

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28267
Docket No. MW-27713
90-3-87-3-172

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

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Burlington Northern Railroad Company (formerly The
Colorado and Southern Railway Company)

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

Trackman J. Rivera, Jr. shall be compensated for two (2) days of pay at his straight time rate and allowed expenses he incurred as a result of being improperly withheld from service on August 19 and 20, 1985 (System File BN-19-85/DMWD 85-12-04B)."

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.

Claimant herein, a Trackman, was required to submit to a return to duty physical examination including a drug screening test, on June 13, 1985. Following the examination he was assigned to the Ft. Collins Section Gang and began to work. On July 11, 1985, Claimant was advised as follows:

"As part of your recent physical examination, a drug screening was performed and the presence of an illegal drug was detected. We request you contact and cooperate with the Employee Assistance Counselor within the next seven calendar days.

If you have any questions regarding the results of your examination, please contact the Chief Medical Officer."

Claimant did not contact the Employee Assistance Counselor and was withheld from service on August 19 and 20 in order to submit to an evaluation by the Employee Assistance Program. Thereafter, he was returned to service. It is noted that on August 19 and August 20 Claimant had been placed on medical leave.

First it must be noted that the Organization has presented voluminous scientific and published articles relating to the validity of drug testing. It must be noted, however, that this data was not presented until well over a year following the filing of the Claim herein. This was clearly "after the fact" with regard to a serious challenge to the validity of the particular test administered to the Claimant. In addition, it appears to the Board that this data is not relevant to the particular issues in this dispute which deal with whether Carrier was within its rights in holding Claimant out of service and whether or not expenses were appropriate in this dispute.

The Organization argues that Carrier's actions in this case were both inconsistent and incorrect. First, it is alleged that Carrier permitted Claimant to work for a significant period of time after the results of the drug test were known. Further, he was removed from service and was not given any medical treatment whatever, before being returned to service. Additionally, it is urged that the drug screening test relied on by Carrier is both inaccurate and unreliable. Finally, it is maintained by the Organization that this is not a physical disqualification case, but rather one in which the Claimant was improperly and unjustly withheld from service.

Carrier points out that it was within its rights in withholding Claimant from service based on medical authority. Further, Carrier argues that the medical material with respect to testing submitted by the Organization is neither relevant nor persuasive. It is noted by Carrier that Claimant was held out of service essentially for his failure to adhere to the instructions he received from the Carrier's Medical Department on July 11, 1985.

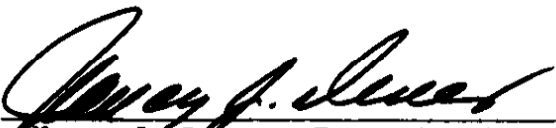
In this Board's view it is self evident that Carrier is properly and prudently concerned with any possible problems of its employees with respect to drugs or alcohol. In this case, after a finding of the presence of marijuana, Carrier merely requested that Claimant contact the Employee Assistance Counselor. It is clear that his subsequent loss of two days pay was caused by his failure to abide by Carrier's instructions. Carrier had a right, through its Medical Department, to place Claimant on a medical leave of absence for purposes of evaluation by the Employee Assistance Counselor. The Claim for expenses is not supported by any rule cited by the Organization.

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 28th day of February 1990.

CARRIER MEMBERS' CONCURRENCE
TO
AWARD 28267, DOCKET MW-27713
AND
AWARD 28268, DOCKET MW-27714
(Referee Lieberman)

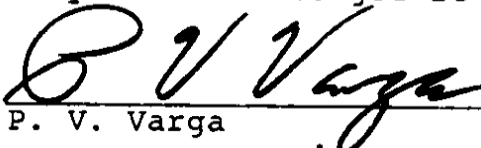
It is correctly noted in Award 28267 that:

"First it must be noted that Organization has presented voluminous scientific and published articles relating to the validity of drug testing. It must be noted, however, that this data was not presented until well over a year following the filing of the Claim herein. This was clearly 'after the fact' with regard to a serious challenge to the validity of the particular test administered to the Claimant.... In addition, it appears to the Board that this data is not relevant to the particular issues in this dispute..."


However, in order to arrive at this conclusion, this Board and the Referee in each docket had to delve through 227 pages of exhibits of which only 24 pages involved the on-property handling of this case. The Organization made reference to another, then pending dispute, and attached correspondence concerning that matter totalling 130 pages. Award 26670 disposed of that matter and it was issued two (2) months prior to this Docket being closed. Of the remaining 73 pages of exhibits, 69 pages involved material NOT handled on the property containing various articles of general opinion and correspondence, not by the parties, but in reply to the Organization's Submission writer's request five (5) months AFTER the dispute was filed with this Board.

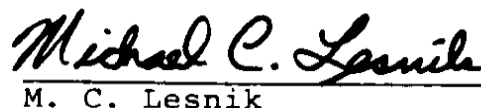
It is manifestly evident that such padding of the record does nothing to help the resolution of the dispute, but does cause unnecessary and unwarranted expense to the Section 3 process.

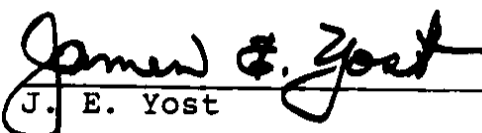
This Board's rules limit the arbitration process to the resolution of the dispute as it was argued on the property; not as it should have been handled or could have been handled or whether the issue looms large or small in the industry. The parties have had over 50 years of experience in handling issues before this tribunal. If they want an all encompassing decision, they know how to get it here. Padding the record does not do it.


P. V. Varga


M. W. Fingerhut


R. L. Hicks


M. C. Lesnik


J. E. Yost