

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30698
Docket No. SG-31111
95-3-93-3-159

The Third Division consisted of the regular members and in addition Referee M. David Vaughn 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 Signalman on the Union Pacific Railroad (former Missouri Pacific):

"Claim on behalf of W. H. Bennett for reinstatement to service with payment for all lost time and seniority rights restored, account Carrier violated the current Signalmen's Agreement, particularly Rule 28, when it conducted a hearing into charges against the Claimant outside the time limits and, despite failing to prove its charges against the Claimant, imposed the harsh and excessive discipline of dismissal. Carrier's File No. 920213. General Chairman's File No. 92-36-K-D. BRS File Case No. 8946-UP (MP)."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee, 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 employed as a Signalman. He was covered by the Hours of Service Law and, therefore, by Federal Railroad Administration drug testing regulations, 49 CFR Part 40 (the "Regulations").

In 1989, Claimant tested positive for marijuana and elected to undergo rehabilitation and a 12 month probationary period pursuant to a March 17, 1987 Prevention Program Companion Agreement (the "1987 Agreement") which had been negotiated between the Carrier and Organization. It is undisputed that the probationary period expired without Claimant having again tested positive for drugs. Section 11 of the 1987 Agreement provides that, "[i]f the employee successfully completes the Rule 'G' R/E Program, a notation to that effect shall be placed on the employee's personal record, the employee's probationary status shall be terminated and all seniority and other rights shall be restored."

Subsequent to Claimant's earlier positive drug test, the Federal Railroad Administration ("FRA") promulgated its Regulations, Sec. 219.104 which required covered carriers not to return to service employees who have been determined to have violated the Regulations unless they meet certain requirements, including referral to an Employee Assistance Program and compliance with recommended treatment and compliance with testing programs for covered employees which include "a reasonable program of follow-up drug testing" for a period of "not more than" five years for employees who previously tested positive. However, the quoted Section also provides, at (c) (4) that "nothing in this part shall be deemed to abridge any additional procedural rights or remedies that are available to the employee under a collective bargaining agreement, [or] the Railway Labor Act . . . with respect to the removal or other adverse action taken as a consequence of a positive test result in a test authorized or required by this part."

The Carrier promulgated a drug testing program (the "Plan"), which was submitted to and approved by the FRA. The Plan became effective on January 16, 1991; and all employees were given notice of its terms, including a requirement that employees who had previously tested positive were subject to follow-up testing for five years.

The Carrier regarded Claimant as covered under the five-year post-positive test provisions of the Plan. On December 18, 1991, it took a sample (the "Sample"), which Claimant furnished under protest, on the basis that his 12 month probation period had expired.

The Sample was transmitted to the National Institute on Drug Abuse ("NIDA")-certified drug testing laboratory under contract to the Carrier. The chain of custody was maintained, but, for reasons not a part of the record, the transmittal of the Sample took 10 days from collection to testing. It is not established whether the Sample was maintained under "laboratory conditions" during the period.

The Sample was tested on December 28, 1991, under NIDA/FRA procedures. The result was positive for marijuana. The results were forwarded to the Carrier's contract Medical Review Officer ("MRO"), who interviewed Claimant by telephone on the 3rd of January, 1992. Although Claimant denied marijuana use, the MRO verified the test as "MRO positive" for marijuana and faxed and mailed the verification to the Carrier. The fax was received after business hours on January 3rd; the letter was not received by Officers of the Carrier until January 6th or after.

Following receipt of the MRO verification, the Carrier charged Claimant with using "an illegal or unauthorized drug as evidence by the positive test result of the random follow-up drug and alcohol test given you" and scheduled a hearing for January 24, 1992. For reasons not a part of the record, the Carrier rescheduled the hearing for February 4, 1992. It advised the Organization of the rescheduling, but did not obtain the Organization's consent. The Carrier assumed from the Organization's lack of objection that it consented, or at least that it had waived its objection. The hearing was conducted, at which the above facts were ascertained. Following the hearing, the Carrier upheld the charges against Claimant and dismissed him from service, effective February 11, 1992.

The Organization protested the Carrier's action. The Parties were unable to resolve the dispute on the property; and it was referred to the Board. This proceeding followed.

The Carrier argues that Claimant was properly tested for prohibited drugs under the Plan, since he had previously tested positive for drugs within the five year period covered by the Plan. It asserts that the evidence is that Claimant was shown, through a valid test, to have tested positive for marijuana. It asserts that FRA Regulations and the Plan provided the penalty dismissal for a second positive test.

The Carrier argues that the Regulations and Plan superseded the earlier, negotiated Agreement and that, by the terms of the Regulations and Plan, Claimant came under their rules, including the provision allowing testing for five years following a positive test.

The Carrier contends that the chain of custody for the Sample was properly maintained throughout the testing process and that the ten day delay between collection and testing violated no provision of the Regulations or Plan and that there is no indication that the Sample was in any way contaminated, or the test results altered, as a result of the delay. Indeed, it asserts that any delay likely reduced the amount of metabolites in the sample, thereby reducing the likelihood of a positive test.

The Carrier argues that the 30 day period for conducting the investigatory hearing did not begin until the Carrier Officers received the written confirmation of MRO positive on or after January 6th, thereby making February 4th within the 30 days. The Carrier asserts that, in any event, by the Organization's failure to object to the Carrier's proposed postponement of the hearing when it was notified of the proposal, it waived its right to challenge the timeliness of the date later.

The Carrier denies any violation of Claimant's rights. However, it asserts that court precedent prohibits overturning discipline for violation of the Regulations on the basis of procedural violation. The Carrier asserts that Claimant's guilt is established by substantial evidence and that the penalty was required, and not arbitrary or capricious. It urges that the claim be denied.

The Organization argues that the Carrier was bound by the provisions of its 1987 negotiated Agreement and could only test Claimant during a probationary period of one year following his positive test. It points out that he passed that period without any further positive test. The Organization asserts that to subject Claimant to the 1990 Plan would constitute an improper, retroactive application of the Plan; and it asserts, therefore, that the Carrier lacked cause or authority to test Claimant.

The Organization argues, further, that the disappearance of the Sample and the 10 day delay between its collection and the test is not in compliance with proper practice and renders the testing procedure suspect and the result invalid. The Organization denies that the delay benefitted Claimant, but asserts, in any event, that benefit is not the test. It contends that, because of the severe impact on the employee of dismissal for drug use, strict compliance with testing procedures must be required.

The Organization contends, further, that the Carrier had notice of the test results on January 3rd, making the February 4th hearing - held the 32nd day after the Carrier knew of the alleged violation - untimely under Rule 28, which requires a hearing within 30 days. It asserts that no demonstration of harm as a result of the delay is required in order to render the hearing untimely.

The Organization argues that the discipline must be overturned because it was imposed in violation of Claimant's rights to due process and to strict compliance by the Carrier with guidelines and procedures. It asserts that the Carrier's "cavalier handling" of the case should not be endorsed. The Organization urges that the claim be sustained and Claimant made whole for all wages and benefits lost.

The importance of maintaining work places free from the effects of uses of prohibited drugs has been endorsed by numerous decisions of this Board. The historic "Rule G" requirement that employees not use illicit drugs and not be impaired by such drugs while on duty or subject to duty has been extended by FRA Regulations to require Carriers to test covered employees for such use.

Claimant had previously tested positive for prohibited drugs and was properly subject to testing under the 1987 negotiated Agreement. That test was approximately 18 months prior to his December 18th test here at issue. The Organization argues that his satisfaction of the terms of the Agreement which he elected extinguished the Carrier's authority to test him on the basis of his prior positive any time after the year period expired. We note, in this regard, that the charge against Claimant was based on a positive "follow-up" test, a clear reference to Sec. XII of the Plan and not to any other provision of the Plan authorizing the test.

The principle that rules may not be applied retroactively has been recognized by the Board. See, e.g., First Division Award 24187. However, the analysis in this case is not so simple: the Regulations changed the Carrier's obligation with respect to many issues in drug testing, including the duration of post-positive follow-up testing.

Section 219.104 (c) (4) of the Regulations, quoted above, preserved bargained-for procedural rights and remedies "not inconsistent with" the Regulations. Paragraph (d) (3) of that Section sets an upper limit for testing of 5 years, but sets no lower limit. The Plan - but not the Regulations - set a lower limit of 2 years of post-positive testing (See Sec. XII of the Plan), but Claimant had not been placed under the Plan as a result of his prior positive test -because it did not exist at the time - but, instead, had been placed under the 1987 Agreement. We note that Claimant was allowed to choose the treatment and probation provisions of the 1987 Agreement and that he relied on those terms and complied with them in good faith.

FRA approved the Plan, but its approval did not speak to the status of employees whose positive drug tests preceded the Regulations. Neither the Plan nor the FRA on review of the Plan invalidated the 1987 Agreement. A comparison of the 1987 Agreement and the Regulations leads the Board to the conclusion that the 1987 Agreement is "not inconsistent with" the Regulations with respect to the length of the probation period. We further conclude that Claimant's satisfaction of the conditions required by the Plan removed his probationary status and returned him to the same status as other employees who had not produced positive tests. He was not, therefore, subject to "special" testing.

From the foregoing analysis, the question arises whether the Carrier properly tested Claimant under the Plan in the absence of being able to treat him as having had a prior positive test. The record is clear that the Carrier relied on Claimant's prior positive test as the authority to test him; that is the only argument it raises in support thereof. There is no assertion in the record that the Carrier tested him, or would have tested him, in the absence of his prior positive test and unless he was subject to the Section XIII requirement.

The Board concludes that the Carrier did not have authority - probable cause, random draw, accident, or any substitute - to test Claimant. Neither the Regulations nor the Plan confer on the Carrier a plenary right to test employees; only if an employee fits into a specified category and is otherwise selected for testing in accordance with the governing document or documents does the Carrier have a right to test under the Plan. To stretch the Plan to cover Claimant, on the basis of his earlier test, when he completed his probationary period and was "restored" to all his rights - including a "clean" status for purposes of being tested - prior to promulgation of the Plan and Regulations, would effectively subject him to a "Bill of Attainder", a concept universally rejected in our system of law.

In the absence of authority to have conducted the test, the Board concludes that the test was invalid and cannot support the discipline imposed. We so hold. Because the Board concludes that the test was invalid as having been conducted without authority, we do not reach or resolve the other, procedural issues raised by the Parties.

The Board believes that the Carrier's argument that court authorities preclude the reinstatement of employees on the basis of procedural deficiencies in the testing policies is inapposite to the conclusion reached by the Board, which is based on jurisdictional and substantive determinations. However, even if the "procedural" attack is deemed applicable to our analysis (it appears to have been directed against arguments alleging defects in the testing procedure and the timeliness of the hearing which were raised by the Organization), the Board is not convinced that the argument requires a denial award.

The Public Law Board's Award in the case cited in support of the Carrier's argument, Union Pacific Railroad Co. v. UTU et al., 8:CV91-00392 (Dist. Neb. 1992), was set aside (and remanded to the Board with instructions to order another hearing for the employee therein) on the basis that the PLB had found Claimant to have been denied a fair hearing, as well as having found a flaw in that Board's reasoning, which sustained one offense of misconduct, while denying an intertwined "Rule G" violation on procedural grounds. The Court found a "well-defined public policy" against the

reinstatement in safety-sensitive positions of employees who have created threats to safety by abusing drugs or alcohol. See Slip Opinion at p. 6. The Court pointed in support of its finding of a well-defined public policy against reemploying drug users to the Federal Government's Regulations.

Where, as here, the Board concludes that the offense is not brought within the reach of the Regulations, or the Plan promulgated pursuant thereto, for purposes of establishing the basis for the Carrier to conduct the test, the Board is not persuaded that the Regulations can be applied to establish the public policy. Further, the Court in the case cited - as well as some other decisions not cited - focused only on the public policy against reemploying drug abusers. There are other public policies, at least equally well-defined and important to our system of law and contract, which favor collective bargaining and the enforceability of agreements reached thereunder, as well as public policies protecting individual rights and ensuring due process for employees subjected to drug testing. This Board specifically recognizes such policies, which must be, and are, balanced against the policy against reemploying persons who were drug users.

The Board respects the efforts of the Carrier, the Organization and the Government to rid the railroad industry of drug users. Such employees represent genuine threats to safety. No authority wishes to be a party to returning to service an employee unfit to serve because of drug or alcohol conditions. However, the existing assistance and testing procedures of the Plan provide sufficient protection, through return to work examinations and the ongoing aspects of the Carrier's Plan, to minimize such consequences. The Award so reflects.

The test used by the Carrier to establish Claimant's guilt was conducted without authority and was, therefore, invalid. It cannot be used to establish Claimant's guilt. Claimant's dismissal shall be rescinded; and he shall be made whole for wages and benefits lost as a result of the Carrier's actions dismissing him. Claimant's record shall be cleared of the test results and discipline. However, Claimant's reinstatement shall be subject to his taking and passing a drug screen, his enrollment and participation in Sec. XI of the Plan, and his undergoing the follow-up testing program provided for in Sec. XII of the Plan. This Award constitutes specific authority for the Carrier to require such participation. Claimant's failure to participate successfully in Secs. XI and XII of the Plan will subject him to the penalties provided for in the Plan and Regulations.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

National Railroad Adjustment Board
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of January 1995.