Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37469
Docket No. MW-36510
05-3-01-3-7

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (withheld from service) imposed upon Mr. M. S. Gentry from June 30 through September 8, 1998 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-98-P018-14/MWA 98-10-23AE BNR).

(2) As a consequence of the violation referred to in Part (1) above, Mr. M. S. Gentry shall now be '. . . paid for all lost straight time and overtime at his appropriate rate of pay and for any lost expenses he has incurred. I am also requesting the lost days be counted as vacation qualifying days and all benefits be restored.'"

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 Claimant established seniority as a Trackman in the Maintenance of Way Track Subdepartment on June 24, 1996. At the time of the instant claim, he was regularly assigned to the "Thayer Blitz" Production Gang near Thayer, Missouri. The record shows that on June 19, 1998, while on duty, the Claimant suffered a heat-related medical emergency and was transported and subsequently admitted to the Eastern Ozarks Medical Center in Cherokee Village, Arkansas, where he was treated for extreme heat stress.

According to documentary evidence contained in the record, during the Claimant's overnight stay in the hospital, a drug screen urinalysis was performed without the Claimant's knowledge or consent. The results indicated that the Claimant was "presumed positive" for cannabinoids. However, notwithstanding the test result, and apparently without having informed the Claimant that he had been tested for drugs or that the result was other than negative, the Claimant was discharged from the hospital at 3:00 P.M. on June 20, 1998, and returned to his home in Falls City, Nebraska.

The record establishes that on June 23, 1998, the Claimant was examined by his personal physician, Allan Tramp, M.D., who ordered a battery of metabolic tests, which did not include a drug screen. The tests produced favorable results and by letter dated June 26, 1998, Dr. Tramp released the Claimant for full return to duty, to be effective on June 30, 1998.

According to the Organization, upon obtaining the medical release from Dr. Tramp, the Claimant promptly contacted Roadmaster Skoubo and requested that he be permitted to return to work. Skoubo told the Claimant that he could not authorize his return until the Claimant first contacted Employee Assistance Program (EAP) Manager Reinecker. The Organization contends that when Reinecker told the Claimant that he had tested positive for marijuana, the Claimant denied having knowledge of any such test. He also requested to be drug tested immediately, so as "to prove his innocence." According to the Claimant, Reinecker told him an immediate test would not be necessary and that the Carrier would contact him within five days concerning a re-test.

The Organization then explained that, on July 2, 1998, the Claimant spoke with the Carrier's Manager of Drug and Alcohol Testing, M. Crespin, and was told that, effective immediately, he would be medically disqualified until further notice to "protect him" from a "Rule G" violation. In a letter dated July 3, 1998, Crespin confirmed the disqualification and stated that the disqualification would remain in effect until the Claimant fulfilled certain conditions for reinstatement which, according to the Organization, were not unlike those required of employees returning to duty after admittedly using, or after having been proven guilty of using, alcohol or prohibited drugs. Indeed, the first requirement was that the Claimant, within five days, obtain an assessment from the Carrier's Employee Assistance Services (EAP) Manager, abide by his treatment recommendations, and be subsequently cleared for return to duty. The second requirement was that the Claimant provide a supervised negative urine specimen and/or breath sample within the time limits specified in the letter.

The Organization asserts that the five days passed without the Claimant receiving any word from the Carrier. Thus, the Claimant contacted his Union Representative who in turn advised the Claimant to obtain his own drug test, which the Claimant did on July 7, 1998. The Organization stresses that the test was performed at an "NIDA (National Institute on Drug Abuse) approved laboratory," Quest Diagnostics, where the proper collection and chain-of-custody protocols were followed. The result derived by enzyme immunoassay test was negative for all prohibited substances, including marijuana metabolites (THC). Nevertheless, the Claimant continued to be withheld from service until he complied with the EAP Manager's instructions to complete a formal treatment program, which included ten hours of classes and six Alcoholics Anonymous meetings.

By letter dated August 31, 1998, having passed a return-to-work drug screen ordered by the Carrier Manager of Drug and Alcohol Testing Crespin notified the Claimant that he was released to active service, pending contact with his supervisor and compliance with any other conditions for return to duty deemed necessary by the supervisor. The Claimant was furthermore informed that he would be subject to periodic drug and/or alcohol testing for a period of five years from his date of return, and would be subject to other drug testing requirements as well.

The Carrier asserts that the issue for resolution by the Board is whether the Carrier's decision to disqualify the Claimant was proper in light of the June 20, 1998 positive drug test result. The Carrier urges the Board to deny the claim if it

finds that the disqualification was correct. According to the Carrier, although its Medical Department "discovered the Claimant's drug use" outside of its customary rules, regulations and policies governing drug testing, it submits that because the Carrier had received "valid medical information indicating that the Claimant had been using marijuana" in violation of the Carrier's Rules, the Carrier's decision to disqualify the Claimant, based on the June 20, 1998 test result, was proper.

The Carrier additionally contends that given the "unconventional manner" in which the "evidence" had been obtained, it had no contractual authority to handle the matter as a disciplinary issue under the Carrier's Rules and policies prohibiting illicit drug use. However, in the Carrier's view, "simply putting the Claimant back to work would expose the Carrier to an unacceptable amount of risk."

Thus, according to the record, the Carrier decided that the correct course of action was to require the Claimant to participate in a rehabilitation program, "without reference to any rule violation," as a condition for his return to service. The Carrier stresses that in light of the unusual circumstances surrounding the positive test result, in order to ensure that the Claimant met "a minimum standard of physical fitness to perform his duties," the Chief Medical Officer exercised his managerial prerogative and discretion by determining that the Claimant should be withheld from service until he met the Carrier's fitness standard. See Award 225 of Special Board of Adjustment No. 910, Award 5 of Public Law Board No. 5052, and Third Division Award 15367.

The Organization argues that the Carrier's decision to withhold the Claimant solely on the basis of a drug test that had not been authorized by the Carrier, and furthermore yielded an uncertain result of "presumed positive" for marijuana violated the Claimant's due process rights under Rule 40. The Organization furthermore stresses that according to a printed notation at the bottom of the hospital's test result form, "presumed positive" test results would be confirmed by "alternate methods." The Organization points out that, without conceding that the test was legitimate in any manner whatsoever, according to the record, the "presumed positive" result was never confirmed by any subsequent test using alternate methods. That voids any further action by the Carrier, the Organization submits.

Because the Claimant had been released by Dr. Tramp to return to service without restriction, there was no medical condition that prevented him from

returning to his assignment, the Organization further asserted. Thus, the Carrier's decision to withhold the Claimant from service violated Rule 40, cited above, which essentially states that an employee in service for 60 days or more will not be dismissed or disciplined until after a fair and impartial Investigation has been held. In the Organization's view, under the circumstances, the Carrier's decision to withhold him from service was constructive discipline, without the due process rights of notice and Hearing, it strenuously suggests.

The Organization also is quick to point out that no Investigation was held, and the "presumed positive" test provided no legitimate basis for withholding the Claimant from service. The Organization stresses that the hospital urinalysis was performed without probable cause and without the Claimant's knowledge or permission. Citing Third Division Award 33445, the Organization strenuously argues that given the absence of probable cause and the fact that the Claimant's consent had not been obtained, the test result did not constitute a valid basis for the Claimant's removal from service.

The Organization further argued that, with respect to the manner in which the drug test was conducted, there is no documentary evidence which shows that the procedures and protocols required by the Carrier and the DOT for specimen collection, chain of custody, and initial and confirmation testing were followed by the laboratory personnel at the Eastern Ozarks Medical Center. In that respect, the Organization stressed that in a November 3, 1999 letter from Carrier Medical Officer Michael R. Jarrard, M.D., M.P.H., to Director of Labor Relations T. Rohling, Dr. Jarrard essentially admitted, in the Organization's words, that the test was "unauthorized, unconfirmed, failed to follow Company Policy, Federal Law or even good forensic practices." (Emphasis added)

The Organization finally reasoned that the Carrier's admission that the test was, in fact, performed under "questionable procedures" and without the Claimant's knowledge and consent strongly support its position that the Claimant's removal from service was without Agreement or other Rule support. In light of the above, therefore, the Organization urged the Board to sustain the instant claim on the following grounds: (1) the Carrier's reliance on an unauthorized drug test that furthermore produced inconclusive results to justify its decision to withhold the Claimant from service was misplaced and violated Rule 40; and (2) the Carrier proffered no probative medical evidence during the on-property handling of this dispute to establish that the Claimant's withholding from service for six weeks was

justified because of the existence of a bona fide medical condition that prevented the Claimant from satisfactorily performing the normal duties of his assignment.

The Board carefully reviewed the on-property record in light of the parties' arguments and the precedent Awards offered in support of their respective positions. The dispute in this case of course centers on the appropriateness of the Carrier's decision to withhold the Claimant from service, following the results of a drug test conducted during his hospitalization, until he fulfilled the requirements described in its July 3, 1998 letter from the Manager of Drug and Alcohol Testing. For reasons fully explained below, we find that the record as a whole does not substantiate the Carrier's decision to withhold the Claimant from service based on the result of the drug test conducted while the Claimant was hospitalized at the Eastern Ozarks Medical Center. Therefore, the claim must be sustained in its entirety, we conclude.

First, the majority finds that the drug test undertaken at the Eastern Ozarks Medical Center was neither authorized by the Carrier, nor required under any Carrier or federal drug testing rules. Specifically, there was no showing in the record that the incident of heat stress suffered by the Claimant triggered probable cause or any other testing under the Carrier's or DOT's Rules, we hold. Third Division Awards 33445 and 30698, cited by the Organization, are directly on point, we find, notwithstanding the fact that they involved dismissal cases as opposed to the circumstances present here. The reasoning in each Award is convincing in the lack of authorization for the test under the Carrier's Rules, we hold.

Second, we conclude that the above Awards stand for the premise that Carriers do not have an absolute right to test employees and to subsequently rely upon the results of "invalid tests," i.e., those conducted without proper authority to support discipline. In this case, the withholding of the Claimant from service for the purported reason of medical disqualification in fact had precisely the same practical results as the equivalent disciplinary action we are persuaded. For example, the conditions outlined in the July 3, 1998 letter from the Manager of Drug and Alcohol Testing, Crespin, with which the Claimant was told he must comply before he would be allowed to return to service, were similar, if not identical, to those typically applicable to employees returning to service following either proven or admitted violations of Carrier or federal Rules prohibiting employee drug use resulting from legitimate tests, we specifically find, as the Organization has so strongly maintained.

Based on the record before us, then, the invalid test result did not provide the Carrier with any authority to impose those conditions upon the Claimant as a prerequisite to returning to service, and only served to exacerbate the delay, we rule. Indeed, as the Board stated in Award 30698:

> "The Board concludes that the Carrier did not have authority – probable cause, random draw, accident, or any substitute – to test Claimant. Neither the Regulations nor the Plan confer on the Carrier a plenary right to test employees; only if an employee fits into a specified category and is otherwise selected for testing in accordance with the governing document or documents does the Carrier have a right to test under the Plan. . . . In the absence of authority to have conducted the test, the Board concludes that the test was invalid and cannot support the discipline imposed. We so hold. . . ."

We again note from the record that it is evident neither probable cause nor any other testing authority justified the drug test at issue here. No documentation pertaining to the chain-of-custody and/or testing measures and protocols utilized by the hospital lab accompanied the "presumed positive" test result, we point out. This further undermines the credibility of the speculative test result at issue here. See on-property Third Division Award 33858, which deemed a drug test result obtained where chain-of-custody procedures were shown to have not been followed as evidence lacking in probative value.

Finally, there is no dispute that a subsequent test by "alternate methods" was never performed on the sample obtained by the hospital. According to the record, the hospital told Dr. Jarrard that the quantity of the Claimant's urine that was tested was "insufficient to confirm any presence of cannabinoids." Thus, the Carrier's reference to the test as a "positive," and thereby justifying the Claimant's removal from service, does not comport with the actual facts. "Presumed positive" did not mean "positive." As evidenced by the note on the test result form which conspicuously stated that presumed positive results would be confirmed by alternate methods, there needed to be an additional step and that step never happened in this case.

We stress that we find that the test at issue did not support the Carrier's decision to withhold the Claimant from service in much the same way that the drug

tests at issue in Awards 33445 and 30698 were similarly deemed not supportive of the disciplinary actions therein. As the Board stated in Third Division Award 15367, cited by the Carrier, however:

> "We will here follow the long line of Third Division Awards that through the years have held that a Carrier has the right to determine the physical fitness of its employes; and in so doing has *the right, if not an obligation, to accept the recommendations of its* chief medical officer in such matters."

Thus, the Board emphasizes that the Carrier's right to impose reasonable medical qualifications on its employees and to disqualify employees when there is *reason to believe they do not meet medical qualifications* has been long established, and this Board agrees. However, the record before us demonstrates that Dr. Tramp's assessment of the Claimant's physical fitness was never challenged by the Carrier, and thus was not the issue here. The precedent Awards cited by the Carrier, specifically, Award 225 of Special Board of Adjustment No. 910 and on-property Award 5 of Public Law Board No. 5052 are not controlling. We emphasize that those Awards are factually distinguishable from the instant case because both of those cases dealt with medical restrictions and fitness for duty questions, whereas here, as the record makes plain, the Carrier's reluctance to release the Claimant to service was predicated on a drug test result erroneously deemed credible by the Carrier. Moreover, we find that on-property Third Division Award 28267 is not on point because that test result (positive for an illegal drug) was derived from a valid drug test, and the two days of lost time experienced by that claimant stemmed from his proven failure to contact the EAP counselor in a timely manner.

Turning to the question of the relevance of Rule 41 to this case, as mentioned above, we find that the Carrier never disputed the Claimant's physical fitness and ability to return to duty as communicated by the Claimant's own physician, Dr. Tramp. Although the Carrier repeatedly asserted that the Claimant required treatment for an "undiagnosed medical condition" before he could be allowed to return, we find that such assertion did not refer to any real medical infirmity, but was simply a euphemistic reference to the "presumed positive" invalid drug test.

Moreover, we conclude that inasmuch as Rule 41, Physical Disqualification, deals with medical issues and not drug test results, under the circumstances in this case, the Claimant was not required to invoke the second medical opinion provision

contained within that Rule. Thus, the Carrier's argument that the length of time during which the Claimant remained out of service was predicated on his own failure to request a second medical opinion under Rule 41 is unfounded and unsupported by the record. In light of the facts and circumstances in this case, we agree with the Organization that the Carrier's treatment of the Claimant was tantamount to discipline without the due process available to him under Rule 40 of the Agreement. As the Board found in Third Division Award 31368, we similarly conclude in this case that the Claimant was "constructively disciplined" as a result of the Carrier's insistence on withholding him from service based on the result of an invalid drug test.

Thus, in light of the above, we conclude that based on the unique facts and circumstances present in this case, the Carrier's decision to withhold the Claimant from service was not supported by any Rule, regulation or policy. Therefore, the Carrier's action toward the Claimant was arbitrary and capricious. As a result, the claim is sustained, and the Claimant must be made whole for the wages and benefits lost. See Third Division Awards 30802 and 29925, which awarded monetary relief under factual circumstances not entirely dissimilar to those in this case.

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 19th day of April 2005.