

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 34972  
Docket No. MW-33331  
00-3-96-3-835**

The Third Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

**(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Consolidated Rail Corporation**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The dismissal of Mr. C. H. Fancil for his alleged conduct unbecoming an employe and being uncooperative when required to submit to a random drug and alcohol test on January 30, 1995 was arbitrary, capricious and in violation of the Agreement (System Docket MW-3956-D).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be afforded the remedy prescribed by the parties in Rule 27, Section 4.”**

**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.

Prior to the Claimant's dismissal from the service of the Carrier on July 6, 1995, he was employed as a Track Foreman.

**On January 30, 1995, the Carrier performed spot drug testing on the first shift at the Carrier's Ft. Wayne, Indiana, facility. The Carrier randomly selected employees with Commercial Drivers' Licenses for drug tests.**

**The Claimant was removed from service on January 30, 1995 and was charged by the Carrier with conduct unbecoming an employee because of his use of foul and inappropriate language in the presence of the Carrier's Manager of Medical Testing, Dan Degelman, Trainmaster George J. Souhan and Loretta Green, an employee of Concord Labs, a Company that administers the testing for the Carrier. In addition, the Carrier charged that the Claimant was uncooperative when he was required to submit to random drug and alcohol testing on January 30, 1995.**

**The Hearing in this matter was originally scheduled for February 15, 1995. The Claimant subsequently requested and was granted postponements on two separate occasions.**

**On June 2, 1995, the Carrier sent notice to the Claimant that the Hearing was to be held on June 22, 1995. A postponement by Local Chairman W. T. Ames was requested on June 20 that the Claimant was scheduled to undergo surgery on the scheduled Hearing date of June 22, 1995. Ames was advised that the District Engineer's office required medical documentation to substantiate that the Claimant, in fact, was scheduled to undergo surgery in order to grant further postponement of the Hearing.**

**On June 21, 1995, Ames sent by telecopier a letter along with an insurance company disability report to the District Engineer. Finding that the medical report contained no evidence to establish that surgery was in fact, scheduled for June 22, 1995 a Hearing was held in absentia on June 22, 1995. As a result of the Hearing the charges against the Claimant were sustained and the Claimant was dismissed from service on July 6, 1995.**

**During the random drug testing the Claimant began speaking to Souhan in a loud voice and using foul language. At first the Claimant requested the Carrier to provide him with gloves because he was not "about to hold a cup" and relieve himself "all over his hands." He repeated his statement in front of the other employees, who found him to be funny.**

**Souhan requested the Claimant to stop using foul and abusive language because of the presence of a "woman tester in the other room." The Claimant said he did not care who was present; nor did he care that a female "had to listen to what he had to say." The**

evidence adduced at the Hearing established that the Claimant's fellow employees told him to watch his language and "calm it down."

When the time came for the Claimant to take the test he went to the bathroom and did not close the door. The Claimant filled the cup with his urine specimen. While he walked back to place the specimen on the tray, he spilled the urine, by exaggerated movements and shaking the bottle filled with the urine specimen. Not only did he spill part of the specimen while walking down the hallway, he also spilled a part of the specimen on the tray.

Based upon the record, the Claimant used vulgar language and behaved in an obnoxious, belligerent and insolent manner. He sought to disrupt and interfere with the administration of the drug and alcohol test which was properly authorized by the Carrier. The Claimant ignored the requests of Souhan and his fellow employees to cease his unruly, offensive and disruptive behavior.

It may very well be that the Claimant is an "older employee" and as the Organization states is "essentially set in his mannerisms and vocabulary usage." However, in light of the circumstances surrounding the drug and alcohol test on January 30, 1995, it is imperative that the Claimant must accommodate his mannerisms and vocabulary usage to the setting established by the Carrier; it is not the Carrier that must adapt to the Claimant's "mannerisms and vocabulary usage." The circumstances involved in alcohol and drug testing are serious. The Claimant's conduct was hostile, disruptive and interfered with the administration of the Carrier's policy on January 30, 1995.

It is true that the Claimant was singled out on January 30, 1995. But there were good reasons for doing so. By his behavior, he, alone, sought to disrupt the administration of the drug and alcohol test on January 30, 1995.

The record establishes that the Carrier postponed a Hearing at the request of the Organization on two separate occasions before June 2, 1995 when another Notice of Hearing for June 22, 1995 was sent to the Claimant.

On June 20, 1995, two days before the scheduled date of the June 22 Hearing, the Organization again requested a postponement because the Claimant was to undergo surgery for carpal tunnel syndrome on the date of the Hearing. The record indicates that the Organization was advised that the Division Engineer's office required medical documentation to establish that the Claimant was in fact scheduled to undergo surgery.

The Organization's letter along with an insurance company disability report was sent by telecopier to the Division Engineer on June 21. Although the letter indicated that the Claimant was to undergo surgery the following day, the medical report contained no evidence that the Claimant, in fact, was scheduled to undergo surgery on June 22.

The Carrier's Office Manager, Julia Cierly of the Dearborn, Michigan, Division Engineer was not able to reach Ames but left a message on his answering machine in the afternoon of June 21 that the Hearing would not be postponed and that the documentation he provided did not establish that the Claimant was scheduled for surgery on June 22, 1995. Later that same day, Cierly tried to contact Ames several times to talk directly to him but was unable to do so. She never received a response from Ames to the message which she left on his answering machine.

Furthermore, the medical report from the Claimant's physician sets forth that he was disabled and "unable to perform duties of own occupation." However, there is nothing in the doctor's report that the Claimant was unable to attend the Hearing on June 22, 1995.

Rule 27, Section 1 (d), in relevant part, provides as follows:

"... a hearing may be postponed for a valid reason for a reasonable period of time at the request of the Company, the employee or the employee's union representative ..."

The Claimant was removed from service on January 30, 1995. Due to repeated postponements by the Organization, almost five months went by before a Hearing was held on June 22, 1995. The Carrier's notice of the June 22, 1995 Hearing was received by the Claimant on June 5, 1995. The Organization's notice that surgery on the Claimant was scheduled on the same date that the Hearing was scheduled, was sent to the Carrier two days before the scheduled date of the Hearing. Proof of the surgery on June 22, 1995 was lacking; also, by its submission of medical documentation, the Organization failed to establish that the Claimant was unable to attend the Hearing. Accordingly, the Carrier was justified in refusing to postpone the Hearing scheduled for June 22, 1995. No valid reason was shown by the Organization to warrant another postponement of the Hearing. Accordingly, the Carrier complied with Rule 27, Section (D) in refusing to postpone the Hearing scheduled for June 22, 1995.

Since there was no valid reason for the Claimant not to appear at the June 22, 1995 Hearing, the Carrier properly held the Hearing in absentia. The Claimant was given

notification of the date, time and place of the Hearing. He was advised of his rights with respect to representation and witnesses at the Hearing. He failed to attend the Hearing at his peril. See, e.g., Second Division Award 7844.

The record establishes that the Claimant was belligerent and disruptive when the Carrier attempted to administer random drug and alcohol tests to various employees. His conduct during the test was tantamount to insubordination. The Claimant's 20 years of service is outweighed by the gravity of the offense combined with his failure to attend the Hearing on June 22, 1995. Accordingly, the Board finds no reason to disturb the Carrier's dismissal of the Claimant.

**AWARD**

**Claim denied.**

**ORDER**

**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 20th day of September, 2000.**