

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33383
Docket No. MW-34424
99-3-98-3-27

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Vehicle Operator T. L. Sorrell for alleged insubordination on April 2, 1997, in connection with his failure to comply with a direct order to return to Elkhart Yard and provide a urine sample in connection with the Conrail Drug Testing Policy, was arbitrary, capricious and without just and sufficient cause (System Docket MW-4658D).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall receive the remedy prescribed by the parties in Rule 27, Section 4.”

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 were given due notice of hearing thereon.

Claimant, an employee of the Carrier for more than 21 years, was dismissed from the Carrier's service following a hearing for "use of sickness as a subterfuge to avoid compliance" with the Carrier's Drug Testing Policy and for insubordination.

On April 2, 1997, in the morning meeting which started at approximately 7:00 A.M., an Assistant Supervisor Production announced that the Elkhart cluster, which included the Claimant, would be subject to random drug testing that morning. The Claimant did not report for the drug testing and left the property. Prior to leaving the Carrier's property, he told a Foreman that he was ill and that he was leaving, asking that the information be given to the Assistant Supervisor Production. Later, the Claimant, while apparently driving home, telephoned the Assistant Supervisor Production, notifying him he was on his way home and that he was sick.

The Organization contends that the Claimant was acutely ill and that he was not at the meeting when the random drug testing was announced, that the Carrier as a result of the impugning and "stigmatizing" nature of the charge is subject to a higher standard of proof, that the Carrier has failed to prove that the Claimant used sickness to avoid the mandatory drug test, and that the Claimant was not insubordinate. The Organization states that this dispute "does not involve the efficacy of the Carrier's drug testing policy."

Specifically, the Organization submits evidence that the Claimant had stated he was "real sick" the evening before the announced drug test; that prior to the announcement, the Claimant told three others of his illness, including his Foreman the next morning; that he did not sign up to work, was not at the morning meeting, which was attested to by 20 fellow employees, and did not hear the announcement; that prior to leaving the property he tried to flag down his Assistant Supervisor Production to advise him he was leaving and did so advise his Foreman, asking that such be relayed to his Assistant Supervisor Production. Additionally, the Organization states that the Claimant called his Assistant Supervisor Production and explained he had not signed up for work, was sick, and was going home to see his doctor. The Organization states that the evidence from the Claimant's doctor regarding the Claimant's illness is uncontroverted.

The Carrier contends that the Claimant was present for the announcement of the random drug testing, challenges the Claimant's assertion that he advised other individuals of his illness in the morning prior to the announcement because he did not

mention it when he allegedly walked past his Assistant Supervisor Production ten minutes later; and that the Claimant was given a direct order to return and submit to the random drug test.

The Carrier produced five witnesses in support of its case. The Track Engineer, who was also the Non-Agreement Test Point Supervisor, testified that he notified the Production Engineer that there would be "random testing" at "6:30 - 6:35 in the morning;" that he was told the random testing was announced to the employees "after the supervisors held their safety job briefing ... at 7:15 or 7:10 a.m.;" and that he could assume that no one was aware of the random testing until after the completion of the safety meeting. He did not have personal knowledge of the Claimant's attendance at the meeting.

The Production Engineer testified that the starting time for the Claimant was 7:00 A.M.; that just prior to 7:00 A.M. he told the Assistant Supervisor of Production there would be random drug testing; that he was told about the testing by the Track Engineer at "probably five (5) to (10) minutes before" 7:00 A.M.; and that there is a sign in sheet at the morning meeting, and the Claimant did not sign it. He also had no personal knowledge of the Claimant's attendance at the morning meeting.

The Assistant Supervisor Production specifically identified the Claimant and the location where he was standing at 7:00 A.M. and at 7:16 A.M. when he announced that there would be a "test for drugs and alcohol." Further, he testifies he called the Claimant's name shortly thereafter and the Claimant didn't answer him. This Assistant Supervisor Production stated that there were between 29 and 33 people at the meeting in the diner car, and that the Claimant could get daily orders from him, another Assistant Supervisor Production, or "any of the foreman" that the task is assigned to.

The Assistant Supervisor for whom the Claimant worked testified that he was notified of the random drug test at approximately 7:10 A.M.; that the Claimant was at the camp car when the random drug test was announced; that at 7:00 A.M. the Claimant "came in the east end of the diner car and walked by me at the west end;" and that at that time he did not mention he was sick. When questioned on the exact timing of events, this Assistant Supervisor Production first admits that the Claimant may not have been at the meeting after 7:00 A.M. Additionally, this Assistant Supervisor Production testified that it would not have been uncommon for the Claimant to discuss daily job assignments with a track foreman. Regarding the sign in sheet, he admits employees are

told that if they do not sign the sign in sheet they will not be paid, but he said such statements are more for "leverage to get them to sign" and that did not mean they wouldn't get paid. Also, he testified that he had no information that the Claimant does not typically sign the attendance sheet, and that he neither took exception to one employee's belief the Claimant was sick based on that employee's conversation with the Claimant at 6:45 A.M. nor another employee's statement that the Claimant said he was sick the evening before the testing. Regarding that period of the morning and explaining why others believed the Claimant was not at the meeting, he testified:

"It was utter chaos prior to the meeting, people coming and going. Does everyone remember everyone that was there? I don't think so. That's why we have a sign in sheet, one reason we have a sign in sheet"

This Assistant Supervisor Production clearly testified that, when the Claimant called him at 7:45 A.M., he ordered the Claimant to return and submit to the drug and alcohol test. While this Assistant Supervisor Production stated he did not know whether the Claimant was at the meeting after 7:00 A.M., he stated later that he last remembered seeing the Claimant at 7:10 A.M., ten minutes later than his prior testimony.

The Track foreman testified that he did not see the Claimant at the 7:00 A.M. meeting but did see the Claimant between 6:45 A.M. and 7:00 A.M. when he walked in to get breakfast; that he was told at about 7:00 A.M. that the Claimant was going to work with him that day, but he had been told the day prior that may be the case; that prior to 7:00 A.M. he told the Claimant "it was most likely me and him on clean up detail today" and the Claimant told him that he wasn't feeling well and didn't know if he was going to make it; and that at 7:20 A.M. he saw the Claimant "throwing his suit cases in the trunk of his car," and was told by the Claimant that he couldn't get hold of the Assistant Supervisor Production and asked him to tell the Assistant Supervisor Production that "he was sick, and going home and going to the doctor." The Track Foremen also testified that it was customary for employees that work for him to tell him that they were sick and going home that day. The Foreman never spoke to the Claimant about the random drug test.

The Claimant testified that he never reported to work on the morning in question; that he had a conversation with the Track Foreman at about 6:45 A.M. concerning that day's work, his inability to do anything, and his going home and to a doctor; and that

perhaps his Assistant Supervisor Production saw him earlier and was confusing the time because of the "chaos." In regard to the issue of insubordination and refusing to comply with a direct order allegedly given at 7:45 A.M. when he called and spoke to the Assistant Supervisor Production, the Claimant dodged the inquiries:

"Q: . . . Did you follow his direct order?

A: I explained to him that I was enroute to my house to see my doctor.

Q: Did you follow his order?

A: And I explained that I didn't mark on duty that morning, that I was unable to work that day.

Q: Again I ask you, did you follow his order?

A: I wasn't given a direct order that day, I was in a phone conversation."

In response to several other attempts to have the Claimant respond on this point, the Claimant said he was "unable to comply with anything."

The Carrier's first charge has two elements that need to be proven in relation to Claimant's departure at 7:20 A.M.: the Claimant was present at the meeting and heard the announcement of the random test and that he used sickness as a subterfuge to avoid complying with the Carrier's Drug Testing Policy.

Of the five Carrier witnesses, only two place him at the meeting and one says he did not see the Claimant at the meeting. Of the two witnesses that state they saw the Claimant at the meeting, the Claimant's Assistant Supervisor Production said he saw the Claimant last at 7:00 A.M. and later changed it to 7:10 A.M.; he also said that the meeting room was chaotic and questioned whether anyone could remember who was there, emphasizing that was one reason why they used the sign in sheet. The Assistant Supervisor Production for whom the Claimant did not work that testified with the greatest specificity disagreed with the Claimant's Assistant Supervisor Production regarding the "chaos" of the morning meeting and states that the Claimant was at the

meeting at 7:16 A.M., four minutes before the Claimant's Foreman sees and talks to the Claimant as he is placing his suit cases in the trunk of his car.¹

There is sufficient evidence presented by the Carrier's witnesses to conclude that the exact times of the events in question are unclear and vary depending on the Carrier's own witnesses, and at times different portions of a witnesses own testimony, and that the circumstances surrounding the morning meeting were not conducive to anyone's clear recollection. Also, the devise admittedly used to clarify attendance at the morning meeting, the sign in sheet, was not signed by the Claimant, and the Claimant's Assistant Supervisor Production admitted he didn't have any information that the Claimant did not typically sign the attendance sheet.

In regard to using sickness as a subterfuge, there is uncontroverted testimony that prior to any possibility that the Claimant knew of the random drug test, he told others that he was sick. In fact, at 6:45 A.M., prior to any possible knowledge of the random drug test, the Claimant had such discussion with the Track Foreman and also spoke to him about not working that day. The Claimant's conversation with the Track Foreman at 7:20 A.M. seems to be a continuation of the earlier conversation. Neither the Claimant nor his Foreman brought up the subject of the random drug test.

In regard to the charge of insubordination and the refusal to obey a direct order, the Claimant by his own testimony placed himself at half the distance on his drive home when he made the telephone call to his Assistant Supervisor Production. If given a direct order, there was no legitimate basis of refusing the direct order. His ability to drive the remainder of the way home is an admission that he could have complied with the direct order to return to the camp. The cases cited by the Organization in support of the "exceptions" to obeying orders that are "illegal, immoral, or unsafe" are not on point.

¹ The shortness of time between the alleged attendance at the meeting and the Claimant's departure was addressed on appeal, and the Carrier's Manager of Labor Relations stated that the time of the announcement was 7:10 A.M. and that ten minutes was more than enough time to walk a "few hundred feet", "collect a few items, and begin loading them into a car." There is no evidence in the record that four or five minutes would not have been sufficient.

If the Claimant believed that the order was improper in that he alleged he did not mark up to work and did not hear the announcement, he was required to obey the order and to grieve the order later.²

The record of this case describes the Claimant as an employee with 21 years of service and with what the organization describes as an "unblemished record." Uncontroverted evidence from testimony and exhibits suggest that the Claimant was indeed ill the day in question, even if such illness would not have been sufficient to excuse him from obeying a direct order under the circumstances of this case. Also, the Claimant, supposedly after finding out for the first time of the drug testing issue in his 7:45 A.M. phone call, took a drug test in the city of his residence, and the test was negative.

Based on a review of the entire record, this Board finds that the Carrier has failed to substantiate its first charge involving the Claimant's departure from the camp at 7:20 A.M., but that the evidence in support of the second charge, involving insubordination and a failure to follow instructions, is substantial and credible.

In regard to whether the degree to which the charges are proven support the supreme penalty of discharge, this Board concludes that the Carrier has not shown that discharge is appropriate. Under the circumstances of this case, including the Claimant's long service record without evidence of prior discipline, the Board holds that the Claimant's dismissal was excessive. It is our opinion that any penalty beyond 60 days in this case would be arbitrary and capricious. Therefore, we hold that the Carrier reinstate the Claimant, reduce the Claimant's dismissal to a 60 day suspension, and compensate the Claimant for all time lost in excess of the 60 day suspension.

AWARD

Claim sustained in accordance with the Findings.

² The Carrier's own witnesses testified that the Claimant would not have been subject to the random drug test if he had not marked up for work and was unaware that the random drug test would be conducted.

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 13th day of July 1999.

**Carrier Members' Dissent
to Award 33383 Docket (MW-34424)
Referee Livingood**

This matter turns on a factual event. Was Claimant present in the camp car when the random drug test was announced? The answer to that matter is yes! Claimant was specifically seen by two supervisors in the camp car. While the Majority notes other events there is no evidence of record that Claimant was anywhere else at the time. Claimant then left the property without securing his supervisor's permission even though they were both present in the camp car. Claimant never raised any sickness matter with his supervisor although it appears that he had discussions with just about everyone else.

After Claimant deliberately left the property without permission, he finally called his supervisor at 7:45 A.M.:

"Q: Did you have conversation with Mr. Sorrell on April 2nd, 1997 pertaining to the random drug test at Elkhart, Indiana?

A: Yes I did.

Q: What was the conversation?

A: At approximately 7:45, Tim Sorrell called Dan Coffin's office to report off work, to tell me that he was going home sick at which time I instructed Tim to come to the dorm for the drug test first before he went home. He said he wasn't going to come here. I then made a direct order for Tim to come here and test because it was the policy, Conrail's Policy for him to test before leaving.

Q: Did Mr. Sorrell comply with your direct order?

A: No."

The supervisor's concern was that Claimant was deliberately avoiding the standing policy on random testing:

“Q: When you talked to Tim at 7:45, you stated he did indicate that he was sick?”

A: That is correct.

Q: Do you have any concern about ordering him to drive back to Elkhart when he was ill?

A: Well, there is always that concern, yes.

Q: Were you more concerned with him getting drug tested then him driving when he was sick?


A: Tim did not indicate to me that he was that critical condition. I was concerned about the rule that was about to get violated that it was important for him to come back and take the test.”

The Majority has allowed Claimant to avoid being tested. This flies in the face of several decisions upholding this specific policy on this property.

Finally, to compound the error, the Majority finds that Claimant’s deliberate and direct insubordination only merited minor discipline.

We Dissent.


Paul V. Varga


Martin W. Fingerhut


Michael C. Lesnik