NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 29879
Docket No. SG-30002
93-3-91-3-418

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Union Pacific Railroad Company (former
(Missouri Pacific Railroad)

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad Company:

Claim on behalf of J. W. Bundy, Jr., for reinstatement to service, account of Carrier violated the current Signalmen's Agreement as amended, particularly, Rule 28, when it failed to give him a fair and impartial investigation, did not find him guilty as charged and did not comply with the time limits of that Rule." Carrier's File No. 900427. Gen'l Chmn's. File No. 90-51-M-D. BRS File Case No. 8462-UP.MP.

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 employe 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.

This discipline case had its beginnings in a routine, random drug test which was administered in compliance with the Program and Procedures for Transportation Workplace Drug Testing promulgated by the Federal Railroad Administration/Department of Transportation and in compliance with the Carrier's Random Drug Testing Policy and Procedure which was approved by the FRA/DOT for use on this property.

On June 8, 1990, Claimant was employed by Carrier as a Signalman and was headquartered at Newport, Arkansas. As such, he was an employee who was subject to the Hours of Service Law and therefore under the jurisdiction of the FRA/DOT mandated random testing program. On that date, Claimant was instructed, by proper authority, to report to a Carrier designated location to submit to such a random test. The case record reveals that the specimen was properly obtained and verified including a certifica-tion signed by Claimant indicating that the specimen had been sealed in his presence. There is nothing in this case record to indicate that the subsequent chain of custody of the specimen was breached in any way. The report from the testing facility was dated June 13, 1990, and indicated a positive determination for marijuana metabolites. This report was delivered to the Carrier on June 14, 1990. On June 15, 1990, Carrier's Medical Director sent a letter via certified mail to Claimant at his home address notifying him of the results of the toxicological testing. On that same date, June 15, 1990, Claimant was notified, in writing, that he was being withheld from service pending the outcome of an Investigation which was scheduled to be held on June 22, 1990.

The Investigation was held as scheduled on June 22. Claimant was present, represented and testified on his own behalf. Subsequently, by letter dated June 27, 1990, Carrier provided Claimant and his representative with a transcribed copy of the hearing record as then available and at the same time notified Claimant and his representative Organization that "approximately ten minutes (10") (sic) of testimony by Company Officers Mike Lewellen and Jack Sanford was not picked up by the recording device". Carrier thereupon reconvened the hearing on July 5, 1990. At the reconvened hearing, Claimant was NOT present. He was, however, represented by his General Chairman who, in answer to the question "Mr. Anousakes, do you know why Mr. Bundy is not here?", replied, "Yes sir, There's no need for him to be here. His part of the transcript is complete". The reconvened hearing con-tinued without Claimant's presence. The General Chairman, however, participated in the reconvened hearing and cross examined both of the Carrier witnesses whose testimony was taken to complete the hearing record. Following completion of the reconvened hearing, Claimant was notified by letter dated July 12, 1990, that he was dismissed from service. The dismissal notice contained the follow-ing advice:

> "Dismissal is with the understanding that you may return to service under the Companion Agreement on a probationary basis as determined by the Employee Assistance Counselor after having been counseled by the Employee Assistance Counselor and a program has been established in which you will participate."

In addition to the notice of discipline dated July 12, 1990, and on that same date, Claimant was informed by separate letter of the provisions of the actions necessary by him to enter the Rule G Rehabilitation/Education Program. Claimant did not elect to participate in the employee assistance program.

The threshold issue which must be addressed in our consideration of this case concerns the Organization's strenuous objection to Carrier's action of reconvening the hearing because of the malfunction of the Carrier's recording device at the original hearing. The Organization argued that this reconvening action amounts to a type of "double jeopardy" and causes Carrier to be in violation of the time limits requirements as set forth in Rule 28-DISCIPLINE which demand that the hearing must be held within ten days following the date of notification and that the notice of discipline must be issued within ten days after completion of the hearing. The Organization also argued that Carrier's act of prohibiting the General Chairman from using his personal tape recorder at the June 22 hearing violated Claimant's due process rights and could have acted to avoid the necessity of a reconvened hearing.

We have examined both aspects of these arguments and it is our conclusion that Carrier's refusal of the General Chairman's use of his personal tape recorder did not, in any way, violate any rule of the Agreement and therefore did not violate any due process right of the Claimant inasmuch as due process rights flow only from the terms and conditions of the Agreement. In any event, the case record here indicates that the issue of the use of a personal tape recorder by the representative has been resolved on this property and that portion of the Organization's argument is, therefore, a settled matter.

As to the argument relative to the reconvening of the hearing because of the malfunction of the recording device at the original hearing, that type of situation has been previously addressed by this Board. For example, in Second Division Award 9686, this Board ruled as follows:

> "Nor do we view the tape malfunction and resulting resumption of the investigatory hearing as inherently or contractually improper. On the contrary, the Carrier's action in reconvening the hearing to recreate the missing testimony reflects what appears to be honest concern for an accurate record."

Similar determinations are found in Second Division Awards 9518 and 9685.

As to the alleged time limit violation, the Investigation was scheduled under the provisions of Rule 28(b) to begin within ten days following the date the employee was notified of the charge - notified June 15, hearing scheduled June 22. Rule 28(d) requires that "notice of discipline assessed, with copy of the transcript, will be issued, in writing, within ten (10) days after completion of the investigation". In this case, the Investigation was not completed until all pertinent testimony was recorded at the reconvened hearing on July 5, 1990. The notice of discipline was issued on July 12, within the required time limit. Therefore, the Organization's arguments in this regard are rejected.

On the merits of the situation, we have here a case in which the Claimant was properly and randomly tested as mandated by the FRA/DOT requirements. Those FRA/DOT requirements contain a built in safeguard which permits an employee to request a second test of his specimen if he believes that the original result was erroneous. Rather than using this retest provision, Claimant, on June 8 presented himself to a second collection facility and presented a second specimen which is alleged to have tested negative. In the testimony of this case, Claimant initially denied knowledge of the existence of the retest provision in the FRA/DOT regulations but testified that he gave the second specimen at the second facility because "I wanted a second drug screen just in case the first one was positive." The record of this case shows that by letter dated July 23, 1990, just 11 days after the notice of discipline had been issued, Carrier directed the attention of the Claimant's representative to the retest provision which permitted Claimant to have the original specimen tested at an approved laboratory of his own choice. Carrier recommended that this action be taken by Claimant. However, the representative, by letter dated August 10, 1990, stated that he could not recommend this procedure to the Claimant and persisted in his contention relative to the negative result of the second specimen which had been given at the second facility. As a result, there was no second test made on the original specimen. This action was taken by Claimant at his own peril. The FRA/DOT requirements specifically prohibit the consideration of specimens or results which were not obtained or processed in accordance with the FRA/DOT procedures. Therefore, we are left here with only the original test results of the original properly taken specimen which indicated a positive result for the presence of a prohibited substance. Such a situation required that Claimant be immediately removed from service subject only to a return to service through the provisions of an Employee Assistance Program. Such an action through such a program was offered to Claimant as noted earlier in this award. Unfortunately, this employee assistance program was also rejected by Claimant. Again he acted at his own peril.

On the basis of the record in this case, this Board concludes that Claimant was properly dismissed from service and the Claim as outlined in the Statement of Claim, supra, is denied. This Board does, however, strongly suggest to the Carrier that, inasmuch as it is committed to employee assistance and rehabilitation opportunities for all employees, the offer to return to service, subject to the Claimant's participation in the Carrier Rule G Rehabilitation/ Education program as referred to in the original notice of discipline and as outlined in Carrier's letter dated July 12, 1990, to the Claimant, be again extended to this Claimant to permit him to demonstrate to himself and all others involved that he is truly interested in a career as a railroad Signalman.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 26th day of October 1993.