

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30763
Docket No. CL-31592
95-3-93-3-596

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

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

STATEMENT OF CLAIM: "Claim of the System Committee of the Organization (GL-10975) that:

1. The dismissal 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 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 Claimant 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 that he was being removed from service for nine months, as required by law, for his failure to submit to a Random Drug Test. (A claim protecting said suspension was denied by this Board in Third Division Award 30723.) On March 23, 1992, the Claimant received a second charge letter as a result of the same altercation. Within the charge letter the Claimant was advised:

"Formal investigation will be held in the Conference Room, Union Station, 102 So. Harrison Street, Davenport, IA, on March 26, 1992, at 2:30 p.m. to determine facts, circumstances and your responsibility, if any, for your alleged failure to properly comply with the provisions of General Rules A and D and Rules 600, 607 and 608 of the General Code of Operating Rules when on March 20, 1992, you refused a direct order from two Carrier Officers and engaged in a physical and verbal altercation with one of them."

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. 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 13, 1992 of his determination. In the letter he made credibility evaluations and concluded the evidence adduced at the Investigation would support whatever discipline the Acting General Manager deemed appropriate.

Once she received the letter, the Acting General Manager sent the Claimant a Certified Letter dated April 15, 1992 wherein she advised Claimant a review of the evidence from the Investigation supported the charges that he had violated General Rules A and D and Rules 600, 607, and 608 of the General Code of Operating Rules. As a result, he was dismissed.

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 and the General Chairman. 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 the property, the Organization appealed the matter to this Board.

The Organization argues that 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, Special Board of Adjustment No. 968; Third Division Awards 28567, 24476, 23427; Fourth Division Award 3746.

Beyond this, the Organization contends the Carrier violated Rule 56 when it disciplined the Claimant twice for the same incident. It asserts that even though 49 CFR §219.603 (b) does give the Carrier the right to impose additional sanctions for the same or related conduct if an employee covered under the Hours of Service Act refuses to provide a sample, in this case the Carrier was not in conformance with the law when it administered an illegal Random Drug Test upon Claimant. The Organization contends the Claimant was not on duty when asked to submit to a drug test; therefore, this provision is not applicable.

The Organization further 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. According to Organization, 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.

In this matter the Organization argues that 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.

According to the Organization, the Carrier also 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.

The Carrier argues the Investigation afforded the Claimant was fair and impartial and demonstrated sufficient cause to impose the discipline of dismissal.

The Carrier contends that the Claimant was not dismissed for ". . . alleged refusal to submit to FRA random drug testing. . . ," as submitted by the Organization in its claim in this matter. He was dismissed because the evidence adduced at Hearing clearly showed he refused a direct order from two Carrier officers and engaged in a physical and verbal altercation with one of them.

The Carrier observes that the issue raised by the Organization relative to the legality of the drug test was not at issue in the Investigation. The issue was whether the Claimant was insubordinate by refusing to comply with instructions from proper authorities and by entering into a physical and verbal altercation with a supervisor. This occurred both prior to and after his scheduled starting time. At no time did the Claimant contend he was refusing the directions from the supervisors because the request was illegal.

The Carrier agrees an employee does not have to obey now and grieve later when personal safety is concerned. The Claimant never contended he was personally threatened. In fact, when asked if he was afraid of anything physically, he responded he was ". . . not afraid of anything physically." Besides, there was nothing to show the Claimant had any kind of conflict with the Director on the day in question, and yet he refused to accompany him to take the test.

The two Carrier officers have many years of service and excellent records. They gave the Claimant a legitimate order which he refused. They had no reason to lie in order to incriminate the Claimant. On the other hand, the Claimant had every reason to distort the truth in order to protect his position.

The charges against the Claimant were substantiated and the discipline assessed was appropriate.

The Board does not agree the Claimant's due process rights were violated when the Acting General Manager handled each level of appeal. While the "appellate" officer of the Carrier (the Acting General Manager) sent the charge letter, she was not involved in the incident which led to the charges, nor was she a Carrier witness. Her only function, in this regard, seemed to be to send the charge letter after being notified of the incident by the two Carrier officers involved. The two Carrier officers who were present when the Claimant refused to submit to the Random Drug Test also served as witnesses at the Hearing. Another 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 be disciplined. Finally, the Acting General Manager heard the case at each level of appeal on the property.

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 a meaningful exchange.

Furthermore, it is the Board's belief the Carrier complied with Third Division Award 28567 involving a prior dispute on the property. The charges, for all intents and purposes, were leveled against the Claimant by two Carrier officers, who also served as witnesses (this was true even though the Acting General Manager sent the charge letter). 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 starting 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 Claimant was an employee with only three years of service. Three years of service in the railroad industry is not what one views as lengthy tenure. While three good years of service does provide evidence of an employee's potential productivity, it is hardly enough time to grant an employee mitigation for a grievous offense. The Claimant erred seriously when he failed to follow the instructions of both supervisors. Moreover, when he was in the car on his way to be tested, he had no right to grab the Manager's arm even if he refused to stop the car and let him out. Supervisors must be protected from employees who would choose to do things their way. They are in charge and must be given the latitude to orchestrate a productive work force. The Claimant was wrong, especially in light of the fact he admitted he was not afraid for his physical well-being. Certainly there was no evidence he should have feared for his safety.

The Claimant testified before the Board and appeared contrite for his actions. He demonstrated an appreciation for the opportunity he had with the Carrier and expressed a desire to have his position reinstated. In view of the fact the Carrier once saw fit to reinstate him on a leniency basis, and since this Board believes the Claimant recognized the error of his ways, we believe he should be reinstated with all rights unimpaired. Such reinstatement would settle any outstanding claims the Claimant has against the Carrier, if there are any remaining. His termination to point of reinstatement would be considered a suspension without pay. He would be required to comply with reinstatement provisions required by 49 CFR 219.605(e) namely:

- a) Provide a urine sample that tests negative for controlled substances assayed.

b) Be evaluated by the DRI&NW EAP counsellor to determine if he is affected by a psychological or physical dependence on one or more controlled substances or by another identifiable and treatable mental or physical disorder involving abuse of alcohol or drugs as a primary manifestation, and

c) Successfully complete any course of counselling or treatment determined to be necessary by the EAP Counselor prior to return to covered service.

and

After being returned to service will continue in any program of counselling or treatment deemed necessary by the EAP counsellor, and be subject to a reasonable program of follow-up drug testing without prior notice for a period of not more than 60 months following return to service as stipulated in 49 CFR 219.605(e).

While Claimant may feel he does not have a drug/alcohol problem, he must remember he brought on the reinstatement conditions outlined in 49 CFR 219.605(e) when he refused to take the drug test on March 20, 1992. He has no other choice but to comply with the legal requirements.

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 24th day of February 1995.