

CORRECTED

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26394
Docket Number MW-26735

Edwin H. Benn, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Chesapeake and Ohio Railway Company (Southern Region)

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

1. Claimant R. M. Drewry was improperly withheld from service beginning August 22, 1984 (System File C-TC-2479/MG-4854).

2. The claimant shall be returned to service, he shall be compensated for all wage loss suffered and all days he is compensated for shall be credited as vacation qualifying time."

OPINION OF BOARD: Claimant was employed by the Carrier as a Trackman with seniority since approximately June, 1982.

Claimant was initially charged with possession of narcotics, dangerous drugs and a firearm while on Company property. After Hearing on the charges on August 22, 1984, established that Claimant's automobile in which the materials were found was not on the Carrier's property, the Carrier agreed to return Claimant to service in exchange for a waiver of a time Claim. Upon appearing for work, Claimant was required to undergo a medical examination which resulted in a finding by the Carrier's Chief Medical Officer that Claimant's urine showed the presence of cannabinoids. Claimant was not permitted to return to work at that time but was given the opportunity to undergo another return to duty examination when he felt his system was clear of cannabinoids. Claimant was in an alcohol treatment program from July 12, 1984, until August 9, 1984. Claimant was released from the program to return to work on August 10, 1984.

By letter dated October 9, 1984, Claimant was charged with conduct unbecoming an employee in that he was convicted on October 1, 1984, in Newport News Circuit Court for the unlawful possession of marijuana. Investigation on that charge was set for October 23, 1984. By letter dated November 5, 1984, Claimant was dismissed from service. That dismissal is not the subject of the Claim presently before this Board.

First, with respect to the Organization's argument that the Carrier improperly required Claimant to submit to a return to service examination after agreeing to his reinstatement, we find that argument lacking in merit. The reinstatement agreement was apparently an informal one and we are not the beneficiary of the precise terms of that agreement. The Carrier has not disputed the Organization's assertion that a return to service physical was

not specifically made a part of the settlement agreement and we therefore find its absence to be a fact. Similarly the Organization does not dispute the standard for our review on this issue, i.e., that in order for the Organization to prevail, the Carrier's actions of requiring the examination under the circumstances must be shown to have been arbitrary or capricious. On the basis of this record, we do not find such a showing made herein.

The Carrier has the right to determine an employee's fitness for duty. See Third Division Awards 21344, 20652; Fourth Division Award 3990. Further, the Carrier can require examinations so long as such a requirement is not based upon arbitrary or capricious reasons. See e.g., Third Division Awards 26249, 25634. Here, the record shows that Claimant was involved in drug related activity in that drugs and drug paraphernalia were found in his automobile, albeit while the vehicle was not on the Carrier's property. Further, nine days after the incident on July 3, 1984, when the search of Claimant's car was performed, Claimant entered a substance abuse treatment program and remained in that program for almost one month until August 9, 1984. Additionally, at the time Claimant reported for work after the August 22, 1984, settlement, he had missed over 30 days and the record indicates that the Carrier's practice has been to require employees missing that period of time to submit to a return to work physical examination. We therefore find that the Carrier was neither arbitrary or capricious by requiring Claimant to submit to a physical examination. The fact that the requirement for this kind of examination was not made a part of the informal reinstatement agreement in and of itself does not amount to a showing that the Carrier was arbitrary or capricious when the aforementioned factors are considered.

Second, the Organization argues that the tests utilized by the Carrier are inaccurate, invalid and unreliable to determine the fact of Claimant's recent marijuana usage. We find that in this case we cannot address the issue raised by the Organization concerning the drug test used on Claimant for the simple reason that the validity of the test was not raised on the property. The issue raised on the property by the Organization goes to whether or not Claimant can be considered to have been actually under the influence of marijuana based upon the given fact that he tested positive as opposed to a general attack upon the overall validity and reliability of these kinds of testing procedures as the Organization now seeks to bring into issue. Where an issue is not raised on the property, this Board is precluded from considering it. See Third Division Award 24357; Fourth Division Awards 3941, 3167.

The Organization's reliance upon Special Board of Adjustment No. 925, Award Nos. 22 and 30 is misplaced. Those Awards involved situations where the employees tested positive for marijuana and were disciplined under a Rule prohibiting the reporting to work under the influence of drugs. In those Awards it was determined that there was no showing that the employees were under the influence as required by the Rule at issue. This matter does not involve such a Rule and further involves a different and less strict standard of proof from the Carrier's standpoint, i.e., an arbitrary or capricious standard as opposed to whether substantial evidence exists in the record.

With respect to the ultimate question of whether Claimant was wrongfully withheld from service, we shall deny the Claim. Under the totality of the circumstances presented and considering the fact that the Carrier has the right to determine the physical qualifications of its employees and was not precluded from administering a physical examination in this case; the fact that Claimant showed cannabinoids in his system and the fact that we are precluded under the circumstances of this case from considering the validity of the test utilized, we are compelled to conclude that no showing has been made that the Carrier was arbitrary or capricious in withholding Claimant from service until a time that he could pass a physical examination.

We find no evidence in the record to support the Organization's argument that the Carrier's action was a contrivance designed to delay implementation of the settlement agreement until Claimant was dismissed on the basis of the charges stemming from Claimant's conviction. Our decision in this matter shall have no bearing on the merits of any Claim concerning Claimant's dismissal.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

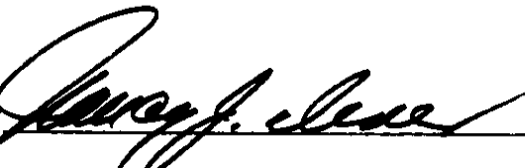
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of July 1987.