

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30723
Docket No. CL-31589
95-3-93-3-479

The Third Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

(Transportation Communications International
(Union
PARTIES TO DISPUTE: (
(Davenport Rock Island and Northwestern Railway
(Company

STATEMENT OF CLAIM: "Claim of the System Committee of the
Organization (GL-10974) that:

1. The nine month suspension imposed upon claimant Robert C. Holmquist, Clerk, for alleged refusal to submit to FRA Random Drug Test in accordance with the provisions of 49 CFR 2129.603 (a) was without just and sufficient cause and was made on the basis of illegal action on the part of the Davenport Rock Island and Northwestern Railway, when an illegal Random Drug Test was initiated with an off-duty off-Company-property employee.
2. The Carrier failed to provide the fair and impartial investigation required by Rule 56 of the Clerks' Working Agreement.
3. The Claimant be compensated for all wage loss, and loss of benefits suffered; the Claimant's record be cleared of all reference to the incident of March 20, 1992, and subsequent actions of the carrier in connection therewith; the Claimant be returned to his former position with seniority and benefits unimpaired.
4. The Claimant be compensated for all "non-covered" service that the Carrier withholds the Claimant from performing."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the 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 were given due notice of hearing thereon.

The Claimant was a DRI&NW clerical employee with a seniority date of August 13, 1989. On March 20, 1992, the Claimant served as the Second Shift Operator on DRI&NW Bridge 149, Crescent Bridge, a swing span bridge crossing the Mississippi River between Rock Island, Illinois and Davenport, Iowa.

The Carrier had instituted a random drug testing program on November 1, 1990. The program was established in accordance with FRA Regulations. Under the program the Claimant was designated to be tested during the month of March 1992.

On March 20, 1992, the Claimant arrived at the parking lot normally used by employees at 2:50 P.M., ten minutes before his scheduled starting time. The Manager of Maintenance and Operations, advised him that he was selected for a Random Drug Test and asked him to get into his car. When he got into the car, he was given a Notice to Covered Employees to read and sign, which he did.

Within a short time, there was an exchange of words and an altercation occurred. At one point, the Claimant tore up the Notice to Covered Employees, asked the Supervisor to stop the car, and got out. He refused to proceed with the Manager to the testing site. The Manager, then called the Bridge Operator on the radio and asked him to contact the Director of Administration, who arrived within a few minutes.

The three entered into a discussion and the Claimant refused to accompany the Manager to the drug testing clinic. The Director testified that he told the Claimant he would personally drive him to the clinic and repeatedly asked the Claimant to comply with the testing requirement. The Claimant refused. The Claimant contends he refused to go to the testing site with the Manager, but was never offered the alternative of going with the Director.

In any event, the Claimant left the vicinity in his own vehicle and never took the test. On the same day, March 20, 1992, the Director, notified the Claimant by Certified Letter he was being removed from service for nine months, as required by law, for his failure to submit to a Random Drug Test. (The Claimant was

subsequently dismissed for his alleged altercation with the Manager and his refusal to comply with a direct order to submit to a drug test. A claim protesting said discharge is the subject of a companion case.)

The Claimant requested a Hearing on the suspension as provided under 49 CFR 219.603(b)(2) which reads:

"219.603 Participation in testing; refusals.

- a. Participation. . . . Compliance by the employee shall be excused only in the case of a documented medical or family emergency.
- (2) Upon being withdrawn from service under this section, the employee shall be entitled to the same procedural protections as those set out in 219.213(b) of this part with respect to refusal of post-accident testing. The purpose of the hearing shall be to determine whether the employee refused to provide a sample, having been notified of the requirement to do so, and whether the employee can establish a basis for being excused under the criteria stated by paragraph (a) of this section."

The Hearing was held on April 2, 1992. The Carrier contracted Mr. B. A. Webster, retired DRI&NW General Manager, to serve as the Hearing Officer. All witnesses were sequestered at the request of the Local Chairman of the Organization. Witnesses for the Claimant and the Carrier, as well as, the Claimant himself testified about what had occurred the day of the incident.

The Hearing Officer notified the Acting General Manager by letter dated April 10, 1992, of his determination. In the letter he made credibility evaluations and concluded the appeal of the Claimant was without merit.

Once she received the letter, the Acting General Manager sent the Claimant a Certified Letter stating there was no evidence presented at the Hearing which would indicate that the March 20, 1992 decision by the Director to remove him from service should be reversed. The nine month suspension was to remain in effect. He would be allowed to return to service after that time provided he met the provisions outlined in 49 CFR 219.605(e).

The Organization appealed the Carrier's decision several times over the next eight months, always to the same Carrier Officer, the Acting General Manager. In January 1993, a conversation took place between the Acting General Manager for the Carrier and the General Chairman of the Organization. The two discussed an offer for

reinstatement of the Claimant on a leniency basis. Acceptance of the offer to return to service would be settlement of all outstanding claims filed on behalf of the Claimant relative to the March 20, 1994 incident. In addition, the Claimant would have to apologize to the Supervisor with whom he had the altercation and would have to comply with all the reinstatement provisions of 49 CFR 219.605(e) as well as participate in any program recommended by the Carrier's EAP counsellor.

The Claimant rejected the reinstatement offer and asked that his claim continue to be processed. When the Parties could not resolve the dispute on property, the Organization appealed the matter to this Board.

The Organization contends the Carrier's request for a Random Drug test was in violation of 49 CFR 219, Subpart G - Random Drug Testing. As provided under the provision: "219.601(b)(6). An employee shall be subject to testing only while on duty. . . ." The employee was approached before the beginning of his tour of duty and asked to sign a "Notice to Covered Employees," which he did. Not only was the Claimant not on duty, he was off Carrier property. This clearly constitutes a violation of the regulations. Absent a bona fide order to submit to a Random Drug Test, there can be no refusal on the part of the Claimant.

The Organization argues that even the Director was aware the Carrier was in violation, as substantiated by the following exchange during the Hearing:

"Q. And what's the approximate time for that test to be conducted?

A. During the tour of duty. . . .

Q So you admit that there was a violation then?

A. I admit that he was initially approached prior to the tour of his duty.

Q. And do you believe that was a violation of the law as written?

A. It was incorrect, yes.

Q. Is this law not the authority under which you conduct these tests?

A. Yes, it is."

The Organization contends the Board should be guided by Award 59 of Public Law Board No. 4267, Third Division Award 27802, and

Award 30 of Public Law Board No. 4803.

The Organization also asserts the Carrier erred when it removed the Claimant from all service and not just covered service. There were other duties the Claimant could have been assigned to, but was not.

Furthermore, according to the Organization, the Carrier violated Rule 56 of the Agreement when it failed to provide the Claimant with a fair and impartial Investigation and appeal process. The language of the Agreement contemplates a Claimant is entitled to review by an authority other than the authority who initially acted. In this case, the Carrier officer who heard all levels of appeal was the same person. Such a multiplicity of roles is unacceptable and has been ruled so in several Awards. (See Award 16 of Special Board of Adjustment No. 968; Third Division Awards 28567, 24476; and Fourth Division Award 3746.)

The Carrier argues the test was requested in a timely manner. After all the Claimant was not called out to duty for the purpose of the Random Drug test. Instead, he arrived early for his tour of duty which has been the practice for Bridge employees. He was parked in the normal parking area and was only asked to sign the "Notice to Covered Employees" and accompany the Manager to the drug testing site. He never objected to the timeliness of the request at the time and in all probability the testing itself would not have begun before the Claimant's actual starting time. Furthermore, the Claimant's refusals to the Director's request that he submit to a drug test were well within the Claimant's scheduled starting time. Besides, the Federal Railroad Administration representative designated to handle drug testing procedures did not feel that the Carrier's procedures constituted an invalid test.

Despite the suggestion by the Claimant he feared for his safety and therefore refused to accompany the Manager, he never raised that same concern about the Director and yet refused more than once to accompany the Director to take the test.

As far as the Carrier is concerned, the only valid reasons for refusing to take the test were a documented family or medical emergency. He provided no evidence at the time he refused to take the test or during his subsequent Hearing, that either situation existed.

The Board does not agree that the Claimant's due process rights were violated when the Acting General Manager handled each level of appeal. Clearly, one Carrier Officer made the decision to discipline the Claimant. That Officer who was present when the Claimant refused to submit to the Random Drug Test, also served as a witness at the Hearing. A second individual was contracted by the Carrier to serve as the Hearing Officer. It was this individual who made the initial credibility determinations and

recommended to the Acting General Manager that the Claimant's request should be denied. Finally, the Acting General Manager heard the case at the appeal levels.

The fact that the Acting General Manager heard each level of appeal did not violate the Claimant's due process rights. The Organization argues that one of two things should have occurred. Either there should have been another Carrier Officer to hear one of the levels of appeal or the Carrier should have notified the Organization that there would only be one level of appeal since there was only one remaining Carrier Officer who was not otherwise involved in the case. The Organization's position must fail for several reasons.

The Board sees no difference in the Acting General Manager hearing the appeal once or more than once as long as there was an opportunity for the Claimant to present his case, be represented by the Organization and have access to an appellate process. This is especially true when there is evidence the Carrier's representative was not simply going through the motions, but was making a sincere effort to resolve the dispute. In this case, the Acting General Manager did not simply dismiss the Organization's attempts at resolving the case. After the second appeal, she made an offer to settle the dispute. While the offer may not have been to the Claimant's liking, it was a good faith offer on the part of the Carrier. Nor does the Board believe the Claimant was in any way harmed by the Carrier not limiting the number of appeal levels because there was only one Officer to handle the appeals. On the contrary, the evidence shows the Officer did not offer the settlement until she had spoken to the second Representative from the Organization. The discussions were not fruitless and did provoke meaningful exchange.

Furthermore, it is the Board's belief the Carrier complied with Third Division Award 28567. The charges were leveled against the Claimant by one Carrier Officer, who also served as a witness. The Carrier contracted an outside Hearing Officer whose functions were to hear the evidence, make credibility determinations and to render an opinion on the merits as he determined them. Finally, the remaining Carrier Officer heard the Claimant's on-the-property appeals. The Claimant's due process rights were protected.

The Carrier did not err when it asked the Claimant to begin the process of taking the Random Drug test when he arrived ten minutes before his scheduled start time. First, there was unrefuted testimony that the Bridge Operators customarily relieved their co-workers early. The Claimant had come prepared to begin work. Secondly, the Claimant was not called out to work, but was merely asked to start the paperwork for his drug test once he arrived at the parking lot. It is not as if he were accosted in an unrelated parking lot. He was approached where employees parked for the purpose of reporting to work and he never once objected to

the timeliness of the request. Besides, there is little doubt in the Board's mind that the Claimant would not have actually begun the testing until after the start of his tour of duty even if he had cooperated. The fact remains, however, that he was asked more than once to take the test after the start of his shift. He refused at that time. Therefore, he was in violation of the FRA Random Drug Test Regulations. The appropriate penalty was a nine month suspension.

The cases cited by the Organization all dealt with testing based on probable cause. They had nothing to do with Random Drug Testing as required by the FRA Regulations.

The Board believes there is sufficient evidence the Claimant was guilty of refusing to take the Random Drug Test. The penalty issued was governed by law.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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