Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29244
THIRD DIVISION Docket No. MW-29756
92-3-91-3-113

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Consolidated Rail Corporation

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

(1) The dismissal of Welder K. Hoffman for his alleged failure to '... comply with the Conrail Drug Testing Policy as you were instructed in letter dated May 11, 1989, in that you did not report to the Metro-North Medical Office for further testing on December 6, 1989 at 8:00 A.M. as directed by letter from Division Engineer T. C. Tierney and your failure to report to the Metro-North Medical Office for further testing on December 7, 1989, as directed by Track Supervisor C. J. Callahan.' was arbitrary, capricious, excessive and based on unproven charges (System Docket MW-1083).

(2) Claimant K. Hoffman shall be reinstated, 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 the Statement of Claim in this case alludes to an alleged failure to comply with the Carrier's Drug Testing Policy, a reading of the Hearing transcript and a study of the respective arguments and contentions of the parties reveals that the mechanics of handling of the Drug Policy rather than the Policy itself is at issue here.

There is no dispute relative to the fact that in April, 1989, Claimant tested positive for use of a controlled substance. There is no dispute that Claimant was put on notice by letter dated April 19, 1989, that he would be out of service until such time as he could "... rid your system of cannabinoid and other prohibited drugs and to provide a negative urine sample within 45 days of the date of this letter." There is no dispute that Claimant did, in fact, provide a negative urine sample on May 8, 1989 (well within the 45 day limit) and, by letter dated May 11, 1989, he was returned to service. At that time he was clearly informed that he was, in effect, on probation for a three year period during which he would be subjected to random testing to demonstrate that he was no longer using cannabinoid or other prohibited drugs. This May 11, 1989 letter went on to state in clear and concise terms the following:

> "Should a further test, including a test conducted as a part of any medical examination, a test performed under FRA mandate or authorization, or a test in the three-year monitoring period, be positive, you may be subject to dismissal by your department for failure to follow proper instructions." (Underscoring ours)

There is no dispute that Claimant tested negative during a random monitoring in October, 1989. There is no dispute that Claimant was instructed to appear for a random test on December 6, 1989, and he did not so appear. There is no dispute that Claimant was subsequently instructed to appear for a random test on December 7, 1989, and again he did not so appear. There is no dispute that Claimant did, in fact, present himself and supplied a specimen for testing on December 11, 1989. There is no indication in this record file to indicate that the December 11, 1989, specimen was ever tested or, if it was, what the result of that test revealed.

It is at this point in the chronology of events that "dispute" and "controversy" enter the scene.

Claimant was verbally withheld from service on December 11, 1989. He was not, however, notified in writing that he had been withheld from service until December 26, 1989, when he was informed that "You are out of service for medical reasons as advised by MD-40 dated December 11, 1989." It is significant to observe at this point that the record contains no evidence that the May 11, 1989 MD-40 form was ever presented directly or timely to the Claimant. In the meantime, Claimant was instructed by notice dated December 12, 1989, to appear for a Hearing on December 26, 1989, on the charges of failure to follow instructions of his Supervisor when he failed to report for a medical examination on December 6 and December 7, 1989. Nothing in the charge notice confirmed that Claimant was being withheld from service pending Hearing. By letter dated December 13, 1989, the December 12, 1989 Notice of Investigation was cancelled. A separate Notice of Investigation was issued on December 13, 1989, informing Claimant to appear for a Hearing on January 2, 1990, on the charge:

> "Your failure to comply with the Conrail Drug Testing Policy as you were instructed in letter dated May 11, 1989, in that you did not report to the Metro-North Medical Office for further testing on December 6, 1989 at 8:00 A.M. as directed by letter from Division Engineer T. C. Tierney, and your failure to report to the Metro-North Medical Office for further testing on December 7, 1989, as directed by Track Supervisor C. J. Callahan."

And again, there was nothing in the charge notice confirming the fact that Claimant was being withheld from service pending the Hearing. The Hearing was held as scheduled and the dismissal which followed forms the basis of the dispute being considered by this Board.

The record is clear that Claimant, upon being properly instructed on December 6, 1989, to present himself for testing made no objection. He immediately proceeded to comply with the instruction. While enroute to the testing facility, he was involved in a traffic accident which rendered his vehicle useless. He thereupon contacted his Supervisor and was informed to go to the testing facility "at any time during the day." The record then indicates that at approximately 2:15 P.M. on December 6, 1989, Claimant again contacted the Supervisor and informed him that he could not make it to the testing facility on December 6, 1989. Thereafter, according to the Hearing testimony, the Supervisor answered "Yes" to the question "Did you set up a physical for the 7th?" While there is some unresolved confusion in the transcript record relative to exactly when the Supervisor arranged for the December 7, 1989, testing as well as exactly when and with whom he had his conversations, there is no doubt from the record that he did, in fact and without objection, arrange for the Claimant to be tested on December 7, 1989.

Again from the Hearing record, it is clear that on December 7, 1989, Claimant was apparently ill; he presented himself to a private medical facility; he was diagnosed and treated with the instruction to remain off work until December 11, 1989. Documentation of this diagnosis and treatment was presented to the Supervisor on December 7, 1989, and, from the record, was not challenged, questioned or in any way objected to by the Supervisor. As a result of this illness, Claimant did not present himself for the random testing at Carrier's designated facility on December 7, 1989. Rather, on December 11, 1989, the date he was released for duty by his personal physician, Claimant presented himself for testing and supplied the required specimen. As noted earlier herein, there is no record in this case file to indicate that this specimen was ever tested or, if it was, what the results of that test were.

Carrier, in their presentation to this Board, raises two hypotheses, as follows:

"One must question why he didn't have her (his girlfriend) take him approximately 1 mile from the accident scene to the medical facility to submit to his drug test."

AND

"It is curious that the appellant could undergo a physical at Hamden Medical Services on December 7, but allege he was too sick to give a urine specimen for his follow-up drug test. It is also curious that he was well enough to personally deliver his doctor's note to his work location, but could not go approximately 5 miles further to submit to his drug test. The appellant's deliberate action in failing to submit a drug test as ordered looks suspiciously like someone who feared a possible positive test result."

It is significant to note that these hypotheses are raised for the first time before this Board. Carrier did not seek to resolve these issues during the on-property hearing. They are, therefore, conjecture and speculation with no basis in fact.

We have read and studied the several precedential citations which the parties have submitted. We find all of them to be well reasoned and sound judgmental decisions based upon the fact situations which apparently existed in the individual cases. We do not, however, find the fact situation in this case to be four square with any of the fact situations which apparently existed in the cited Awards.

We are not dealing in this case with the right or wrong of Carrier's Drug Policy. Rather, we are dealing with the mechanics of application of their clearly recognized and sound Drug Policy. There is no serious question in this Board's mind relative to Carrier's right to conduct random testing in situations of the type which exist here. There is no serious question in this Board's mind relative to Carrier's right to insist on reasonable compliance with their instructions concerning the matter of random testing. We agree that "The orders of superiors must be obeyed" (Third Division Award 16074). But when, as here, the properly authorized and communicated instruction is voluntarily changed by the Supervisor who initially issued it, there can be no serious argument that the initial order was disregarded in an insubordinate manner by the employee.

We find nothing in this record to prove by substantial evidence that Claimant was guilty of insubordination in any form. Carrier itself absolved Claimant of any wrongdoing on December 6, 1989, when they accepted the excuse given and rescheduled the test. They did not, as was done in Public Law Board No. 4410, Award 97, inform Claimant that he must "make the appointment" or that he should "take a cab or there are other forms of transportation available." Rather, Carrier rescheduled the test for Claimant without objection.

As for the validity, authenticity and acceptability of the reasons given by Claimant for not keeping the appointments on the two dates in question, we find that Carrier's own two Management witnesses who were both directly involved in the handling of this situation testified forthrightly that they believed and accepted that the traffic accident and the documented illness were justifiable reasons for Claimant being unable to keep the scheduled appointments.

It is significant in this case that the May 11, 1989, letter from the Medical Director to the Claimant plays a major role in the Notice of Investigation as issued and in the position of the Carrier throughout their handling of this dispute. Earlier in this Award we have quoted a material portion of this letter. In this record, we have not been shown a situation in which a positive test result was found subsequent to the issuance of the May 11, 1989, letter. There is no proof that Carrier's well reasoned Drug Policy has not been compiled with by Claimant.

The absence of results from the specimen presented on December 11, 1989, negates that portion of the charge notice which refers to the May 11, 1989, letter. The acceptance by Carrier's officers as justifiable and reasonable the excuses given for Claimant's failure (not refusal) to report for testing on December 6 and 7, 1989, negates that portion of the charge notice which refers to those two dates.

On the basis of the record before us, Claimant should be reinstated to service in accordance with the provisions of Section 4 of Rule 27 of the applicable Rules Agreement, subject, of course, to his ability to successfully pass all physical and job related examinations normally required of a reinstated employee including, but not limited to, a drug screen to determine that he is no longer using cannabinoid or other prohibited drugs.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 18th day of May 1992.