired."

Following the investigation held on August 23, 1988 the Claimant was notified under date of September 16, 1988, as follows:

"This refers to investigation held at 10:00 a.m. on Tuesday, August 23, 1988, at the office of the Plant Manager, Nashville, Tennessee.

Facts developed at the investigation established that you failed to remain drug free, in violation of the conditions for your continued employment placed upon you by Award No. 2 of Public Law Board No. 3762.

Accordingly, your dismissal from the service of the Carrier is affirmed.

Copy of the stenographic record taken at the investigation is attached."

The Employees have presented numerous arguments in this case. We shall address them individually. First, the Employees argue that the Carrier did not provide Claimant with a fair and impartial investigation and that the Conducting Officer acted as accuser, judge and jury. It is true that the same Carrier Officer charged the Claimant, acted as Hearing Officer and affirmed the discipline assessed the Claimant. However, our review of the investigation testimony reveals that the investigation was fair and impartial. The conduct of this Carrier Officer was beyond reproach: he in no way acted so as to prejudice the Claimant at any time and always acted impartially towards the Claimant. See Second Division Awards 8888 and 8423 and Third Division Award 24207 for Findings regarding Carrier officers serving multiple roles in a disciplinary proceeding.

The Employees stress the fact that the test results from August 8, 1985 were originally reported as negative and then subsequently reported as positive. This is true, however, the original report to the Carrier was based on a telephone conversation and this was corrected when the doctor at Clinical Laboratories received a written copy of the results of the drug screen through the mail. We give more credence to a written report than to a telephone conversation, therefore conclude the Claimant tested positive to "cannabinoids" on August 8, 1985.

The Employees argue that the Emit test (used in testing Claimant) is not reliable and submit numerous articles questioning the reliability of such tests.

While the Employees question the reliability of the Emit test given the Claimant on August 8, 1985, they at the same time submit as evidence a report of a negative drug screen test the Claimant had on November 19, 1985. The November 19, 1985 test was at the same place as the August 8, 1985 test, i.e., at International Clinical Laboratories. Claimant at the investigation, in answer to a question as to what type of test he had on November 13, 1985, stated, "The same test that I guess that the Carrier had."

Until it is conclusively shown that Emit tests are 100% unreliable we do not believe it would be proper for us to ignore or not accept the results of such tests as evidence unless there are other factors involved that would cause us to do so.

Accordingly we are concluding that the reports of both the August 8, 1985, and the November 11, 1985, tests were accurate. However, because of the time lapse between tests, (approximately three months), we cannot accept the November test as evidence that the August 8, 1985, test was not accurate. We are sure the Claimant was well aware of the conditions under which he was reinstated by Public Law Board 3762, i.e., "that he remain alcohol and drug free." Therefore, when the Claimant received the results of the August 8, 1985 test, if he thought that there was an error in the results it was incumbent upon him to challenge or question such results immediately, not three months later.

The Employees argue that the Carrier should have called the doctor from the International Clinical Laboratories as a witness. The Employees were well aware of the issues that were involved in the case and made no effort to arrange for the doctor's presence at the hearing or to request prior to the hearing that the doctor be called as a witness. We do not find in this instance that the failure of the Carrier to call the doctor as a witness is a procedural defect. As indicated above we concluded that reports of both drug screen tests were accurate.

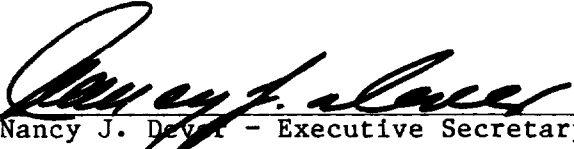
We find that the Carrier complied with the orders of Second Division Award 11507. We also find that the evidence introduced at the August 23, 1988 investigation proved that the Claimant violated the requirement set forth in the Findings in Case No. 2 of Public Law Board No. 3762, i.e., he did not remain drug free following his reinstatement. It is our conclusion, therefore, that Carrier's dismissal of the Claimant was justified and warranted.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 10th day of July 1991.

