Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36180
Docket No. SG-36138
02-3-00-3-321

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Long Island Railroad Company

STATEMENT OF CLAIM:

"Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Long Island Rail Road:

Claim on behalf of J. Randall for payment of all lost time and benefits and for any reference to this matter to be removed from the Claimant's personal record. Account Carrier violated the current Signalmen's Agreement, particularly Rule 47, when Carrier dismissed the Claimant from service without meeting the burden of proving the charges against him, and without the benefit of a fair and impartial investigation, and issued harsh and excessive discipline against him in connection with an investigation held on November 29, 1999. General Chairman's File No. S99-035. BRS File Case No. 11366-LI."

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 the Claimant's rest day, he was arrested for failure to provide identification when requested. During the arrest, the officer found drug paraphernalia and railroad identification, which led to the officer contacting Labor Relations to report the incident. Labor Relations contacted the Engineering Department and a drug test was ordered at the start of the Claimant's next tour of duty.

On the following day, May 13, 1999, the Claimant attempted to call off sick, but given the Carrier's knowledge, was directed to report to work and undergo a drug test. The Claimant did not do so. He was notified that date that he was held out of service for conduct unbecoming an employee in that he was "arrested by the New York City Police . . . for possession of drug paraphernalia, drugs and public intoxication, as well as for your insubordinate actions. . . ."

By Notice dated May 14, 1999 the Claimant was charged with alleged actions of conduct unbecoming an employee, violation of the Carrier's policy on drug and alcohol use and insubordination in that he failed to report and comply with the Carrier's directions to undergo a drug test. Following postponements, a Hearing was held on September 10 and by Notice of October 7, 1999, the Claimant was found guilty as charged and dismissed from service.

Subsequently, the Carrier permitted the Claimant on November 29, 1999, after being out of service for seven months, to return to service after signing a Last Chance Agreement with several stipulations. The Claimant admitted guilt, agreed to follow an Employee Assistance Program, submit to future drug testing and maintain a good work record of attendance.

The case at bar was brought by the Organization by letter dated December 15, 1999. The Organization alleges that it did not sign the Last Chance Agreement and therefore the waiver is not valid. The fact that the Claimant admitted guilt is irrelevant given the numerous facts at bar. The Organization points to several basic issues. It notes that the waiver was signed after the Claimant was out of work for seven months and had little choice but to admit guilt or wait years for a resolution. It notes that the court found the Claimant arrested for failure to produce valid identification.

The Organization argues that the Claimant's rights were violated in that he properly called and requested to be off work due to sleep deprivation. The Claimant had a proper right to do so and had fulfilled his employment responsibilities. It argues that

the Carrier had no right to order the Claimant in for a drug test, deny the Claimant's right for an approved sick day and all due to an event that occurred on the Claimant's rest day. Even further, there was no reasonable suspicion and in a lengthy discourse on March 2, 2000, the Organization points out that none of the charges leveled against the Claimant were reasonable or supported by the record. In fact, the Claimant was eventually found guilty of disorderly conduct and nothing that had to do with unlawful drug or alcohol behavior. The fact that the Claimant was willing to come in for a drug test on May 15, 1999, that he was convicted of no offense covered by the Carrier's policies, that he was never provided the time to take the test when he was on duty indicates that the charge of conduct unbecoming was unproven.

As for the charge of insubordination, the Claimant called off for disability sick due to back pain and sleep deprivation. He was ordered to work only for the Carrier to test him for drugs, not to work. Clearly, the Claimant had a right under the Agreement for 12 sick days and properly called in and requested his Agreement right. In fact, the Director of Labor Relations denied the Claimant his rights and the rights to a fair and impartial Hearing as he was the one who received the call from the police. He was the individual who determined the Claimant should be ordered to work and tested. He was also the individual who handled the appeal.

The Organization argues that this entire episode prejudged the Claimant's guilt, reacted inappropriately to his rights and found him guilty without waiting for the result of the findings against the Claimant in court. In short, the Claimant was a 14 year employee without prior discipline who after failure to be proven guilty of the charges was given arbitrary, capricious and excessive discipline.

The Board carefully reviewed the full text, testimony, the Carrier rejection of all Organization arguments and contentions, and the evidence of record. First, on the procedural objections, the Board finds that the Claimant was afforded a fair and impartial Hearing. The fact that the New York City police called Labor Relations and Labor Relations instituted the actions by calling the Engineering Department is not shown to be in any way prejudicial to the full actions at bar. In the review process or from the onset of this case, there exists no probative evidence that Labor Relations actions were anything but minimal.

On merits, the record indicates that the Claimant was charged with illegal behavior. Nothing required the Carrier to postpone its actions until after a civil trial.

Nor is it relevant that the Board go into a detailed discussion of each issue related to the use of drugs, public intoxication or the testimony of the officer at the Carrier's trial. There is sufficient probative evidence, including the police officer's testimony that the Claimant had illegal drugs in his possession. There is sufficient reason in this record to have had the Carrier take action. It is also factually proven in the Claimant's signing of the waiver. The Claimant signed and admitted to the fact that he was guilty of the charges.

For all the above reasons, the Board finds no merit in the claim at bar. The Carrier provided a fair and impartial Hearing. The testimony of the New York City police officer and the full record, including the waiver, indicates that the Claimant was guilty. The dismissal was neither arbitrary nor capricious. The claim at bar must be denied.

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 August 2002.

Labor Members Dissent to
Third Division Award No. 36180
Docket No. SG – 36138

The facts of record indicate that the Claimant was dismissed for conduct unbecoming involving an alleged incident while off duty. The record further denotes that the text of the charges and ultimate dismissal were based on the assumption that the Claimant had been "arrested by the New York City Police ...for possession of drug paraphernalia, drugs and public intoxication, as well as for your insubordinate actions."

What the Board failed to consider is the fact that the Claimant was found innocent of the charges by the court. His only offense involved his failure to produce valid identification at the time of the arrest. **This is certainly not a dismissable offense.**

As noted in this case, the Claimant was incarcerated for the entire night and requested a sick day because of sleep deprivation. As noted in the Award "Clearly, the Claimant had a right under the Agreement for 12 sick days and properly called in and requested his Agreement right..." The Carrier, under the assumption that the Claimant was guilty of unlawful drug and alcohol behavior, demanded that the Claimant report to work for the sole purpose of taking a drug test. The Claimant reasonably related his reservations regarding coming into work and offered to take a drug test the following day. As noted, the Carrier denied this request and subsequently terminated his employment.

Obviously, the Claimant's actions were prudent and justified. The danger with accepting Award 36180 on its face and reliance in future cases is clearly expressed by the Board's determination to ignore the relevant facts by commenting that; "Nor is it relevant that the Board go into a detailed discussion of each issue related to the use of drugs, public intoxication or the testimony of the officer at the Carrier's trial." At the very least the Claimant was entitled to a thorough review of all the facts involved in this case.

The bottom line is that the Claimant was not found guilty for possession of drug paraphernalia, drugs and public intoxication. The Claimant was not guilty of insubordination because he requested a sick day because of sleep deprivation.

It remains the Organization's position that Carrier's demand that the Claimant report for a drug test for assumed actions while off work should be considered unreasonable.

Claimant's signing a waiver after being out of work for seven months inappropriately swayed the Board. As discussed during the handling of this case, the Organization noted the Claimant had little choice but to admit guilt or wait years for a resolution. This fact is undisputed by the parties that the merits of this dispute were the only issue before the Board.

Based on the foregoing, Third Division Award 36180 should not be relied upon in future disputes.

Respectfully Submitted,

C.A. McGraw, International Vice President - BofRS
Labor Member / Third Division