Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28757
THIRD DIVISION Docket No. CL-29056
91-3-89-3-526

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

PARTIES TO DISPUTE: (Transportation Communications International Union
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(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10402) that:

1. Carrier violated the effective Telegraphers' Agreement when it withheld Operator R. Wammack from service without just cause on October 22, 25, 26, 27 and 28, 1988.

2. Carrier shall now compensate Mr. Wammack eight (8) hours' pay at the straight time rate of his position for each of such dates."

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.

The Organization alleges that the Claimant was withheld from service for five days between October 22 and 28, 1988, without cause. Claimant suffered what was thought to be a heart attack on September 7, 1988, while working the daytime position at Chicago Heights Tower. He was subsequently hospitalized and was released by his personal physician to return to duty as of October 21, 1988. Carrier approved Claimant's return on October 28 after it conducted its own physical, which included a drug screen. It waited until it received the results of that test.

The Organization argues that (1) There was no "probable cause" for the screen and therefore it must be considered a "random test." (2) In adopting a policy whereby it tests for drugs upon an employee's return to work following an illness, Carrier is engaging in random testing. Carrier may not impose such a policy unilaterally, since to do so constitutes a substantial change in the employees' conditions of employment. Such a change may only be

effectuated through collective negotiations. (3) The imposition of this policy violates a clear past practice. Supervisors have always relied on firsthand observation to determine whether they had cause to test for drug or alcohol use. (4) In withholding Claimant from work, he was in effect suspended from service without an Investigation, in violation of Rule 45. (5) Carrier's action constitutes an improper attempt to control Claimant's off-duty conduct.

Carrier, on the other hand, maintains that the Organization is long overdue in challenging its policy of administering drug tests during return-to-work physical examinations. It instituted its policy in February 1986, and notified the Organization on October 18, 1985, about its position on drugs. At the same time, it gave the Organization its Presumption of Impairment Notice, which spoke about withholding employees from service when they failed a drug test that they were required to take during a return-to-work physical exam. In addition, employees who take such tests sign a release form indicating that they are aware of the drug screen.

Carrier also contends that medical standards for employees have always been set by Carrier without negotiations with the Organization and there is no contractual bar in the parties' Agreement against screens under the circumstances here. Carrier does not believe that there was unreasonable delay in this case. Further, the Claim is excessive since Claimant was not scheduled to work on October 22, and he could not have returned to work on October 25, the date of his exam.

This Board has reviewed the entire record of this case, including Awards presented by both parties in support of their respective positions. We find that the better reasoned decisions support a Carrier's right to institute drug screens during return-to-work physicals where such a procedure is not expressly prohibited by Agreement or by a clearly enunciated, long-standing past practice. (See, for example, Award No. 21 of SBA 1020.) We find no such prohibitions here.

The Organization's assumption that the administration of drug tests during return-to-work physical examinations is not for proper cause and therefore constitutes random testing is open to question. The right and obligation of employers in the railroad industry to ensure that their employees are fit for employment is undisputed. As noted in First Division Award 13859, a carrier has a "strict legal liability to the public for the safe passage of its trains." It follows that employees must be in acceptable condition to ensure their own safety and that of others.

In conducting return-to-work physicals after an illness, Carrier physicians seek to ensure that employees are neither impaired nor incapacitated. Returning workers must be able to perform their regular jobs without harm to themselves, their fellow employees, or members of the general public. In engaging in drug testing, an employer need not necessarily be seeking out illicit drugs. There are numerous licit drugs, provided by personal physicians under prescriptions, that may have an adverse effect on an individual. To say that a Carrier may not conduct a drug screen in this instance would be unduly restrictive and unreasonable. Under these circumstances, it can only be concluded that a Carrier has good and proper cause to undertake such tests.

In Claimant's case, the Carrier advised the Organization that the Claimant was taking medication prescribed for treatment of his heart problem. As pointed out by Assistant Superintendent of Operations in his letter to the General Chairman on January 25, 1989:

> "Mr. Wammack's case in particular leaves reason to assume that there may well have been related heart difficulties and/or disease which might require the use of medication prescribed or otherwise which could well deem him impaired."

As previously noted, we find no contractual bar in the record to drug testing following an illness. At the same time, there is no evidence of a practice outlawing drug screens. (The alleged practice in regard to Rule G cases in not applicable here. We also cannot conclude that a carrier that conducts such tests is seeking to control off-duty behavior.) Rather, as noted by Carrier, there appears to have been a practice on the property extending over a period of two to three years, wherein drug tests were administered during return-to-work physicals following an illness. (In Claimant's case, he apparently was given a similar test just a week or two before and raised no objection to it then.)

Under all the circumstances present here, we cannot conclude that the delay to which Claimant was subjected was unreasonable. For all these reasons, the Claim must be denied.

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 30th day of April 1991.

LABOR MEMBER'S DISSENT TO

AWARD 28757, DOCKET CL-29056

(REFEREE GOLD)

The Majority Opinion has erred in the case at bar and has issued a decision which is contrary to the weighted authority on the subject within the industry as well as the Agreement.

The facts of this dispute are the Claimant a twenty year employe with an unblemished record suffered what appeared to be a heart attack. He was released from service on October 21, 1988. He notified the Carrier and was advised that he would be required to undergo a return-to-work physical by a Carrier physician which couldn't be done until October 25, 1988.

He was examined on October 25, 1988, and found fit for service, however he wasn't approved until the results of the drug test were received. Claimant was ultimately permitted to return to work on October 28, 1988.

Claimants illness was in no way drug related nor is there any evidence to indicate that he is an abuser of drugs on or off duty.

The Majority has ignored the fact that there was no probable cause to require any drug test and the adoption of a policy wherein employe are tested for drugs upon return to work following illness, or any other "without cause" testing policy constitutes a substantial changes in employment conditions which can only be accomplished over the bargaining table; and Cause Drug Testing is an Unreasonable Abuse of Managerial Prerogative and even if such a policy could be instituted it fails to meet the standards of reasonableness.

It stands unrefuted that Claimant's illness was not drug related, nor is there any inference

that the Claimant had any drug or alcohol problems. What the record does show is that there was no probable cause of suspicion that the Claimant was under the influence of drugs or alcohol. His record of 20 years of unblemished service speaks to his excellent character.

As said before the Carrier had no probable cause for testing and contrary to the Majority Opinion the record is clear that they didn't historically do such testing of employees in the past.

The identical issues and same questions raised in this case involving clerical employe was recently addressed by Public Law Board 4418 Awards 16, 26 and 28 which are thoughtful and comprehensive studies that should have been followed in this instance. In those cases the Board concluded that identical rules to those in this dispute guaranteed Claimant's the right to return to duty from Leaves of Absence including medical without being first required to take a mandatory or random drug test. The Majority has erred in this instance by not following those precedential decisions.

Finally the Majority somehow managed to compound it's first error by then proceeding to ignore the clear language of Rule 62 which states:

"...if an employe is removed or withheld from service and it is later determined that they were capable of performing their usual duties, such an employe will be compensated for all monetary loss suffered during the time they were improperly withheld or removed from service..."

The rule does not allow for any type of delay. If the parties intended that employes be returned to service without "unreasonable delay" it would have been stated, but since they said all monetary loss will be covered then that's exactly what the Claimant was owed. The record clearly indicated that the Claimant was fit for service as of October 21, 1988, and the drug screen results of October 28, 1988, verify the same thus in accordance with Rule 62 Claimant

was entitled to five (5) days pay.

Award 28757 carries no precedential value and it is palpably wrong and requires strenuous dissent.

William R. Miller

William R. Miller

April 30, 1991

CARRIER MEMBERS' RESPONSE
TO
DISSENT OF THE ORGANIZATION
IN
THIRD DIVISION AWARD 28757, DOCKET CL-29056
(Referee Gold)

The rationale of the Majority is set forth cogently and at some length. It needs no further defense. The purpose of this Response is to make it clear that every argument and Award referred to in the Dissent was presented to the Board by the Organization, argued with great fervor by the Organization, and rejected by the Board.

M. W. Fingerhut

R. L Hicks

M. C. Lesnik

P. V. Varga

J. E. YOST