Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33024
Docket No. MW-34068
99-3-97-3-602

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Mr. J. Bass for alleged violation of Rules A, D and G in connection with his allegedly testing positive for marijuana metabolites in a urinalysis conducted as part of a Company required physical examination on February 1, 1996 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File NEC-BMWE-SD-3738D AMT).

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

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.

On February 1, 1996, Claimant was given a return-to-duty physical examination which included a drug screen. The lab report indicated that Claimant's urine tested positive for marijuana metabolites.

On February 14, 1996, Carrier instructed Claimant to attend an Investigation on February 20, 1996. The Hearing was postponed to and begun on October 31, 1996. The Hearing was recessed and reconvened and concluded on February 13, 1997. On February 27, 1997, Carrier advised Claimant that he had been found guilty of the charge and had been dismissed from service.

The Organization contends that Carrier violated the Agreement by delaying the Hearing unreasonably, following the initial postponement. The Organization further contends that Carrier failed to prove the alleged violations. The Organization maintains that Claimant was taking medication for a kidney infection at the time of the drug screen and that Claimant's medical condition and/or his medication triggered a false positive result.

Carrier contends that the Organization was responsible for the delay. According to Carrier, the continuation of the Hearing was delayed because the parties were trying to resolve the matter. Furthermore, in Carrier's view, the Organization failed to contact the Hearing Officer to reschedule the Hearing until September 1996, at which time it was promptly rescheduled.

On the merits, Carrier contends that it established the chain of custody of Claimant's urine sample, the regularity of the testing procedure and the positive test result. Furthermore, in Carrier's view, the evidence established that neither Claimant's medication nor his kidney infection could have produced a false positive result.

Rule 71 provides, in relevant part:

> ". . . The date on which the trial is scheduled to be held shall be within thirty (30) days from the date the Division Engineer or his representative had knowledge of the employee's involvement.

> At the written request of either party (one request each) a trial will be postponed for a reasonable period; additional requests may be agreed upon."

Claimant's return-to-duty physical was given on February 1, 1996. The Hearing was scheduled originally for February 20, 1996, well within the 30 day time limit. The Hearing was postponed by mutual consent. It was not held until October 31, 1996. The issue is whether this delay of eight months was reasonable.

What constitutes a reasonable period must be evaluated based on the particular facts and circumstance. The Agreement sets no express time limitation for the rescheduling, thereby recognizing that the reasonableness of the rescheduling will depend on the circumstances of each case.

At the beginning of the Hearing on October 31, 1996, the Vice Chairman challenged the delay. The Hearing Officer responded that he first received information that the Organization wanted the Hearing scheduled on September 19, and that he had been trying to find a mutually acceptable date since. The Hearing Officer further indicated that until September 19, he believed that the parties were trying to work the situation out.

The Vice General Chairman replied that he had been trying to get the Hearing scheduled for some time. He stated:

> "This is not true, we weren't trying to work it out I wanted a date I had requested a date June 11 during a meeting with Mr. Denzil of Labor Relations and I informed the Carrier that we need some action on Mr. Bass situation as soon as acknowledged by Mr. Denzil who maybe we will have to call him later. Then I spoke to the Engineering Department about this case on July 30, August 5, August 6 and told B&B supervision that is the sub department Mr. Bass works in again that the situation must be resolved. On August I told Mr. Fama is ultimate boss who runs B&B in New York that the Bass situation has gone on too long I offered to settle he refused and stated he would schedule a trial. On September I requested Mr. Fama ADE structures, Ron Denzil Manager Labor Relations from New York and yourself the Hearing Officer to do something about Bass's situation I didn't hear anything and when I had another meet with Mr.

Denzil on October 8 again I then requested Mr. Denzil to get some movement on the J. Bass case he immediately called the Hearing Officer and got your secretary I believe Judy and she stated that you schedule the trial for the 21st and I told them that was not a good day and we should go for another day."

Later in the Hearing, the Vice Chairman indicated that he wanted to call the Carrier officials with whom he had spoken trying to schedule the Hearing if the Carrier denied that those efforts had taken place. Carrier did not deny the Vice Chairman's representations and the witnesses were not called to testify. Thus, it is clear from the uncontested statements of the Vice Chairman that the Organization was trying to get the Hearing scheduled since at least June 1996.

The only other response that Carrier raises is the Vice Chairman's failure to contact the Hearing Officer directly. However, the Vice Chairman made it perfectly clear to several Carrier officials that the Organization wanted Claimant's Hearing scheduled promptly. Furthermore, although the notice of charges indicates that the Hearing Officer should be contacted to request a postponement of the Hearing, it does not expressly require that the Hearing Officer be contacted to set the rescheduled date. Indeed, it is Carrier's responsibility to reschedule the Hearing within a reasonable time following its postponement. If the Carrier officials with whom the Vice Chairman communicated wanted the Vice Chairman to contact the Hearing Officer directly, they should have advised him to do so. There is no evidence that they did.

If the parties were, in fact, trying to arrive at a compromise, then it would be reasonable to delay rescheduling the Hearing. However, the Vice Chairman's statement dispelled any such rationale for the delay. Moreover, the Claimant was being held out of service throughout this period and, when an employee is held out of service, particular care should be exercised to reschedule his Hearing promptly. Considering all of the circumstances, we find that Carrier violated Rule 71(a) by failing to reschedule the Hearing within a reasonable time. Accordingly, we sustain the claim on procedural grounds and find no need to reach the merits. See Third Division Award 28927.

We shall order that the Claimant be reinstated to service, with seniority and benefits unimpaired, and that he be compensated for all wage loss suffered. This remedy, however, is conditioned upon Claimant's passing any reasonable physical exam, including a drug screen, that Carrier may impose prior to reinstatement.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 25th day of January 1999.

CARRIER MEMBER'S DISSENT TO AWARD NO. 33024, DOCKET MW-34068

The majority opinion, that Amtrak violated Rule 71(a) by failing to reschedule the hearing within a "reasonable" time, was clearly reached without consideration of the facts in this case.

As indicated in the record, the initial investigation into this, claimant's second violation of Rule G, was scheduled for February 20, 1996, and postponed by mutual consent.

The majority accepted as "reasonable" that the employees would wait almost four (4) months (February to June 1996) before inquiring about rescheduling the subject investigation. This also accepts that a passing comment made in conversation with the Division Manager Labor Relations, who has no involvement in the scheduling process, during an entirely unrelated meeting, constitutes a valid effort to reschedule the investigation.

Additionally, the majority accepted as "reasonable" that the employees would wait another six (6) weeks before making their second inquiry, and that addressing those comments to Bridge & Building Department supervision rather than the Hearing Officer who has control over the scheduling process, also constitutes a valid effort to reschedule the investigation.

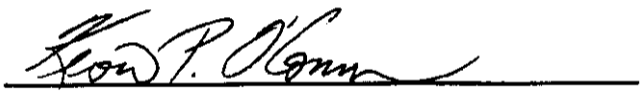
Finally, the majority accepted as "reasonable" that the employees should wait an additional six (6) weeks (until September 19, 1996) before actually contacting the Hearing Officer to reschedule the investigation, following which it was promptly scheduled in conjunction with the duly accredited representative's availability.

Clearly, the parties shared responsibility for the delay in holding the investigation. In such circumstances, the determination as to whether the delay was "reasonable" should have been made based on the impact of the delay, if any, on the investigation.

The record shows that the delay had no impact on the employees' ability to prepare and present their defense. The delay did not in any way alter the quality or quantity of evidence presented by either party; the facts surrounding the proper handling of claimant's specimen did not change, nor did the fact that it was confirmed as positive for claimant's use of illegal drugs. The only impact the delay had was to afford the claimant additional time to obtain medical evidence to present in his defense.

Since there is absolutely no evidence that the delay was in any way harmful to the process or to the claimant's defense, a determination that the delay was "unreasonable" and therefore, constitutes a fatal error, is unjustified. In fact, the only act that can be viewed as "unreasonable" is the finding that the decision in this case should not be made on the merits.

For this reason, we respectfully dissent to the majority opinion in this case.



SERIAL NO. 384

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 33024

DOCKET NO. MW-34068

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: (National Railroad Passenger Corporation (Amtrak)

This matter has been returned to the Board on the request of the Organization for an Interpretation. In Award 33024 we found that the Agreement was violated by the manner in which the Carrier dismissed the Claimant. We ordered that the Claimant be reinstated to service, with seniority and benefits unimpaired, and that he be compensated for all wage loss suffered. The Organization seeks this Interpretation because it contends that the Claimant has not been compensated for all wage loss suffered. The request for Interpretation raises three issues concerning the calculation of backpay. We shall address them in the order in which they were presented.

The first issue concerns whether the Carrier may deduct the Claimant's outside earnings from the overall compensation. The Organization objects to such a deduction on the ground that the Carrier never raised the issue during handling of the claim on the property and that the Agreement does not expressly provide for deductions of outside earnings.

A review of the cited Awards shows that there is no consensus among Referees concerning whether a Carrier must raise the outside earnings issue during handling of the initial claim in order to preserve it for consideration in the event of a sustaining Award. There also is no consensus concerning whether outside earnings may be deducted in the absence of an express provision of the Agreement authorizing such deduction. These are certainly issues over which reasonable minds can differ and over which reasonable Referees do differ.

We need not join the abstract debate over deductions of outside earnings to resolve the dispute presented. The Carrier has cited to relevant authority that has decided these issues on this property. In Public Law Board No. 2406, Interpretation to Award 21, involving the same parties, the Board held that the Carrier could offset outside earnings even though it had not raised the issue prior to the issuance of the Award reinstating the Claimant with compensation for time held out of service. Furthermore, the Board interpreted Rule 74 of the Agreement to provide for such offsets. The Organization offered no contrary authority emanating from this property. When faced with controlling authority on the property we should follow it unless we conclude that the authority is palpably wrong. In light of the diversity of arbitral opinion on the issue in the abstract, we cannot conclude that the Interpretation to Award 21 of Public Law Board No. 2406 is palpably wrong. Accordingly, we will follow it. The Carrier may deduct the Claimant's outside earnings.

The second issue concerns the proper employee against whom to compare the Claimant for purposes of determining what overtime the Claimant would have worked had he not been wrongfully discharged. The Carrier compared the Claimant to the next junior employee at Hunter Yard in Newark, New Jersey, because that was his headquarters at the time of his dismissal and, upon reinstatement, the Claimant exercised seniority to Hunter Yard. The Organization maintains, however, that the Carrier should have compared the Claimant to three other employees: the next junior employee at Adams Maintenance of Way Base in Newark, New Jersey; the next junior employee at Penn Station, New York; and the next junior employee at Sunnyside Yard. The Organization contends that throughout his history the Claimant worked at various locations within his seniority district. The Organization maintains that the Claimant sought to maximize his overtime opportunities. The three junior employees suggested by the Organization, in its view, better capture the Claimant's real likely loss of overtime than does comparing him to the next junior employee at Hunter Yard.

We are not persuaded by the Organization's argument. We refuse to speculate as to how often and where the Claimant would have moved had he worked during the period that he was dismissed. The one undisputed objective fact apparent from the record is that at the time of his dismissal, the Claimant was headquartered at Hunter Yard and, upon his reinstatement, the Claimant exercised seniority to Hunter Yard. Under these circumstances, the Carrier acted properly in basing overtime on the record of the next junior employee headquartered at Hunter Yard.

The final issue arises because the Carrier reduced the Claimant's backpay compensation by 19 percent. According to the Carrier, the reduction was justified because of the Claimant's absenteeism during the three years prior to his dismissal. The Carrier cites several Awards that allow reductions in compensation based on a claimant's attendance record.

The purpose of an Award of compensation for lost wages is to place the Claimant in the economic position he would have occupied had he not been wrongfully dismissed. Thus, under appropriate circumstances, a claimant's absenteeism record, if left unexplained, can support a conclusion that the backpay award should be reduced to avoid giving the claimant a windfall.

In the instant case, however, during consideration on the property, the Organization asserted that the Claimant's absenteeism was due to a kidney ailment and to carpel tunnel syndrome. The Organization backed this assertion by pointing to the fact that the Carrier never initiated disciplinary action for chronic absenteeism during this period. Finally, the Organization asserted that the Claimant had been treated successfully for these medical conditions prior to his dismissal. Thus, in the Organization's view, consideration of the Claimant's prior attendance record distorts the picture of the earnings he would have had if he had not been dismissed.

The Organization's assertions concerning the Claimant's medical conditions were not disputed during handling on the property. Accepting these assertions as true, which on the record presented we must do, leads inevitably to the conclusion that the Claimant's attendance record for the three years prior to his dismissal cannot serve as a basis for reducing his compensation. Accordingly, we hold that the Carrier acted improperly in reducing the Claimant's backpay by 19 percent.

Referee Martin H. Malin who sat with the Division as a neutral member when Award 33024 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 20th day of December, 2000.