

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33609
Docket No. MW-34123
99-3-97-3-604**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. T. L. Atwood for alleged violation of Rule 1.6 in connection with his alleged failure to comply with instructions given by Manager Track Maintenance P. R. O'Kelley in his letter of February 26, 1996 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File D-250/1027337D).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to the Carrier's service with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered beginning January 22, 1996 until he is reinstated to service."**

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 dismissed from service following a May 29, 1996 Investigation for failing to comply with a conditional reinstatement directive. The record evidence shows that on November 16, 1995, the Claimant took a return-to-work physical which included a drug screen. On December 13, 1995, the Claimant was informed that his drug sample had tested positive for illegal or unauthorized drugs, and he was medically disqualified from returning to work. The Claimant was also advised that, pursuant to the Carrier's Employee Assistance Program (EAP), he would be afforded one further opportunity to be reemployed provided he demonstrated his fitness for duty in accordance with various conditions. One of those stated conditions was that he enroll in a personal rehabilitation program within 30 days.

A problem was discovered with respect to the specimen taken on November 16, 1995 and so another drug test was administered on January 22, 1996. Once again, the drug test was positive for illegal or unauthorized drugs, and the Claimant was so notified on February 26, 1996. Once again, the Claimant was notified that in order to return to the Carrier's service he had to demonstrate his fitness for duty by complying with a number of conditions, one of them being that he enroll in the Carrier's EAP program within 30 days.

The Claimant disputed the drug test results, and requested that his specimen be retested. The paperwork necessary to have the retest was sent to the Claimant on March 20, 1996 but the record shows that the Claimant did not follow through with the retest. He testified at the Hearing that the drug testing done at the Carrier's directive was not reliable or accurate because it was "fixed" and that the Carrier was intent on getting rid of him because he had filed claims and won in the past.

On April 25, 1996, the Carrier received a letter from the Manager of the EAP. The letter was admitted in evidence over the Organization's objection. It confirmed that the Claimant had not had his sample retested. The Manager's letter further stated:

"Item number one in your letter of instructions for return to service stated: You must enroll and begin a personal rehabilitation program in Union Pacific's Employee Assistance within 30 days of the date of this correspondence. . . Because [The Claimant] was contesting his positive drug screen, he was given additional time (i.e. 30 days from receipt of the paper work for a retest of his urine specimen) to become enrolled in a program with

Employee Assistance. That new 30 day time limit has expired and [The Claimant] has failed to contact Employee Assistance or make new arrangements with Health Services."

Following receipt of the letter from the EAP Manager, the Carrier notified the Claimant on May 3, 1996 to report for an Investigation on charges that he was insubordinate when he failed to comply with the February 26, 1996 instructions to enroll in the Carrier's EAP program.

At the Hearing, the Claimant testified that he attempted on several occasions to enroll in the EAP. The Claimant stated that he spoke with the EAP Manager who informed him that he needed to admit to having a drug or alcohol problem before he could participate in the EAP. The Organization requested that the Manager be presented as a witness at the Hearing, but the Carrier declined to do so, indicating that the EAP program relies heavily on confidentiality and it was its policy not to have EAP employees testify at disciplinary Investigations.

Instead, the Carrier presented the testimony of W. E. VanTrump, the Director of Track Maintenance, who stated that he checked with the EAP Manager and was informed that the Claimant had indeed contacted the EAP and been told that the program is for individuals who are "willing to face up to their problem and admit it." According to VanTrump, however, the EAP Manager told him that the issue of The Claimant's enrollment in the EAP centered more around the fact that the Claimant indicated that he was pursuing a retest of his drug sample.

In support of its position that the instant claim should be sustained, the Organization advances various procedural objections which, it argues, demonstrate that the Claimant was not afforded a fair and impartial Investigation. First, it contends that the Carrier violated Rule 48 when it failed to level its charges within 30 calendar days from the date of the occurrence at issue in this case. According to the Organization, the time limits for bringing charges against the Claimant should have begun on the date the Carrier was notified that the Claimant's drug test was positive. We disagree. Although the Organization's contention might have merit if the Claimant had been charged with a Rule violation for the use of illegal drugs, it must be remembered that in the instant case the Claimant was charged with insubordination for failing to comply with instructions ordering him to enroll in the EAP program. The record shows that the Manager of the EAP notified the Carrier of the Claimant's failure to enroll in the program in a letter dated April 26, 1996. It was at that point that the Carrier "had knowledge of the occurrence to be

investigated," as the controlling language of Rule 48 specifies. The Notice of Investigation was issued on May 3, 1996 and the Investigation was held May 20, 1996, well within the 30-day period provided by Rule 48. Accordingly, the Board rejects the contention that the charges were not brought in a timely fashion.

The Organization has further argued that the Investigation was less than fair; that the Hearing Officer prejudged the Claimant's guilt and did not fully review or consider the evidence before rendering his decision. We have carefully reviewed the record in its entirety and find that the Organization's contentions are without merit. The Claimant was granted all contractual rights to a fair and impartial Investigation. The Notice of Investigation clearly provided the necessary information to enable him to present his defense. Moreover, the Claimant was present at the Hearing with his Representative and was given the opportunity to cross-examine witnesses and produce evidence. Equally important, we find no basis from which to conclude that the conduct of the Hearing Officer failed to meet the contractual standards negotiated by the parties or prejudged the Claimant's right to a full hearing. We, therefore, reject the Organization's contention that the Claimant's procedural rights were compromised.

The more difficult question in this case is the significance of the fact that the Manager of the EAP program was not presented as a witness at the Hearing. The Organization has characterized his absence as a due process issue, and has maintained that this was a witness within the Carrier's control whose testimony was necessary to shed light on the series of events which led to the Claimant's termination. The Organization objects to the introduction of the EAP Manager's letter as hearsay and argues that such evidence from an absent witness cannot be relied upon by the Carrier as the basis for proving its case by substantial evidence.

It would appear that, from an evidentiary standpoint, the absence of the EAP Manager presents more of a problem for the Carrier than for the Organization. While we understand that the very laudable purpose and goal of the EAP program would be undermined by requiring the presence of EAP employees as witnesses at investigatory hearings, the record as it stands in the instant case is not sufficient to meet the Carrier's evidentiary burden of establishing that the Claimant was indeed insubordinate. What we have here is a letter from the EAP Manager stating that the Claimant did not contact the EAP office after being given additional time to do so, and therefore he was not in compliance with the Carrier's instructions. However, the direct testimony of the Claimant, which was corroborated by the Carrier's own witness, Mr. Van Trump, contradicted the

letter and established that the Claimant had in fact contacted the EAP Manager and spoken to him about enrolling in the program.

As in any disciplinary case involving insubordination, there must be evidence of a refusal by the employee to obey an order that is within the legitimate scope of management's authority. There is no question, in this Board's view, that the instructions contained in the letter of February 26, 1996 were reasonable and proper given the Claimant's positive drug test results. What we do not know, however, are the circumstances surrounding the Claimant's failed attempt to enroll in the EAP. Without additional evidence, there is no basis to reasonably conclude that the Claimant failed or refused to comply with the Carrier instructions.

The proper remedy in this case is to restore the *status quo ante*; that is, to have the Claimant placed in the position he would have been in had it not been for the improper termination. The Claimant was out of service at the time of the events leading to his dismissal, and therefore, notwithstanding the Organization's claim to the contrary, he is not entitled to back wages. His reinstatement is conditioned upon his completion of the Carrier's instructions for returning to service, including his enrollment and successful completion of a rehabilitation program in the Carrier's EAP.

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 16th day of November 1999.