Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35746
Docket No. TD-35864
01-3-99-3-871

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Department/
(Brotherhood of Locomotive Engineers
(
(Burlington Northern Santa Fe Railway Company

STATEMENT OF CLAIM:

"This appeal is written in reference to a decision from General Director Transportation J. H. Grundmann, dated February 26, 1999, declining appeal of claim submitted on behalf of Train Dispatcher S. F. Indihar on February 3, 1999, concerning discipline without benefit of a hearing and lost wages incurred between December 4 and 31, 1998, my file A99002."

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.

As will be demonstrated below, this claim is defective in that "discipline," as asserted in the Statement of Claim, was not assessed to the Claimant.

The Claimant, a Train Dispatcher, was subject to federally mandated random drug and alcohol testing on November 24, 1998. The Carrier was advised on December 1, 1998 that the Claimant's sample tested positive for opiates. On December 3, the Medical Review

Officer interviewed the Claimant as to the results of the test. At the Claimant's request, a statement was obtained from the Claimant's personal physician. The Medical Review Officer determined that this information did not negate the positive drug finding.

Under date of December 4, the Claimant was advised by letter in pertinent part as follows:

> "[Your] test was considered positive and you were informed that you were medically disqualified from service. . . .
>
> You must abide by the conditions outlined in the attached Employee Instructions for Positive Drug and/or Alcohol Test in order to avoid disciplinary action. . . .
>
> If you desire a retest of your urine drug screen, we must receive a written request from you within 72 hours of your conversation with the Medical Review Officer."

The Claimant was later advised that his urine specimen had been reconfirmed as positive.

On December 23, the EAP Manager notified the Medical Department that the Claimant had provided a negative urine specimen. The Claimant was then permitted to return to work commencing January 1, 1999.

The record shows that at no time did the Claimant or the Organization suggest that the testing was improper; that the positive drug test was inaccurate; or that the Carrier had failed to follow established policy concerning procedures when an employee tests positive for drug use.

From the timing of the events described above, and with the cooperation of the Claimant in following established procedures, the Board determines that the Claimant's return to work was handled in an expeditious manner.

The Organization argues that the Claimant was placed out of service as a disciplinary measure and that this was improperly done without granting the Claimant an investigative Hearing as provided in Rule 24. The Organization cites the reference in the

December 4, 2000 letter, quoted above, to measures required "to avoid disciplinary action." By following established procedure, the Claimant in fact did "avoid" disciplinary action.

A number of First Division Awards (25082, 25087, 25089, 25193, and 25194) cited by the Organization all indicated that the claimants therein, having tested positive, were provided with Investigative Hearings prior to the imposition of discipline. These Awards are of no support whatsoever. The claimants therein were subject to disciplinary review because the positive tests were the second positive test within ten years. Under the Carrier's established Policy, this prohibited the claimants from the privilege of returning to work upon providing a negative test, which was the entitlement granted the Claimant in the instance here under review. Further, most of the cited Awards indicated that the claimants were removed from service pending the Investigative Hearings. Thus, the Claimant here was treated in identical fashion, until he provided a negative test.

The Organization ignores completely the question of how the Carrier could be expected to retain in active service an employee who tested positive for drugs. Until he tested negative, the Claimant was clearly "medically disqualified." Thanks to the opportunity offered under the Carrier's Policy, the Claimant herein avoided discipline. As stated at the outset, there is no basis for a claim of failure to provide a Rule 24 Hearing.

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 24th day of October, 2001.

Labor Member's Dissent
To Third Division Award No. 35746
Docket No. TD-35864
(Referee Herbert L. Marx, Jr.)

The Claimant did exactly what he was supposed to do when he was accused of a positive random test result; removed from service as being "medically disqualified" and instructed to abide by the conditions imposed by the EAP without the benefit of a Rule 24 Hearing. He followed the arbitral mandate of "obey now, grieve later". Something this Majority seems to be taking issue with.

Never before this case, and not since, has the Carrier handled an alleged positive test result in this manner. The normal and customary manner in which these types of cases, while few in number, were handled is through the Rule 24 disciplinary procedure, as the Rule 24 Hearing also satisfied the Hearing requirements of the FRA Regulations. The Carrier has always been required to prove its allegation; at least up to this point.

It is the Majority's view that the Claimant and the Organization did not take issue with the testing procedures, the accuracy of the test results and the Carrier's handling of this matter. Given the fact that this claim was filed contradicts that view. Further, had the Carrier handled this case in the customary manner, those issues would have been more properly dealt with in the Rule 24 Hearing.

The Majority states "The Organization ignores completely the question of how the Carrier could be expected to retain in active service an employee who has tested positive for drugs". This statement follows the Majority's thoughts regarding a number of Awards cited by the Organization wherein the Claimants "having tested positive were provided with Investigative Hearings". The Majority found "most of the cited Awards indicated that the Claimants were removed from service pending the Investigative Hearings". It would then stand to reason that had the Claimant in this case been "removed from service pending the Investigative Hearing", he would not also be retained in active service.

It is troubling that the Majority feels that the Carrier can escape the safeguards and due process requirements of a Rule 24 Hearing and does not have to prove such a devastating allegation.

However, given the fact that the Majority found that "this claim is defective in that 'discipline,' as asserted by the Statement of Claim, was not assessed to the Claimant" and that "there is no basis for a claim of failure to provide a Rule 24 Hearing", **NO** mention of this incident can be included in the Claimant's discipline record. And, since it did not meet all of the due process requirements of Rule 24, it cannot be used as a basis for determining the quantum of discipline appropriate in any future case involving this Claimant.

Notwithstanding the above paragraph, I dissent.

David W. Volz

David W. Volz
Labor Member

Carrier Members' Response
to the Labor Member's Dissent
to Award 35746 (Docket TD-35864)
(Referee Marx)

The Organization's Dissent in this matter is nothing but "...sound and fury signifying nothing...."

So that no one can be misled, it was not contested in this record that Claimant's November 24, 1998 drug test was positive for "opiates." The Organization never disputed that fact. Claimant was medically disqualified on December 4th and, after completing the first time offender requirements of Carrier's Drug Policy, Claimant was allowed to make a displacement on January 1, 1999.

The claim that was filed in this matter asserted:

> **"Carrier failed to allow train dispatcher S. F. Indihar to protect his assignment holding him from his position due to the results of a random drug test..." (Organization Exhibit 1 p. 1) (Emphasis added)**

In the Organization's appeal it states:

> **"Mr. Indihar was removed from service, due to the failure of an FRA random test... (Organization Exhibit 3 p. 1) (emphasis added)**

In the Organization's further appeal to the General Director Labor Relations it states:

> **"There is no dispute that Mr. Indihar tested positive for opiates;" (Organization Exhibit 5 p. 1) (emphasis added)**

And complains that:

> **"...what is in dispute is that the Carrier failed to provide a timely avenue for the Indihar's return...(Organization Exhibit 5 p. 1)**

It seems that the Organization felt that Claimant was not accorded all due speed in returning to his position as soon as the drug high wore off. Not too long ago, an individual such as the Claimant would have been given the boot for such conduct with

no second chance possibility. Further, it has been the policy of many Carriers in recent years that a first time offender was medically disqualified until he/she was able to demonstrate the ability to return to service with a negative drug test. In the vast majority of such cases, the time out of service was due to the medical restriction; it was not discipline. Organization's assertions about customary handling and the safeguard of due process ignores the plain and simple fact that Claimant had reported for duty under the influence of "opiates" and such is not disputed.

Finally, if the last paragraph of the Dissent is meant to imply that no record is to be kept of Claimant's action, the Organization is dead wrong. Paragraph 12.0 (a) of the Carrier's Drug Policy notes that:

> **"...employees who have tested positive in the past ten (10) years will be subject to dismissal whenever they test positive a second time..." (Emphasis Added)**

Claimant acknowledged this fact when he signed the Carrier's return to duty letter (Carrier Exhibit K p. 20) on January 13, 1999.

P V Varga

Paul V. Varga

M W Fingerhut

Martin W. Fingerhut

Michael C. Lesnik

Michael C. Lesnik