

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35395
Docket No. SG35938
01-3-00-3-17**

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

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(CSX Transportation, Inc. (former Baltimore and Ohio
(Railroad Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation Company (B&O):

Claim on behalf of M.S. Lysy for reinstatement with all rights and benefits unimpaired; payment for all lost time from November 11, 1998 until he is reinstated; reimbursement for any expenses incurred and pay for any time used in traveling outside of regular assigned hours because of Carrier’s action; and to have his personal record cleared of any reference to this matter, account Carrier violated the current Signalmen’s Agreement, particularly Rule 41, when it dismissed the Claimant from service without just and sufficient cause and without a fair and impartial investigation. Carrier also violated FRA Regulation 49 CFR Parts 217 and 219 when it failed to hold the investigation and comply with other items described therein. Carrier File No. 15 (99-20). BRS File Case No. 11135-B&OCT.”

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.

At the time of the incidents leading to his removal, the Claimant had approximately 16 months of service with the Carrier and he was enrolled in the Carrier's EAP Program. The Claimant was selected to undergo FRA follow-up toxicological testing on November 5, 1998 at the PMSI testing facility in Griffith, Indiana. Upon being tested, it was determined that his urine sample had been adulterated with GIntaraldehyde, a chemical commonly known as "Urinaid" which is known to mask the presence of illicit drugs at the time of a drug test. Because it was determined that the sample was adulterated, the laboratory did not perform a toxicological test.

By letter dated November 10, 1998, the Carrier's Medical Review Officer notified the Carrier's Chief Medical Officer of the laboratory's findings. The Medical Review Officer indicated that because of the presence of Urinaid, the Claimant was considered to have refused to submit a sample. The Claimant contacted his EAP counselor and asked that he be retested. On November 13, 1998, the Claimant presented a second sample and the results were negative.

By letter dated December 5, the Claimant was instructed to attend a formal Investigation on December 8, 1998 in Riverdale, Illinois. The Claimant was notified that the Investigation was being convened to develop the facts concerning the charge he allegedly furnished an adulterated urinesample on November 5, 1998. He was charged with insubordination.

The Investigation was held as scheduled on December 8, 1998. The Carrier determined that the Claimant was guilty of the alleged Rule violation. Pursuant to that Investigation, in an undated letter, the Claimant was informed that he had been found to have been insubordinate and was, therefore, immediately removed from the service of the Carrier. The letter was received by the Claimant on or about January 14, 1999.

The Organization claims that the Carrier violated the Agreement when it failed to provide the Claimant with a fair and impartial Investigation. The Organization claims that the Carrier failed to comply with the time requirements of Rule 41 which call for an Investigation to be held within seven days from the time that an employee is removed from service and for the Carrier to render a decision within seven days of the Investigation. Here, the Claimant was removed from service 27 days prior to the Investigation and did not receive notice of the determination until 37 days after the Investigation. Further, the Organization contends that the Carrier did not present sufficient proof at the Investigation

that the Claimant adulterated his urine sample. Finally, even if it could be found that the Claimant engaged in the alleged violation, the penalty assessed was too severe.

Conversely, the Carrier contends that the Investigation was fair and impartial. As to the merits, the Carrier alleges that the results of the Investigation fully support a finding of substantial evidence that the Claimant engaged in the adulteration of his urine sample and that the charge of insubordination was appropriate. According to the Carrier, witness testimony proved conclusively that the Claimant adulterated his urine sample with Gltaraldehyde. According to the Carrier, there is no question but that the Claimant engaged in the behavior alleged and that his removal from service was reasonable. According to the Carrier, the wealth of arbitral precedent shows that dismissal is the appropriate measure of discipline for an employee's failure to comply with the Carrier's Drug Testing Policy. Finally, the Carrier indicates that there is no merit to the Organization's argument that both the Investigation and the Notice of Discharge were issued in an untimely fashion.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord to what we might or might not have done had it been ours to determine, but to pass upon the question whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325, as well as Third Division Award 21299.)

The Board reviewed the transcript and the positions of both parties. On the question of whether there was substantial evidence that the Claimant was insubordinate when he presented an adulterated urine sample on November 5, 1998, the Board finds substantial evidence that the Claimant presented a sample adulterated with Gltaraldehyde. By doing so, he refused to provide a sample and engaged in an act of insubordination.

We also reviewed the question of whether the Claimant was denied a fair and impartial Investigation. We find that the Organization has shown that certain provisions of Rule 41 were not complied with in a timely fashion. According to Rule 41, an Investigation must be held within seven days of when a claimant is withheld from service and a final decision must be rendered no more than seven days after the completion of the Investigation. In this case, the Claimant was withheld from service on November 11, and

the Investigation was not held until December 8, 1998, a period of 27 days, which is clearly beyond what is required by Rule 41. Further, the Claimant was notified of the results of the Investigation on January 14, 1999, a period of 37 days after the Investigation, or 30 days beyond the Rule's requirements. Thus, we find that the Carrier did not comply with certain requirements of Rule 41.

We next turn to the penalty imposed in this case. As noted above, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. In this case, the Claimant was removed from service for being insubordinate when he refused to present a urine sample that had not been adulterated. As noted above, we believe that substantial evidence was presented which justifies dismissal.

However, we are also cognizant of the fact that the time limits for the Investigation and the delivery of the decision were not complied with. The Carrier took a total of 64 days instead of the required 14 days to both hold the Investigation and then to render its final decision, after the Claimant was withheld from service. While we believe that there was substantial evidence in favor of dismissal, we believe that there must be some remedy as a result of the Carrier's violation of Rule 41. We reviewed past precedent and found that other arbitrators have held that an appropriate remedy for such a violation is compensation for the time limits that were violated. In Third Division Award 26239 involving these same parties, the Board held:

"This procedural violation, however, does not entitle Claimant to be restored to service. It is well established that a late denial is effective to toll the Carrier's liability for a procedural violation as of the date of that denial. From the date of the late denial, disputes are thereafter considered on their merits. Third Division Awards 25604; 25473; 24298; 24269; Decision No. 16 of the National Disputes Committee. Therefore, since we have previously found that substantial evidence exists to support the Carrier's decision to discipline Claimant and that the discipline imposed was neither arbitrary nor excessive, Claimant shall not be restored to service but, because of the late denial, Claimant shall be compensated from July 19, 1984 to September 20, 1984."

Based on this precedent, while we believe that the appropriate penalty in this case is termination of the Claimant, in light of the violations of Rule 41, we find that the Claimant should be compensated for the additional time it took for the Carrier to complete

the process. As noted above, the Investigation/decision process should have been completed within 14 days from the date the Claimant was withheld from service (November 11, 1998). Thus, the process should have been completed no later than November 25, 1998. While we have upheld the dismissal, in light of the delay, we hold that the Claimant should be compensated for all workdays between November 26, 1998 and January 14, 1999, the day that the Claimant received his termination notice.

AWARD

Claim sustained in accordance with the Findings.

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 26th day of April, 2001.