

The Third Division consisted of the regular members and in addition Referee Stanley E. Kravit when award was rendered.

(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Southern Pacific Transportation Company (Eastern Lines)

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

(1) The dismissal of Machine Operator L. Harvey for alleged failure to successfully complete drug screening testing was without just and sufficient cause, arbitrary, on the basis of unproven charges and in violation of the Agreement (System File MW-86-104/457-2-A and X419-93-A).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired and he shall be allowed to exercise his seniority."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

On July 27, 1984, the Claimant sustained an on-duty personal injury at Houston, Texas. He returned to work and on August 1, 1984, he was instructed to submit to a drug screening test. On August 3, 1984, the Carrier received a laboratory report indicating that the test was positive for marijuana.

As a consequence, the Claimant was charged with a violation of the Carrier's Rule G, a hearing was held on August 29, 1984, and, subsequent thereto, the Claimant was dismissed from the Carrier's service. Thereafter, a claim was presented to the Carrier and progressed in the usual manner to the designated officer of the Carrier at the highest appellate level.

In the meantime, the Claimant enrolled and participated in the Carrier's Employee Assistance Program.

On March 14, 1985, the parties agreed to dispose of the claim on the Claimant's behalf by his reinstatement on a leniency basis. The agreement stated in part:

"It is understood that Mr. Harvey has participated in the Carrier's Drug Rehabilitation Program and has been approved to return to service. Mr. Harvey will be required to pass the Carrier's usual return-to-work physical and may be required to undergo additional drug screening during the twelve-month period following his return to service.

In the event Mr. Harvey's seniority will not allow his immediate recall to service, his name will be returned to the appropriate place on the seniority roster and he will be recalled in accordance with the current agreement."

By letter of March 15, 1985, the Claimant was notified of his reinstatement "with seniority and other rights unimpaired."

In April, 1986, the Claimant was recalled to service. He was tested on April 14, 1986, following which the test was reported as positive for cocaine, opiates and marijuana. Thereafter, the Claimant's seniority was unilaterally terminated by the Carrier. The Organization's position in the present Claim is that, despite Claimant's failure to pass the drug screening test on April 14, 1986, he could not be discharged without benefit of an Investigation.

The Carrier's position is that a condition of his reinstatement was that he remain drug free, subject to testing upon recall and random testing thereafter. However, a close examination of the letter of March 15, 1985, as well as the agreement of March 14, 1985, upon which it is based, does not support the further contention that Claimant was automatically subject to discharge if he failed to pass his recall physical or any random test thereafter. He was reinstated "with seniority and other rights unimpaired" and one of these rights is the right to an Investigation if the Carrier seeks to dismiss him from service.

Although Claimant was given a proper Investigation in 1984, he received no Investigation in 1986. If the Carrier had wished to make waiver of Article 14, Discipline and Investigation, a condition of the March 14, 1985 reinstatement agreement, should the Claimant fail a subsequent drug screening test, that agreement should have said so explicitly. See, for example, Award 219 of Special Board of Adjustment 280, submitted by Carrier, where the reinstatement agreement in question stated: "... failure to comply with the conditions as set forth above... will result in (Claimant's) being removed from service of this Company without recourse." (Emphasis added.) This is the condition lacking in the Agreement of March 14, 1985.

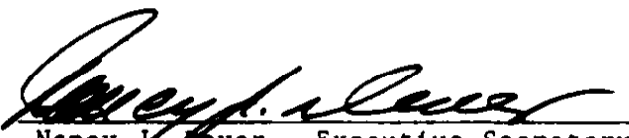
Rights under Article 48, Unjust Treatment, and Article 14 are too important to be waived by inference.

We therefore conclude that the Carrier's failure to conduct an Investigation after March 14, 1986, entitles the Claimant to the remedy requested in Part 2 of the Statement of Claim. He is, however, subject to the normal physical examination and drug testing requirements of Carrier for an employee who has been out of service for an extended period.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Sever - Executive Secretary

Dated at Chicago, Illinois, this 2nd day of February 1989.