Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29448
Docket No. CL-30206
92-3-91-3-645

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

PARTIES TO DISPUTE: (Transportation Communications International Union
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(National Railroad Passenger Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Union (GL-10635) that:

Carrier File No. TCU-D-3485A, TCU-D-3485B; TCU File Nos. 393-DO-085-S, 393-DO-097-D

CLAIM NO. 1

1. The Carrier acted in an arbitrary, capricious and unjust manner and in violation of Rule #24 of the Agreement, when, by notice of July 5, 1990, it assessed discipline of 'Seventeen (17) calendar days suspension for time served (June 19, 1990 through July 5, 1990, inclusive) against Claimant George Dowaliby, pursuant to an investigation held on June 26, 1990.

2. Carrier shall now compensate Claimant an amount equal to what he could have earned including but not limited to daily wages and overtime, holiday pay, had (he not been held from service and had) discipline not been assessed.

3. Carrier shall now expunge the charges and discipline from Claimants record.

CLAIM NO. 2

1. Carrier acted in an arbitrary, capricious and unjust manner and in violation of Rule 24 and other related rules of the Agreement when, by notice of August 16, 1990, it assessed discipline of 'termination from service' against Claimant Dowaliby, pursuant to an investigation held on August 7, 1990.

2. Carrier shall now reinstate Claimant to service with seniority rights unimpaired and compensate Claimant an amount equal to what he could have earned including but not limited to daily wages, overtime and holiday pay, had discipline not been assessed.

3. Carrier shall now expunge the charges and discipline from Claimant's record.

4. Carrier shall now reimburse Claimant for any amounts paid by him for medical, surgical, or dental expenses to the extent that such payments would be payable by the current insurance provided by Carrier."

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 was awarded a bulletined temporary Ticket Clerk position at San Francisco, California, on May 16, 1990, and began work on that position the following day. Thereafter, he observed two rest days and again worked on May 20, 1990. During the next month, however, Claimant worked on only seven days, calling in sick on fifteen days. On June 19, 1990, Claimant's supervisor directed him to report to the Port Medical Clinic for a physical examination. Although Claimant was informed that his failure to submit to the physical would be considered insubordination, he refused to take the examination. Claimant was thereupon removed from service and subsequently directed to appear for an Investigation, at which he was charged as follows:

> "Violation of Rule 'L' of the National Railroad Passenger Corporation Rules of conduct, in that, while employed as a Ticket Clerk at San Francisco, California, on June 19, 1990, you were allegedly insubordinate and failed to comply with a directive from General Supervisor, G. L. Rose, to submit to a fitness for duty physical."

At this Investigation, the General Supervisor testified he explained to Claimant that the physical was necessary because of his absenteeism and the Carrier's concern for his well being. Claimant testified he refused to take the exam without first consulting with his representative. The record indicates he was given approximately forty-five minutes to do so, but the representative could not be located. Claimant also testified the General Supervisor had informed him the physical would include a drug screen, although the General Supervisor acknowledged there was no reason to assume Claimant was engaging in substance abuse and that was not the purpose of the examination. Following this Investigation, Claimant was suspended for seventeen calendar days. The discipline notice, dated July 5, 1990, contained the following directive:

> "Within twenty-four (24) hours of receipt of this letter you are directed to contact Mr. Gary Rose and comply with Mr. Rose's directive of June 19, 1990 and report to Port Medical Clinic for a fitness for duty physical which includes a drug screen."

When Claimant failed to contact the General Supervisor to arrange for a physical examination by the close of business on July 7, 1990, he was again directed to appear for an Investigation for violation of Rule L. Although Claimant declined to testify at this second Investigation, he made an opening statement wherein he admitted he refused to take the physical as long as it included a drug test, which he characterized as illegal and unconstitutional. Rule L reads as follows:

> "Employees must obey instructions, directions, and orders from Amtrak supervisory personnel and officers except when confronted with a clear and immediate danger to themselves, property or the public. Insubordinate conduct will not be tolerated."

The Organization based its appeal on the position the Carrier violated Rule 23(a) of the Agreement when it directed Claimant to submit to a physical examination. That Rule reads as follows:

> "Employees, after completing sixty (60) calendar days of service, will not be required to submit to physical examination unless it is apparent their physical condition is such that an examination should be made."

The Organization argues the examination, which included a drug test, was not sanctioned by the Agreement and, therefore, Claimant was not obligated to follow the principle of "obey now, grieve later." Citing Award 86 of Public Law Board No. 3139 and Case 28 of Public Law Board No. 4418 between these parties, the Organization asserts drug testing is an exception to that principle. In the former case, which was largely relied upon in the latter, the Board wrote:

> "When given a direct order, an employee must usually 'obey now, and grieve later.' The purpose of the 'obey now, grieve later' principle is to prevent workers from constantly challenging their supervisors' orders, causing anarchy in the shops and the disruption of railroad operations. If a supervisor issues an improper order, the aggrieved employee should comply with the instruction and later initiate a grievance to redress any impropriety. However, in this case the 'work now, grieve later' principle is inapplicable for two reasons. First, the Carrier's urine sample request must be premised on probable cause, reasonable cause or a reasonable suspicion. [Footnote omitted] Probable cause gives validity to an order requiring a urine specimen. If the employee were obligated to obey an order (demanding a urine sample) issued without probable cause,

> the Carrier would be effectively relieved of satisfying its threshold burden of demonstrating a necessity for the urinalysis. Compelling the Carrier to first show probable cause of suspected drug usage establishes the relationship between the workplace and the alleged off duty misconduct. The second reason for not applying the 'work now, grieve later' principle to this case is the lack of a feasible remedy should a later grievance be sustained. If the employee obeys the order by submitting a urine specimen and it is later found that the Carrier did not have probable cause for requiring a urinalysis, it would be impossible to redress the effects of the Carrier's improper order. A grievance could hardly undo the personal humiliation and the unreasonable invasion of privacy associated with the administration of an invalid mandatory drug screening test. Thus, this Board rules that before the Carrier may impose discipline on an employee who defies the Carrier's demand for a urine sample, the Carrier must show probable cause for issuing the order. Nonetheless, we warn employees that a refusal to provide a urine specimen (when asked) exposes them to possible discipline. Employees declining to supply a urine sample are guilty of insubordination provided the Carrier's order was premised on probable cause."

In the latter case, Public Law Board No. 4418 had before it the same Rule 23(a) that is the subject of the dispute herein. The facts are different, however, in that the Claimant therein was required to submit to a return-to-duty physical examination, which included a drug test, following a thirty day suspension for failure to protect his assignment. The Claimant had taken the examination, and traces of cocaine were found in his urine. When directed to submit to a second examination, the Claimant refused and was subsequently dismissed. After determining the "obey now, grieve later" principle was inapplicable, for the reasons cited in the PLB 3139 Award quoted above, the Board found Rule 23(a) "preclude[d] the Carrier from routinely requiring physical examinations, including drug tests, of employees returning from leaves."

Carrier, on the other hand, relies upon Award 1 of Public Law Board No. 5022, which also involves these parties and postdated the PLB 3139 Award. There, the Carrier required an employee to submit to a fitness-for-duty physical, asserting she had been absent on five days and late on two more days within a ten day period. Although the employee agreed to take the examination, she refused to be tested for drugs. Carrier subsequently dismissed her for violating Rule L. The Board upheld the discharge, finding that the "obey

now, grieve later" principle governed. Referring to Hill and Sinicropi, Management Rights (BNA, 1986), 507, the Board found the traditional exceptions to "obey now, grieve later" inapplicable in the case before it. The safety exception, which is embodied in Rule L, clearly did not apply. It also rejected the exception for criminal or otherwise unlawful conduct. The Board then discussed the exception for directives which are in flagrant disregard of the Agreement. After concluding the PLB 3139 case of return-to-work examinations was found by that Board to be one of flagrant disregard, PLB 5022 held:

> ". . . Here, from a plain reading of Rule 23(a), we cannot say that the Carrier's imposition of a drug test as part of the fitness-for-duty examination is a flagrant disregard of the Agreement. Although we do not reach the merits of the Carrier's argument, we cannot dismiss as totally out of hand the Carrier's assertion that the drug testing requirement of the fitness-for-duty physical may fall under the exception language in Rule 23(a) which permits the imposition of physical examinations where 'it is apparent their physical condition is such that an examination must be made'. As shown by PLB 4418, Award 28, the return-to-duty drug testing requirement did not arguably fall into that exception language. But, authority for fitness-for-duty drug tests may fall under the Rule 23(a) exception. The argument advanced for upholding the Carrier's ability to require fitness-for-duty drug tests is that since the exception language in Rule 23(a) permits a fitness-for-duty examination (and assuming a given set of facts justifying a requirement that an employee take a fitness-for-duty examination in the first instance) the Carrier has the general authority to administer a drug test as part of the Carrier's general authority to determine the fitness of its employees.
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> Third, it cannot be said that submitting to the drug test and then grieving the matter renders the dispute moot or that the grievance procedure could not yield an adequate remedy for Claimant in the event it was determined that the Carrier could not require a drug test as part of the fitness-for-duty examination. . . . Even if Claimant tested negative and no disciplinary action resulted, the dispute over whether the Carrier could require the drug test in the first instance could have been pursued. Had Claimant submitted to the test and tested positive and if it was determined through the grievance process that the Carrier improperly required Claimant to

> submit to the test in the first instance, the grievance procedure is well-equipped to restore the status quo ante. Specifically, if a determination is made that the Carrier's drug testing requirements violated the Agreement, the grievance procedure could afford Claimant reinstatement, restoration of all lost benefits and seniority, clearing of her record and backpay.
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> The Organization's alluding to the contention . . . that the Carrier's violation of Claimant's asserted privacy rights cannot be remedied in the grievance procedure is not persuasive to invoke application of the exception to the 'obey now, grieve later' rule. Violation of asserted privacy rights are constitutional questions and not questions arising under collective bargaining agreements. . . ." [Footnotes omitted]

The circumstances in the case herein are almost identical to those present in Award 1 of PLB No. 5022. Whereas that case involved an employee who was absent or late on seven days in a ten day period, Claimant was absent on fifteen of twenty-two work days. In both cases, physical examinations were ordered because of the employees' attendance records. In the earlier case, however, the Claimant took that portion of the physical which did not include a drug test. Because her failure to take the drug test at that time was treated as a positive test, she was directed to take a second drug screen. Her refusal to take this test was treated as insubordination, and her dismissal was upheld by the Board. The Claimant herein refused to take any part of the ordered physical exam on the first occasion. At his second Investigation, he stated:

> "As I have communicated to Mr. Rose through Mr. Davis, the Union representative, I stood willing to comply with Ms. Berberian's demand insofar as it directed me to take a fitness for duty physical. Although under no circumstances have I ever or do I now conceive that this demand that I take the physical was valid or proper.
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> As for the drug screen, there is no question that I have not caved in to Ms. Berberian's illegal and improper order that I submit hereto - - thereto. I have never had any intention of waiving my constitutional rights and no one can force me to do so. Since the order to take the physical has been so inextricably tied to the order to take the drug test, it has been made impossible for me to comply with the order to take the physical without also submitting to the illegal and unconstitutional order to take a drug test, since the physical includes a mandatory drug test."

The PLB No. 4418 Award is clearly distinguishable from the case herein. That Award bars the Carrier from conducting return-to-work physicals on a routine basis. PLB No. 5022 considered such examinations a flagrant disregard of the Rules. Further, even if it had not been flagrant disregard in the first instance, once PLB No. 4418 issued its Award, Carrier and its employees were on notice that such examinations were precluded by the Agreement. Such is not the case here. Rule 23(a) authorizes Carrier to require employees to submit to physical examination when "it is apparent their physical condition is such that an examination should be made." While reasonable persons might differ as to whether certain circumstances would warrant an examination, we cannot find Carrier acted in flagrant disregard of the Rules. In reaching this conclusion, we endorse the following language of footnote 6 of PLB No. 5022's Award 1:

> "On this property, under this Agreement it has already been decided that an employee can refuse to take a return-to-duty drug test. PLB 4418, Award 28. The question then arises when, if ever, an employee can refuse to take a fitness-for-duty drug test. If, after the propriety of fitness-for-duty drug testing is finally adjudicated under the Agreement and if that resolution is adverse to the Carrier but the Carrier continues to require such tests, then a strong case can be made for the employee who refuses to take the test. There, after finally adjudicated, a further requirement by the Carrier that the employee must take the test can be considered a flagrant disregard of the Agreement. But, at this point, that conclusion cannot be reached. As the Organization states in its Submission at 1, 'This is the first case to be arbitrated' on the fitness-for-duty drug testing issue. Therefore, until such time as the issue is resolved, the 'obey now, grieve later' rule must prevail."

As many tribunals, including this Board, have noted, the principle of "obey now, grieve later" exists to prevent chaos and anarchy in the workplace, establishing the right of supervisors to direct the work of their subordinates. So, too, does the principle of stare decisis prevent chaos and anarchy. If arbitral decisions served only to resolve individual grievances, and not to guide the parties in their future conduct, they would have little value. When arbitrators interpret the Agreement, which is the law of the shop, that interpretation also becomes the law of the shop, and may be relied upon by the parties either until they change the Agreement or until the Award is found to be palpably mistaken or erroneous.

We do not find Award 1 of PLB No. 5022 to be palpably mistaken or erroneous. The exceptions to "obey now, grieve later" are extremely limited. Claimant was not required to violate the law by submitting to the examination, and there is no basis to conclude Carrier's directive was in violation of any law, notwithstanding Claimant's assertion to the contrary. His reliance upon

constitutional rights is simply inapplicable in an employment setting. Further, we do not find merit in his assertion that the administration of the drug test would be humiliating. There is basis in the record to presume this test would be performed on a urine specimen, which he would most likely have been required to provide in connection with a physical which did not include a drug screen.

Applying Award 1 of PLB No. 5022 to the facts of this case, we cannot come to any different conclusion. In both instances where Claimant refused to submit to examination, his refusal constituted insubordination, which is a dismissable offense. Carrier already gave Claimant a second chance by suspending him the first time. There is nothing in the record to cause us to modify Carrier's decisions.

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 21st day of October 1992.