Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35726
Docket No. MW-34901
01-3-98-3-627

The Third Division consisted of the regular members and in addition Referee Robert L. Douglas 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 Mr. G. **Burgin** for alleged failure to provide a valid urinalysis sample during a return-to-work physical on April 25, 1997was arbitrary, capricious and on the basis ofunproven charges (System Docket MW-4764-D).

(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.

The record indicates that the Carrier issued a Notice of Discipline, dated July 28, 1997, terminating the Claimant. The Carrier outlined the alleged offense as follows:

> "Your failure to comply with Conrail Medical Policy concerning Return to Work Physical requirements on Friday, April 25, 1997 at approximately 5:00 PM when you failed to provide a valid urinalysis sample during a Return to Work Physical at the Health Works, located in Tonawanda, NY. You provided a sample which did not meet testing temperature requirements on that date.
>
> This is a violation of Conrail Medical Policy and Conrail System Timetable #4, Examinations-Medical Section, Paragraph 4."

A review of the record reflects that the Claimant furnished a urine sample at the collection facility as requested. In particular, the Claimant arrived at the facility at approximately 4:00 P.M. and had difficulty providing a urine sample. After having somecranberryjuice, theClaimantprovidedaurinesampleatapproximately5:OOP.M. The Organization asserts that a nurse from the facility allegedly and inexplicably placed the urine sample near an air conditioner for approximately five minutes. At approximately 5:05 P.M., the nurse determined that the urine sample had failed to meet the temperature standards to be deemed a valid sample. The nurse sought another urine sample from the Claimant, who again had difficulty providing a urine sample. The Claimant was instructed that he could not leave until he gave the sample. The Claimant remained in the facility for 30 minutes after the scheduled closing time of the facility until approximately 6:00 P.M., but failed to provide a second urine sample.

The record as developed by the parties contains many factual references. The record, however, lacks critical evidence. The record omits any testimony from the nurse, who played a key part in the entire incident. The record also lacks a copy of the written statement allegedly prepared by the nurse and relied on by the Carrier. The record omits any credible evidence that the Claimant had hindered, sabotaged, or undermined the collection process in an intentional way. Although having difficulty producing a urine specimen may cause suspicion and raise doubts concerning a person's level ofcooperation, such a circumstance, without more, fails to prove that the individual is acting improperly. In the present situation, the absence of any direct testimony from the nurse leaves intact the plausible explanations of the Claimant that he provided the first urine specimen and then attempted in good faith for a significant period of time to

try to provide a second urine specimen. The record as presented to the Board therefore precludes a finding that the Claimant had acted improperly. Thus, the reliance by the Carrier on the written statement from the nurse failed to meet the Carrier's burden of proof to provide sufficient probative and persuasive evidence to sustain the termination of the Claimant under these highly unusual circumstances.

With respect to a remedy, the record substantiates that the Claimant had an obligation to provide a valid urinalysis sample to qualify to return to work. For whatever reason, the Claimant failed to do so. As a consequence, no evidence exists in the record that the Claimant had qualified to return to work. The Claimant therefore lacks a right to any monetary remedy. The Claimant, however, shall be afforded another opportunity to qualify to return to work by submitting a valid urinalysis sample as part of the return-to-work physical requirements of the Carrier.

Any other arguments raised by the parties lack relevance due to the unusual facts set forth in the record.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration ofthedisputeidentified 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 24th day of October, 2001.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 35726. DOCKET MW-34901
(Referee Douglas)

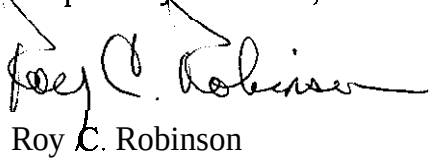
The rather unique circumstances surrounding this particular dispute were adequately set forth within the body of this award and it would serve no purpose to regurgitate them here. In this case, the Board determined that the claim should be sustained; however, it did not award back pay to the Claimant. Since the award was sustained in part, the small concurrence required is only to the extent that the Claimant was finally reinstated. However, the Organization is compelled to dissent to the Board's determination that the Claimant was not entitled to any back pay.

The Board recognized that the crux of this dispute was the issue of whether the Claimant attempted to avoid providing a valid urine sample at his return-to-work physical. This record reveals that on April 27, 1997, the Claimant provided a urine sample at 5:00 P.M. and the nurse at the collection site placed the sample near an air conditioner for approximately five (5) minutes. Then, after that period of time, she tested the temperature of the sample and decreed it to be invalid because it was too cold. She then requested another urine sample from the Claimant. Obviously, after a person has voided his bladder, a period of time is required before another sample could be given. The Claimant began drinking fluids and by 6:00 P.M. he was unable to produce another sample before the clinic closed for the day. The Board recognized that the Claimant in no way "hindered, sabotaged or undermined the collection process" and found that no evidence was

produced to show that the Claimant acted improperly. On that basis, the claim should have been fully sustained and the Claimant awarded back pay for the period of time he was improperly withheld from service by the Carrier.

Incredibly, the Board held that since the Claimant failed to provide a valid urinalysis, he was not qualified to return to work and denied him back pay. This Claimant had rendered more than twenty-one (21) years of unblemished service for the Carrier. Because of the Carrier's recalcitrant and heavy-handed actions, this Claimant has lost out on more than four and one-half (4.5) years of wages and benefits. We submit that the Board's failure to award monetary reparations in this instance represents a miscarriage ofjustice. Failure to award back pay in this instance does nothing but reward the Carrier for its mishandling of this case. Under the circumstances, it is simply unconscionable that the Claimant should be made to suffer monetarily because of the Carrier's mishandling of this claim. For the above reasons, I vehemently dissent to the remedy portion of this Award.

Respectfully submitted,



Roy C. Robinson
Labor Member

Carrier Members' Dissent
and
Response to Labor Member's Concurrence and Dissent
to Award 35726 (Docket MW-34901)
(Referee Douglas)

The main difficulty with this decision is that it has made a late allegation by the Organization into a fact of record and then used said "fact" to absolve Claimant of impropriety. At page 2 of the Award we find the following:

> "The Organization asserts that a nurse from the facility allegedly and inexplicable placed the urine sample near an air conditioner for approximately five minutes."

This assertion was first raised by the Organization during the second level discussion of this matter on August 18, 1997 - approximately 4 months after the April 25, testing. It was NOT raised in the Investigation held on July 11, 1997.

In responding to this assertion, the Carrier advised the Organization in its September 2, 1997 letter:

> "...that his first urine sample was not tested within four minutes of his providing it is completely unsupported by fact or evidence..." (Emphasis added)

Nothing was ever produced in the subsequent on-property handling that would have changed the Carrier's factual conclusion. There is no evidence at all that Claimant's sample was mishandled. There is no evidence of the existence of an air conditioner nor is there any evidence that air conditioning was even needed or turned on on April 25, 1997 at Tonawonda, N.Y. This "fact" is nothing but a hoax perpetrated by the Organization and swallowed by the Majority.

Second, given the asserted difficulty Claimant Burgin had in providing the initial sample, one would have expected that he would have questioned the need for a second sample at all. Yet, he voiced no concern or objection to the conclusion that his sample was cold. Claimant was not new to drug testing. When told that his sample was "not in compliance" there is nothing to indicate that Claimant was surprised.

Next, it is clear and not disputed that Claimant was instructed to give a second sample and that he left the facility without doing so. Claimant was charged with his, "...failure to comply with... Medical Policy... when you failed to provide a valid urinalysis sample...." Such insubordination has long been held to warrant dismissal;

see PLB 4877 Award 1, PLB 3755 Award 26, SBA 1022 Award 82, SBA 909 Award 93, SBA 910 Awards **300, 358, 529,** PLB 4410 Awards **93, 96, 206,** SBA 984 Award 1188, PLB 3514 Award 359, all on this property.

Despite all of the foregoing, the Majority contends that "critical evidence" was missing and concludes at page 3 that there is no evidence, **"...that** the Claimant has acted improperly."

Providing other than a valid sample and refusing to comply with specific instructions to remain to give a valid sample warrants the discipline assessed. Organization's Concurrence and Dissent relies on the same phantom fact to support its notation that Claimant did nothing improper, simply compounds the error of this decision.

One can only hope that the benefice bestowed on Claimant in this Award is taken as a second chance to correct his errant ways.

Paul V. Varga

Martin W. **Fingerhut**

Michael C. Lesnik