

The Second Division consisted of the regular members and in addition Referee Raymond E. McAlpin when award was rendered.

(International Association of Machinists and
(Aerospace Workers
PARTIES TO DISPUTE: (
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

1. That the Chicago and North Western Transportation Company (hereinafter referred to as the "Carrier") violated the provisions of the July 1, 1921 Joint Agreement, as amended July 1, 1979, specifically Rule 35, when, subsequent to an investigation which was neither fair nor impartial, it unjustly and improperly dismissed Proviso diesel shop Machinist Helper Ronald B. Johnson (hereinafter referred to as the "Claimant") from service.

2. That accordingly the Carrier be ordered to:

(a) Restore Claimant to service with all seniority and vacation rights unimpaired.

(b) Compensate Claimant for all time lost from service commencing July 25, 1989.

(c) Make Claimant whole for all health, welfare and insurance benefits for all time held out of 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 were given due notice of hearing thereon.

The Claimant, a machinist employed at the Proviso diesel shop as a machinist helper, was dismissed from service as a result of Discipline Notice #003 on August 4, 1989 as a result of an Investigation held on July 25, 1989 and postponed on several occasions prior to that time. The Carrier alleged that a urinalysis which was taken as a result of an on-the-job injury suffered by the Claimant on January 11, 1989 showed the Claimant to have greater than 600 nanograms per milliliter of the metabolite for cocaine in his system, resulting in his dismissal for the alleged violation of Rule G.

The Organization stated that the Carrier had violated Rule 35 of the Joint Agreement when it arbitrarily dismissed the Claimant from service. The Investigation which was held on July 25, 1989 was not a fair and impartial Hearing due to the conduct of the Hearing Officer. The Organization stated that the Hearing Officer led Carrier witnesses through their testimony, openly solicited insertions into the record of documents, and solely directed his efforts to proving the Claimant to be guilty as charged. The Organization stated that the Hearing Officer must be objective. This is a fundamental concept to a fair and impartial Investigation. The Hearing Officer did not function as a finder of facts but, on more than one instance, gave a clear indication that the Claimant had already been found guilty as charged. The Carrier was merely going through the motions of complying with the Controlling Agreement.

In any event the Organization stated that the Carrier failed to support the charges filed against the Claimant. The Claimant had sustained an injury to his head and neck on January 11, 1989 and was subsequently charged with a violation of Rule G of the Safety and General Rules. The Claimant performed his tasks on the day in question with no problem from 3:00 P.M. to 10:30 P.M. The Carrier had newly installed pipes that were constructed in such a way that anyone that was 5 feet 5 inches or taller would come in contact with these pipes. The Claimant is 6 feet tall and, therefore, was placed in jeopardy. The Carrier has held the point of view that the Claimant's act of striking his head on the low hanging pipe was not accidental, but attributed to his being adversely effected or influenced by some unknown substance. The Carrier has not proven this contention. There is no evidence in the record that would indicate conclusively that the Claimant on the night in question was using a controlled substance on the property, that he had the same on his person or that he reported for duty under the influence of a controlled substance. It is the Organization's position that there was no probable cause to test. In any event, the testing service found only a trace of the metabolite. The accident alone was not a proper reason for testing. This substance can remain in a person's body for a substantial period of time. The Organization cited a number of Awards in support of its position.

The Organization also stated that the Claimant was denied an unbiased review of his appeal in that the Hearing Officer was also the Reviewing Officer who issued the Dismissal Notice on August 4, 1989. It is highly questionable that this Carrier official would have reversed his earlier decision which

was set forth in the Discipline Notice of August 4. Therefore, the Claimant has effectively been denied an impartial and unbiased review of his appeal which is his right under Rule 32 of the Joint Agreement. Again, the Organization cited an Award in support of its position.

For the reasons stated above the Organization asked that its claim be upheld in full.

The Carrier stated that the Claimant was charged with being in violation of the Carrier's Rule G/Drug Policy. Evidence showed that the laboratory test confirmed that the Claimant had greater than 600 nanograms per milliliter of the metabolite for cocaine in his system. This test was confirmed by the GCMS method. The Carrier stated that there was no discernable proximate cause for the injury and that provided for the basis for requiring the urinalysis, the results of which were confirmed by the appropriate test. Therefore, the Carrier has proven the violation of Rule G. Since the Carrier has proven its charge, the appropriate penalty is dismissal. This has been a standard on the property and been upheld in numerous Board Awards which are cited by the Carrier.

The Organization stated that the Hearing Officer did not conduct a fair and impartial Hearing. It is the Carrier's contention that a reading of the transcript will show that the Hearing Officer properly performed his responsibilities without exception. The Claimant's right to a fair and impartial Hearing was not jeopardized in any manner by the Hearing Officer's action. The Carrier noted that the Hearing Officer had no other connection with the case other than his role as Hearing Officer. The Organization also objected to the fact that the discipline which was assessed in the initial appeal was taken to the same officer. Again, numerous Board Awards have found that this is proper and does not deny the Claimant a fair and impartial hearing or a proper appeals process. Again, Awards were cited. The Organization's contention that the Hearing Officer reached a conclusion is clearly without merit. The Hearing Officer was doing nothing but stating the testimony of the Carrier witnesses.

The record indicates that the area was adequately lighted to such an extent that one would be able to recognize and observe the overhead pipes. Other personnel had traversed this area without causing injury to themselves. The Claimant had also traversed this area before and was well aware of the overhead obstructions. The Claimant attempted to explain away the presence of the cocaine metabolite by testifying he had taken an over the counter medication called Ambesol. He testified that the medication contained the ingredient benzocaine. However, none of the constituents of the procaine group of which benzocaine is one produced the metabolite benzoylecognine, therefore, the Claimant's use of this product would not account for the presence of metabolite of cocaine in his urine sample. Based on the foregoing, the Carrier asked that the claim be denied.

Upon complete review of the evidence, the Board finds that the Investigation conducted by the Carrier met the minimum standard as required in Rule 35 of the Joint Agreement. The Claimant and his representatives had adequate opportunity to present appropriate evidence on behalf of the Claimant and the record is complete in this respect.

With respect to the merits of the case, the Claimant is charged with a most serious violation of Carrier Rules. This area has been adequately discussed in many Awards before this and other Divisions of the Board, therefore, we do not have to go into any detail regarding the potential safety and other consequences of working while testing positive for the cocaine metabolite. The Board is satisfied that the Carrier's chain of custody and testing methods are appropriate, and the Board finds that the Claimant did test positive for cocaine. Under the circumstances of this case, the Board finds that the Carrier had probable cause for testing this Claimant. The circumstances of his "accident" were such that it was reasonable to suspect a problem. The Claimant's contention that he was using the over-the-counter drug Ambesol for gum relief simply is not credible. This particular medication is applied in minimum dosages and is applied topically to the gum area and, in any event, there was no showing that this medication would metabolize to the same derivative as cocaine.


With respect to the Organization's claim that the appeals were not handled impartially, there is no showing that such multiple handling was prohibited by the Joint Agreement and there are a number of cases which show that this practice on the property has not served to overturn what would otherwise have been an appropriate Carrier decision of dismissal. For all the reasons stated above, the Board finds that the Carrier has proven its case and, therefore, will deny the claim.

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 1st day of April 1992.