Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28118
THIRD DIVISION Docket No. MW-27836
89-3-87-3-346

The Third Division consisted of the regular members and in addition Referee John E. Cloney when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Denver and Rio Grande Western Railroad Company

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

(1) The dismissal of Claimant J. N. Vialpando for alleged '... failure to pass physical examination of February 21, 1986, as provided for in Letter of Understanding dated February 3, 1986, account positive results from drug screen....' was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File D-86-15/MW-14-86).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered because of the violation referred to in Part (1) hereof."

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.

Claimant held seniority as a section laborer dating to August, 1976. By letter of November 12, 1985, he was dismissed from service. On December 13, 1985, he was reinstated on a leniency basis subject to passing a physical examination which was conducted on December 17. By letter of December 19 Claimant was informed an illegal drug was detected in the drug screen portion of the physical examination and he was ordered to contact the Employee Assistance Counselor.

On February 3, 1986, Claimant and the Local Chairman signed a Letter of Understanding stating:

> "I am agreeable to returning to service with all rights unimpaired and without pay for time lost on a probationary basis for a six-month trial period, provided that I continue to work with the Employee Assistance Program.
>
> I also understand I will be subject to random alcohol/drug screen testing during this six-month trial period.
>
> If I fail to pass the alcohol/drug screen testing at any time during this six-month trial period I understand and agree that I will be removed from service and subject to investigation for this reason."

On February 10, 1986, Claimant was informed he was reinstated and would be notified when his seniority permitted a return to work. He was recalled on February 19, 1986, subject to a physical examination which was administered February 21, 1986. On February 27, 1986, Carrier received a report that Claimant had tested positive for cannabinoids in the drug screen portion of the examination. On March 13, 1986, Claimant was notified to attend a formal investigation on March 17, 1986, account a positive drug screen. On March 26, 1986, Claimant was notified he was dismissed.

Rule 28 - Discipline provides in pertinent part:

> "Hearings - (a). An employe who has been in the service more than sixty (60) calendar days shall not be disciplined or dismissed without being given a fair and impartial investigation, except as provided in Rule 7 of this agreement. He may, however, on proper authority be held out of service pending such investigation.
>
> When an investigation is necessary it will be held as soon as possible, ordinarily within ten (10) calendar days but not to exceed thirty (30) calendar days from date of report. The accused employe shall be advised of the charges against him and shall have reasonable time to secure the presence of a representative of his choice and necessary witnesses."

The Organization argues no evidence was presented to establish why an investigation was not held until March 17, approximately 24 days from the date of the test, whereas Rule 28 requires investigation "ordinarily within ten (10) calendar days." As we read Rule 28 it required investigation be held within thirty days of February 27, 1986, the date Carrier received the drug screen report. Even if the time began to run from the date of the test, the investigation would have been conducted within thirty calendar days.

Although arguing Rule 28 was not observed by Carrier, the Organization contends "Rule 28, Discipline, pertains to individuals who are an employe, not those who are furloughed . . . ." In answer we quote Second Division Award 11412:

> "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 employe is in a furloughed status . . . ."

The Organization also argues there was no proof of impairment. In an August 7, 1986, letter the General Chairman argued Carrier was assuming:

> "the test in question is qualitatively and quantitatively accurate and reliable, that the chain of specimen custody was untainted by specimen mishandling and that the test is capable of correlating physiological and psychological effects of marijuana with levels of urinary metabolites reported therein. You are in serious error."

In furtherance of this position the Organization submitted numerous articles from scholarly Journals and other authoritative sources dealing with rates of error in testing, possibilities of lack of care in the chain of custody of samples, and related items. (Carrier has objected to some of these as not having been presented on the property.) This Board views arguments regarding the efficiency, reliability and desirability of substance testing generally as largely irrelevant to this dispute. Claimant is not in the same situation as an employe sent for testing because of suspected impairment or as a result of some accident in which he had been involved or solely as part of a routine physical. After a leniency basis reinstatement Claimant and the Organization had signed a Letter of Understanding acknowledging he was subject to random testing for a specific period in order to return to service and was subject to removal if the test was failed. We do not imply that care and safeguards need not be taken in such situations and we do note there is no evidence of any irregularities which might affect the collection procedure, the

chain of custody or the results of the test. We do believe that having entered into the specific testing agreement, Claimant cannot attack the concept of testing conducted pursuant to the agreement. In short, we view this as a case involving enforcement of a return to service agreement, not as a typical drug screen matter.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of September 1989.