

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31534
Docket No. MW-31865
96-3-94-3-194**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

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

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

1. The dismissal of B & B Mechanic J. L. Sullivan for his alleged insubordination on February 25, 1993 was arbitrary, capricious and on the basis on unproven charges (System Docket MW-2898D)

2. As a consequence of the violation referred to in Part (1) above, the Claimant shall be afforded the remedy as stipulated within Rule 27, Section 4."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all of 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.

Beginning in early October 1992, Claimant was on medical leave due to an on-duty injury. In early December 1992 Claimant was examined, apparently at Carrier's direction, by a Dr. Hutter who wrote to Carrier on December 4, 1992, that Claimant was able to return to work. On December 15, Carrier directed Claimant to report on

December 21, 1992 to Carrier's physician for a "medical evaluation." Claimant reported as directed, but the physician declined to examine Claimant because he had not been released to return to duty by his attending physician. Claimant's attending physician was a Dr. Bchakjian.

On February 12, Carrier advised Claimant to report to Carrier's physician for a "return to work evaluation" on February 25, 1993. Claimant reported as directed but, when asked to provide a urine specimen for a drug screen, refused to do so. Consequently, on March 24, Claimant was advised to report for an Investigation on April 14, 1993, concerning alleged insubordination arising from his refusal to submit to the drug screen. The Investigation was postponed to and held on May 11, 1993. On May 27, 1993, Claimant was advised that he was dismissed from service.

The Organization contends that Carrier had no authority to require Claimant to submit to a drug test on February 25, 1993. The Organization concedes that Carrier's policy provides for a drug screen as part of a return-to-duty physical and that a return-to-duty physical is required where an employee has been out of service for more than fourteen days. However, the Organization contends that the February 25, 1993 evaluation could not have been a return-to-duty physical because Claimant still had not been released by Dr. Bchakjian. The Organization observes that Carrier's witness conceded as much. Therefore, according to the Organization, the dismissal may not stand.

Carrier maintains that Claimant admitted his refusal to provide a urine specimen for a drug screen and, consequently, admitted that he was insubordinate. Carrier contends that Claimant was aware of its drug testing policy, was aware that drug tests were required as part of return-to-duty physicals and was aware that refusal to submit to a drug screen would be grounds for dismissal. Carrier further argues that its drug testing policy has been upheld as reasonable on numerous occasions and that refusal to submit to a required drug screen has been held to be grounds for dismissal. Furthermore, in Carrier's view, if Claimant believed that he was not being treated justly, the proper course of action would have been to submit to the drug test and file a claim through the grievance procedure.

Carrier's policy provides for drug testing under the following circumstances:

pre-employment physical examinations;
required periodic and return-to-duty physical examinations;
before return to duty and during a follow-up period after a disqualification
for any reason associated with drug use; and
executive physical examinations.

Carrier's policy further provides that an employee who tests positive for illegal drugs will be withheld from service and

“ . . . be required to provide a negative drug test within 45 days at a medical facility to which the employee is referred by Conrail's Medical Director, in order to be restored to service. . . .”

The only provision of Carrier's drug testing policy that arguably applied to the instant case is the provision requiring a drug screen as part of a return-to-duty physical examination. However, Carrier's policy concerning return to duty from occupational disability requires a written release from the employee's attending physician. It is undisputed that, as of February 25, 1993, Dr. Behakjian had not released Claimant to return to duty. On December 4, 1992, Dr. Hutter opined that Claimant was able to return to work. However, there is no evidence that Dr. Hutter was Claimant's attending physician.¹ Thus, the evaluation conducted on February 25, 1993 could not have been a return-to-duty exam.

Generally, employees faced with directives that they believe are improper are expected to comply and seek redress through the grievance procedure. Prior Awards, however, establish that a refusal to comply with an improper drug testing order may not result in discipline for insubordination. See Third Division Award 27802; First Division Award 23884. Accordingly, the claim must be sustained.

¹ We note that only the third page of Dr. Hutter's three page report was made part of the record, thereby making it difficult to determine exactly what role Dr. Hutter played. However, from the portion of the report contained in the record and Claimant's testimony, it appears that Dr. Hutter evaluated Claimant's condition on behalf of the Carrier. In any event, there is nothing to suggest that Dr. Hutter was Claimant's attending physician.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of July 1996.