

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30925-
Docket No. MW-28852
95-3-89-3-244

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Pittsburgh and Lake Erie Railroad Company

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

1. The dismissal of Mr. G.L. Hansen for alleged violation of P&LE General Rule (T) B. 1, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement. (System File C-37038-D)
2. The Claimant shall be reinstated to service with all benefits and seniority rights unimpaired 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 employee or employees involved in this dispute are respectively carrier and employee 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.

This claim concerns the dismissal of Claimant effective June 16, 1988, on charges of insubordination for failing to obey instructions received in connection with a return-to-work physical examination.

On December 4, 1987, Claimant signed a certification that he had read and fully understood Carrier's Alcohol and Drug Use Procedure. That procedure provided inter alia that:

".....

An employee who is medically disapproved for service based upon a positive test result shall meet with one of the railroad's employee assistance program coordinators and will be encouraged to accept referral to an external employee assistance counselor to determine if further treatment and assistance is warranted. Following that evaluation, if further treatment and/or assistance is recommended, the employee will be encouraged to fully participate in the prescribed treatment.

.....

An employee who fails to complete the prescribed treatment program, or who does not accept referral to an external employee assistance counselor, or who is not recommended for treatment or assistance by the external counselor, will be instructed, in writing, to rid his or her system of the involved and other prohibited substances and to schedule a return-to-service physical examination within forty-five (45) days and further instructed to provide a negative test sample for the involved and other prohibited substances during such examination. If the test sample is negative, the employee will be returned to service. An employee who fails to schedule an examination during the forty-five (45) day period or fails to provide a negative test sample during the examination will be subject to discipline, up to and including dismissal, for failure to obey instructions. (Emphasis added).

Claimant had elected to accept referral to an external employee assistance counselor for evaluation and determination of a course of treatment. Claimant agreed to an out-patient program, then switched to an in-patient program. After reporting to the program, he decided not to remain.

The Board notes that the Claimant and Carrier offered differing reasons for Claimant's withdrawal from the in-patient program. However, resolution of that issue is not relevant to this matter. It is undisputed that, by so withdrawing, Claimant was required by the Alcohol and Drug Use Procedure to schedule a return-to-service physical examination within 45 days. Claimant

contacted Carrier's Medical Department on February 10, 1988 for this purpose.

Claimant then received a February 10, 1988 certified letter from Carrier requiring him to schedule the examination within five business days. In addition, the letter stated that "[f]ailure to fully participate in the physical examination or failure to provide a negative test sample during such examination will subject you to discipline, up to and including dismissal, for failure to obey instructions."

The test was postponed when Claimant advised Carrier's medical personnel that he had hepatitis. The Board notes that it does not have to resolve the parties' differing explanations for the precise circumstances surrounding this delay. That issue is not dispositive of the issue in the claim before the Board.

Claimant was then scheduled for examination on May 11, 1988. Claimant completed the first phase of that test (vision, hearing and spirometer tests, and submission of a urine specimen) on May 11, 1988. Claimant was then instructed, to complete the second phase of his examination later that morning at a hospital facility.

Carrier was notified later in the day on May 11, 1988 that Claimant had not reported for his scheduled appointment at the hospital. The May 11, 1988 urinalysis tested positive for alcohol.

Claimant asked to return to work on May 26, 1988. He was informed that he had not completed the physical examination. Claimant then told the Carrier's officials that he had, in fact, taken the second part of the physical examination. At the Carrier's request, the hospital re-checked its records. On May 31, 1988, the hospital informed Carrier that Claimant did not report for the scheduled physical, and that "[w]e have not seen nor heard from [Claimant] to date."

On June 1, 1988, Carrier ordered an Investigation as to whether Claimant:

"... failed to comply with the instructions as outlined in the Alcohol and Drug Procedure given to you on December 4, 1987, when you failed to supply the required negative urine specimen on May 11, 1988 and failed to comply with instructions to report to [the second medical facility] for completion of your physical examination on May 11, 1988."

The Investigation was held on June 8, 1988. Claimant did not dispute that the May 11, 1988 urinalysis was positive for alcohol. He did contend, however, that he had reported to the second medical facility and that he had completed the test. The Hearing Officer granted Claimant one week from June 8, 1988 within which to submit evidence to support those contentions. Claimant did not submit any subsequent evidence to support his position in this regard.

Claimant was dismissed Chief Engineer on June 16, 1988. The Organization filed a claim on Claimant's behalf on June 24, 1988. The appeal was discussed on the property without resolution, and is properly before the Board.

The Carrier and Organization each object to exhibits or arguments that were presented in the other Party's Submission to the Board. The Carrier objects to the Organization's assertions that the Hearing was not fair and impartial because the dismissal decision was rendered by an individual who was not present at the Hearing. The Carrier also objects to the Organization's assertions that Claimant was deprived of his right to confront and cross-examine: (1) the signatories of certain statements and letters introduced at the Hearing, including a letter from the hospital to the effect that Claimant did not complete the May 11, 1988 examination, and (2) the laboratory technician responsible for the urinalysis.

The Organization objects to the following exhibits that the Carrier included with its Submission, and to any argument based on those exhibits: (1) Carrier's "Employee Assistance Program (E.A.P.)" (dated March 10, 1986); (2) Carrier's "Policy on Alcohol and Drug Use and Application of Rule G for Violations"; (3) an April 2, 1986 letter forwarding a copy of Carrier's "Policy on Alcohol and Drug Use and Application of Rule G for Violations" to the Organization's General Chairman; (4) an August 26, 1987 letter transmitting to labor organizations a copy of a Notice pertaining to drug and alcohol testing; and (5) a November 20, 1987 letter to labor organizations transmitting a copy of the Carrier's Alcohol and Drug Use Procedure. The Organization contends that these exhibits were not part of the Investigation record.

The Board reviewed the record in this matter, and has determined that it must sustain the objections of both the Carrier and the Organization in this regard. In Third Division Award 25907 this Board summarized "certain principles adhered to by this Board:"

- "1. This Board being an appellate tribunal, may only properly consider the issues that were considered by the parties to the dispute in the handling on the property. New issues and

new defenses may not properly be raised for the first time before this Board.

2. In disputes involving discipline the parties to such disputes and the Board are each and all restricted to the evidence introduced at the hearing or investigation, and the record may not properly be added to after the hearing or investigation closes."

The Board reviewed the Parties' correspondence on the property and the Investigation record. The Carrier correctly argues that the Organization did not raise the issues identified above while the dispute was on the property. In this regard, the Board notes that the Organization did not object to the absence of the laboratory technician during the Investigation. The Board therefore sustains the Carrier's objection to the Organization raising these issues for this first time on appeal.

The Board also concludes that the new issues raised by the Organization would not have resulted in the claim being sustained, even if they had been advanced on the property. As detailed below, the substantial evidence standard is satisfied in this case by un rebutted documentary evidence. The Board can therefore sustain the dismissal without relying on evidence that would otherwise require resolution of the credibility of the witnesses. As a result, the fact that the dismissal was not authored by the Hearing Officer is not dispositive.

The Board also agrees with the Carrier's argument that Claimant was not prejudiced by the documents to which the Organization has taken exception. The record demonstrates that the authors of two of the documents testified at the Hearing. With respect to the letter from the hospital, the Hearing Officer allowed Claimant one week to produce evidence to support his assertion that hospital records would show that he completed the test on May 11, 1988. Claimant did not produce any such evidence.

Similarly, Claimant was not prejudiced by the absence of the laboratory technician at the Hearing. Claimant did not claim that the alcohol-positive urine sample was not his. In addition, no issues were raised at the Hearing that would call into question the Carrier's evidence as to the chain of custody of the urine sample or the accuracy of the test. Indeed, Claimant acknowledged that the test was positive for alcohol because he had consumed alcohol the day before the examination.

The Board also concludes that the Carrier exhibits to which the Organization objected were not part of the record produced at the Investigation. As a result, the Board sustains the

Organization's objections to those exhibits and to arguments based on them.

The Parties presented the following arguments with respect to issues and arguments other than those to which the Board has sustained objections. The Organization contends that the Carrier failed to prove that Claimant violated Rule (T) B.1. The Organization argues that the Carrier cannot be allowed to dismiss an employee for failing to provide a negative urine sample for alcohol when that test was initially given to determine if the employee's system was free of drugs. According to the Organization, Carrier should have notified Claimant in advance that he was required to provide proof of a drug and alcohol free system. The Organization further emphasizes that Claimant tested negative for drugs on May 11, 1988.

The Organization also contends that the evidence in the record does not support any inference that Claimant did not produce his own urine specimen on May 11, 1988. According to the Organization, the Carrier improperly relies on such an inference. The Organization further argues that this Board should accept Claimant's testimony that he did, in fact, report for the second part of his physical examination on May 11, 1988. The Organization therefore requests the Board to sustain the claim.

The Carrier argues that it did not violate the Agreement by dismissing Claimant for insubordination. It is the position of the Carrier that Claimant failed to follow the instructions for his May 11, 1988 return-to-work physical in two respects. The Carrier first contends that Claimant failed to provide a negative urine specimen, as he was required to do.

In addition, the Carrier asserts that Claimant did not complete the May 11, 1988 physical examination. In this regard, the Carrier stresses that the record contains a letter from the hospital that Claimant did not present himself at any time for the second part of the examination. The Carrier emphasizes that Claimant did not produce evidence to corroborate his contrary assertion.

The Carrier further argues that Claimant was on notice that failure to follow such instructions would subject him to discipline up to and including dismissal. In addition, the Carrier contends that dismissal is not unusual in this industry for such violations of drug and alcohol policies. The Carrier also maintains that dismissal was warranted in light of Claimant's disciplinary record, and because Claimant had been unsuccessfully enrolled in the EAP program on two prior occasions. The Carrier therefore requests the Board to deny the claim in its entirety.

The Board carefully reviewed the Investigation record before it. The Board concludes that the dismissal is supported by substantial evidence in the Investigation record, and that the dismissal was not arbitrary or capricious. The claim is therefore denied. It is undisputed that Claimant certified on November 25, 1987 that:

"... I understand that my refusal or failure to fully participate in such proscribed drug and/or alcohol testing, falsification of the certification below or a positive test result shall cause me to be considered unfit for service with such Railroad." (Emphasis added).

This statement was reiterated in the Carrier's February 10, 1988 letter setting the initial appointment for the return-to-work physical.

The record contains substantial evidence that Claimant did not "fully participate" in the return-to-work physical on May 11, 1988. The record includes the following letter from the Director of the hospital's "Partners in Corporate Health Care" program, dated May 31, 1988:

"In response to your telephone inquiry today regarding [Claimant].

[Claimant] was scheduled for a return to work physical and testings on May 11, 1988 but he did not show for the appointment. We have not seen nor heard from [Claimant] to date.

As you requested, we checked with Medical Records to see if [Claimant] had utilized our hospital services but there is no record of him being here at any time...."

This letter was admitted into the record at the Investigation. Claimant did not dispute that he was scheduled for the tests and examination referred to in the letter. Rather, he testified that he completed those requirements. He also testified that hospital employees had informed him that "... they do have records of me being there....", and that "... they had my information in their computer." Claimant's wife also testified that she heard hospital staff tell Claimant that "... they did have information in the computer that he had been there, but they could not find any medical records...."

At the conclusion of the Investigation, the Hearing Officer allowed Claimant one week to produce hospital records to corroborate these assertions. No such evidence was submitted.

The Board agrees with the Carrier that, in the absence of any such supporting evidence, the assertions presented by Claimant do not refute the letter from the hospital. In Second Division Award 7233 it was held:

"While it is true that the burden of proof in discipline cases rests with the carrier the responsibility for producing probative evidence to support assertions made in behalf of claimant rests with the claimant and/or his representatives. The record does not contain such evidence in support of claimant's position."

The record further contains substantial evidence that the May 11, 1988 test contained "a positive test result" for alcohol. The test result was not disputed at the Investigation. Indeed, Claimant testified that the test was positive because he had consumed alcohol on the day before the examination.

The Organization, however, contends that the Carrier could not dismiss the Claimant for a positive alcohol test, since he had been referred to the EAP for a drug problem. The Carrier argues that Claimant was notified that he would be screened for both alcohol and drugs, and that he faced dismissal if he tested positive for either.

Substantial evidence supports the Carrier in this regard. Claimant certified on December 4, 1987 that he had read and understood a notice which stated as follows, in relevant part:

"... [you are] further instructed to provide a negative test sample for the involved and other prohibited substances during such examination. If the test sample is negative, the employee will be returned to service. An employee who fails to schedule an examination during the forty-five (45) day period or fails to provide a negative test sample during the examination will be subject to discipline, up to and including dismissal, for failure to obey instructions." (Emphasis added).

The notice that Claimant received and certified on November 25, 1987 similarly explained that Claimant could be tested for alcohol, as well as drugs, and that he could be disciplined for a positive test result. In addition, the letter scheduling the May 11, 1988 test notified Claimant that "[y]ou are hereby instructed to provide a negative test sample for the involved and other prohibited substances during the examination." This letter further instructed Claimant that the "Railroad's Alcohol and Drug Use Procedure, a copy of which was previously provided ... [states that] the use of prohibited substances is a violation of company policy and that your system must be kept free of such substances." The Board, therefore, agrees with the Carrier that Claimant was

notified that he would face discipline, up to and including dismissal, if he "tested positive" for alcohol on May 11, 1988.

As a result, the Board does not need to address the Organization's assertion that the evidence does not support an inference that the urine specimen was not supplied by Claimant. The Board notes that the Carrier does not rely on any such possible inference at this point. The Board further notes that Claimant asserted at the Investigation that the sample contained his urine, and acknowledged that it tested positive because he had been drinking the day before the test.

Substantial evidence supports the finding that Claimant tested positive for alcohol on May 11, 1988, and that he did not complete the second part of the required examination on that date. The Board therefore concludes that substantial evidence supports the finding that Claimant did not follow the instructions for his return-to-work physical examination, and that he was insubordinate within the meaning of Rule (T) B.1.

The Organization relies on Third Division Award 29244 in support of its position. After carefully reviewing Award 29244, the Board agrees with the Carrier that the cited Award is not on point. In Award 29244, the employee was directed by supervision to report for two follow-up drug tests. He was then discharged for failing to report for those tests. The employee acknowledged that he did not report for those tests. However, he asserted that he had been in a traffic accident on the first date and was ill on the second date.

This Board held that the supervisors who had issued those instructions had accepted "as justifiable and reasonable the excuses given for [the employee's] failure (not refusal) to report for the testing on December 6 and 7, 1989...." As a result, the Board concluded that the employee did not disregard supervisory instructions to report for the drug tests and that he was therefore not insubordinate. Award 29244.

In contrast, in the instant case Claimant has not stated a reason for not appearing for the May 11, 1988 test. Indeed, he maintains that he did take the required physical. As a result, the issue presented by Award 29244 does not appear in this case; e.g. supervisory condonation or approval of the employee's contemporaneous excuses for failing to report for the required drug test.

The Board further agrees with the Carrier that dismissal was not an arbitrary, capricious or excessive penalty under the circumstances presented in this case. Claimant had been reprimanded in 1974 and 1977. He had been suspended for five days in 1977.

Claimant had also received a suspension without pay of three years and two months when he was reinstated in 1982 by Public Law Board 3063. Claimant had been dismissed for using physical force against two supervisors, using profane language against one of them and verbally threatening the life of the other. The Public Law Board specifically directed that its decision be made a part of Claimant's personal record "because of the seriousness of these incidents." The record further indicates that Claimant had twice been enrolled unsuccessfully in the Carrier's Employee Assistance Program.

The Board also agrees with the Carrier that dismissal is not an arbitrary penalty for the conduct proven here. The Organization is not challenging the Carrier's right to implement policies regarding alcohol and drugs. Nor has the Organization asserted that the Carrier was enforcing those policies in a discriminatory manner.

The Agreement was not violated.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 8th day of June 1995.