

The Third Division consisted of the regular members and in addition Referee Jack Warshaw when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Southern Pacific Transportation Company
((Eastern Lines)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Machine Operator E. J. Lang for alleged 'rule violation' in connection with his alleged '... failure to report to Dr. Klein for enrollment in the Employee Assistant Program....' was without just and sufficient cause, on the basis of unproven charges, arbitrary and capricious (System File MW-86-22/445-82-A).

(2) The Agreement was violated when Regional MofW Manager L. L. Mahon failed to timely disallow the claim presented to him by Assistant Chairman M. E. Hanks on December 17, 1985 as contractually stipulated in Article 15.

(3) As a result of either Part (1) and/or Part (2) hereof, the claimant shall be reinstated with seniority and all other rights unimpaired, his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

The Third 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.

While on furlough, the Claimant applied for work on an "extra" basis to relieve vacationing employes. He was instructed to undergo a return to duty physical exam which include a urine drug screening test. On September 9, 1985, the Claimant was advised that he failed the drug screening test and would be required within fifteen days of the Carrier's notice to obtain the services of the Carrier's Employee Assistant Counselor.

The Claimant stated he attempted to contact the EA Counselor unsuccessfully and finally left his name and telephone number on the EA Counselor's

telephone answering device requesting that his call be returned. He received no return call. On October 22, 1985, the Carrier instructed the Claimant that since he had tested positive for marijuana and had failed to contact the EA Counselor he would be required to attend an Investigation. Following the Investigation, the Claimant was found guilty as charged and dismissed from the Carrier's service.

The Organization contends that it did not receive the Carrier's claim denial letter of January 21, 1986. It has been generally held since issuance of Decision No. 16 of the National Disputes Committee that a late denial is an effective toll of the Carrier's liability.

In the instant Claim, the Carrier's liability for its procedural violation would end on March 14, 1986, the date of the Carrier's denial letter which the Organization acknowledges it received on March 21, 1986. It does, however, require a decision by the Board as to the merits of the Claim. (See Third Division Awards 24269, 24298, 25473, 25604).

Concerning the merits, however, the Board finds that the Carrier has sustained its burden of proof that the Claimant failed to comply with Carrier instructions following positive results of a drug screen test. The record discloses that the EA Counselor denied any contact by the Claimant as of November 18, 1985. Further, although the Claimant testified he had documentation to prove that he had tried to reach the EA Counselor and was afforded opportunity to submit a telephone bill of his long distance calls, he never did so during the handling of his Claim on the property.

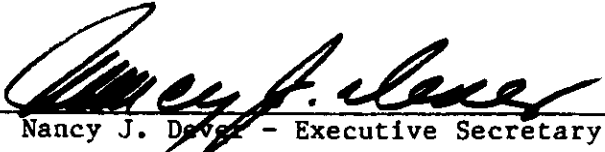
Because we find that the Claimant was guilty of the charge that he failed to comply with the Carrier's valid instructions, we will not award the Claimant's reinstatement, or compensation beyond March 14, 1986.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of July 1988.