

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37811
Docket No. MW-38682
06-3-05-3-47

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employes -
(IBT Rail Conference
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline (withheld from service on August 14, 2003 and subsequent dismissal on September 18, 2003) imposed upon Mr. W. L. Finch for alleged violation of Burlington Northern Santa Fe Policy on use of Alcohol and Drugs dated September 1, 1999, in connection with an alleged positive test on August 5, 2003 at Westwood, California was arbitrary, capricious, without just cause, on the basis of unproven charges and in violation of the Agreement [System File S-P-1078-G/11-04-0069 BNR].
2. The claim as presented by Vice General Chairman M. J. Garisto on November 5, 2003 to Northern California Division Manager S. Weatherby shall be allowed as presented because said claim was not disallowed by Manager S. Weatherby in accordance with Rule 42(A).
3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant W. L. Finch shall now ‘... be reinstated with his seniority rights unimpaired, and be compensated for wage loss, including all benefits accrued to him, at his last rate of pay, starting on August 14, 2003. ...’”

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.

By letter dated August 18, 2003, the Claimant was notified to attend a formal Investigation in connection with the Claimant's positive test for a controlled substance. The Investigation was conducted, as scheduled, on August 24, 2003. By letter dated September 18, 2003, the Claimant was informed that as a result of the Investigation, he had been found guilty as charged, and he was being dismissed from the Carrier's service. The Organization thereafter filed an appeal challenging the Carrier's decision to discharge the Claimant. The Carrier denied the appeal.

The Carrier initially contends that the Claimant's August 2003 positive drug test represented a serious violation of several Carrier Rules. Moreover, this was not the Claimant's first positive test; in August 2001, the Claimant tested positive for a controlled substance and was issued a conditional suspension. The Carrier emphasizes that only two years have elapsed since the Claimant's first positive drug test, and the Carrier's Policy on the Use of Alcohol and Drugs explicitly provides that a second positive test within a ten-year period results in removal from service and subjects the employee to dismissal. The Carrier points out that because this was not the Claimant's first positive test, he was not entitled to a waiver. The Carrier maintains that the record contains substantial evidence of the Claimant's violation, which warrants his dismissal from the Carrier's service.

The Carrier emphasizes that the Organization does not dispute that the Claimant failed his August 2003 drug test. As for the Organization's objection to the entry of the Claimant's drug test results into the record, on the ground that these results were "personal medical information," the Carrier asserts that the Hearing Officer erred on the side of caution when he allowed a portion of the drug test to be

entered into the record. In connection with the Organization's argument that a "positive dilute" is not a positive test result, the Carrier insists that there is no merit to this position because federal regulations state that a positive dilute is a confirmed positive test. The Carrier maintains that it has proven that the Claimant tested positive for controlled substances, and the Claimant's dismissal must be upheld in light of the seriousness of the Claimant's violation.

Turning to the Organization's procedural defenses, the Carrier maintains that these are not valid. The Carrier contends that the Organization's assertion that the Carrier violated Rule 40, by failing to hold the Investigation within 15 days of receiving the test results, is based on a twisted reading of the Conducting Officer's statement. The Carrier maintains that the Division first was notified of the Claimant's violation on August 14, 2003, and the Division issued a Notice for an Investigation to be held on August 24, 2003, clearly within the time limit specified in Rule 40. The Carrier further asserts that even if it had violated Rule 40, the Organization has not shown how such a procedural error resulted in any prejudice to the Claimant's ability to defend himself. The Carrier contends that this procedural objection is without any merit because the Investigation was timely held.

With regard to the Organization's assertion that the Carrier violated Rule 40 when it held the Investigation at the Claimant's last work location, rather than his headquarters, the Carrier points out that the Claimant, as a member of a region/system gang, did not have an assigned headquarters location, and the Carrier's practice is to hold investigations at the work location at the time of the incident. Moreover, contrary to the Organization's contention that the Carrier was required to list all witnesses on the Notice of Investigation, the Carrier maintains that there is no Agreement language requiring the Carrier to list any witnesses on the Notice of Investigation. The Carrier additionally argues that there is no merit to the Organization's assertion that the Notice of Investigation failed to specify any charges; the Carrier insists that the Notice clearly described the charge against the Claimant, and the Carrier is not required to list specific Rules in the Notice.

Turning to the Organization's next procedural objection, that the Conducting Officer was biased and prejudged the Claimant, the Carrier emphasizes that this allegation is based on a distorted recitation of the facts. The Carrier maintains that the Conducting Officer's actions did not constitute bias, nor did they deprive the Claimant of a fair and impartial hearing. In addition, the Organization has not shown how the Claimant was prejudiced by the Conducting Officer's actions. The Carrier points out

that the Claimant tested positive for cocaine for a second time within a ten-year period, and this serious Rule violation warranted his dismissal.

In response to the Organization's argument that the General Manager failed to respond to the appeal within the specified time limit of 60 days, the Carrier maintains that the Organization filed its appeal on November 6, 2003, and the General Manager's response was transmitted to the Organization on January 5, 2004, by fax and by UPS Next-Day Air. The Carrier therefore asserts that this response was issued within the 60-day period. The Carrier further contends that even if the response was late, it was late by only one day and in no way harmed or prejudiced the Claimant.

The Carrier goes on to argue that it is well established that Boards must defer to the on-property credibility decisions of conducting officers. In this case, the Conducting Officer made an appropriate credibility decision that the Claimant did test positive for a second time within a ten-year period. Moreover, the Organization failed to show any actual prejudice or deprivation of a fair and impartial Investigation.

The Carrier contends that the instant claim should be denied in its entirety. In the event that the Board does sustain the claim, the Carrier points out that any outside income that the Claimant earned during his period of dismissal should be deducted from any damages.

The Organization initially contends that the Carrier unquestionably received the results of the disputed drug and alcohol test on August 8, 2003, so the Carrier was required to conduct a Hearing no more than 15 days after this date. The Organization points out that the Carrier scheduled the Claimant's Hearing for August 24, 2003, 16 days after the date that information first was obtained by a Carrier officer. The Organization insists that Rule 40's provisions are clear, concise, and not subject to misinterpretation with regard to such violations. Rule 40 specifies that if an investigation is not held within the stated time limit, then the charges shall be considered as dismissed. The Organization maintains that based on the Carrier's proven violation of Rule 40, as well as Rule 40's unambiguous language, the instant claim must be sustained as presented.

The Organization then asserts that the Carrier compounded its violation when it failed to disallow the instant claim as presented. The Organization points out that its appeal was filed by letter dated November 5, 2003, and the Carrier received this letter on November 6. The Carrier responded by letter dated January 5, 2004, which was received by the General Chairman on January 6. The Organization therefore argues

that the General Chairman received the Carrier's response either 61 or 62 days following the date that the appeal was filed, so the Carrier failed to respond within 60 days as required by Rule 42. The Organization further insists that despite the Carrier's assertion that it faxed a copy of its response to the General Chairman on January 5, the faxing of a document cannot be regarded as valid filing. Based on this proven violation of Rule 42, and the remedy associated with such violations, the instant claim must be sustained as presented.

The Organization goes on to contend that the Carrier committed a number of other violations of Rule 40 and Agreement due process. Among other problems, the Carrier never charged the Claimant with a specific Rule violation. The Organization therefore maintains that any discipline imposed was in violation of the Claimant's contractual right to Agreement due process. The Organization insists that any of these procedural objections standing alone would be a sufficient basis upon which to overturn the Carrier's imposition of discipline, and combined they demonstrate the overwhelming lack of Agreement due process afforded the Claimant. The Organization insists that it is well established that the merits of a claim are not to be considered if a party is guilty of a procedural defect.

As for the merits of this dispute, the Organization contends that the Carrier failed to prove the charges against the Claimant. The Organization points out that the only evidence of a positive drug test was a single documentary exhibit that does not reference any employee name, Social Security number, Employee Identification number, or any other information that would authenticate that the test results apply to the Claimant. Moreover, this document is extremely vague with regard to the final result of the drug test. The Organization also insists that the Carrier failed to enter into the record any of the disciplinary Rules that the Claimant allegedly violated. Moreover, the Carrier's sole witness acknowledged that he had virtually no knowledge with regard to the application and enforcement of the Carrier's drug and alcohol testing policy. The Organization maintains that because of the nature and severity of the charges, and the consequences of a guilty decision by the Carrier, it was imperative that the Carrier provide a witness who was qualified to explain the test results, confirm that the testing procedure was in compliance with federal and Carrier requirements, and intelligibly answer any questions about the testing. The Organization contends that having failed to do so, the Carrier failed to introduce any probative evidence proving the Claimant guilty of violating any Rule or policy.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board reviewed the procedural arguments raised by the Organization and finds that the Carrier did not comply with the Rules in the processing of its case against the Claimant. Rule 40(A) provides the following:

“Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15)-day limit from the date information is obtained by an officer of the company. . . .”

Rule 40(J) states the following:

“If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed.”

A thorough review of the transcript reveals that the Claimant was required to take a drug test on August 5, 2003. The Hearing Officer determined in the transcript that the Carrier received the report on August 8, 2003. Given the requirements of Rule 40(A) the Carrier had 15 days or until August 23, 2003, to hold the Hearing in the above-entitled matter. The record reveals that the Hearing was not held until August 24, 2003. The Board finds that the Hearing was not held within the time limits set forth in the Agreement and, therefore, the charges against the employee must be considered as having been dismissed in accordance with Rule 40(J).

Moreover, the record reveals that the Organization's initial appeal was sent by the Vice General Chairman on November 5, 2003, and was received by the Carrier on November 6, 2003. Rule 42(A) requires that the claim must be disallowed “. . . within sixty (60) days from the date same is filed.” The Rule goes on to state that “. . . if not so notified, the claim or grievance shall be allowed as presented. . . .” The record reveals that the Carrier responded to the appeal by the Organization by letter dated January 5, 2004, which was not received by the Vice General Chairman until January 6, 2004. Consequently, the Carrier's response was not received by the Organization's representative until either 61 or 62 days after it was filed. The Carrier, therefore,

violated the requirements of Rule 42(A) and, once again, the claim must be sustained as written.

Based on the two procedural violations set forth above, the Board must sustain the claim. The facts of this case involve a 34-year employee of the Carrier who was admittedly found guilty of having cocaine in his system in 2001 and appears to have been found guilty of a similar offense on this occasion. Given that background, it is not clear from this record whether or not this Claimant was in a medical condition to return to work at the time that the Carrier violated his procedural rights in scheduling the Hearing and in denying the Organization's claim. Consequently, the Board is not willing to return the Claimant to work with backpay because it is not clear from this record that the Claimant would have been able to work during any of the time that he was off as a result of this case.

Therefore, we order that the Claimant be reinstated to employment and sent for a return-to-work physical. If the Claimant passes that physical, he should be returned to work at his previous job, but without backpay.

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 21st day of June 2006.


CARRIER MEMBER'S DISSENT
TO
THIRD DIVISION AWARD 37811, DOCKET MW-38682
(Referee Meyers)

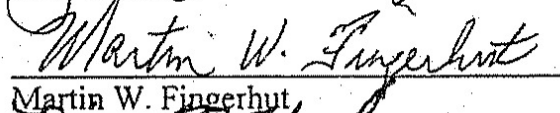
The result, restoring to service a two-time drug user, creates a serious wrong that we cannot ignore. The author of the opinion states, "The Hearing Officer determined in the transcript that the Carrier received the report on August 8, 2003." The Hearing Officer made no such finding. The urine test results report was not written until August 14. The Claimant's supervisor testified on page 13 that he received the report on August 14. The copy of the drug test report (Carrier's Exhibit 1) shows that the MRO interviewed the Claimant on August 14. The Carrier pulled the Claimant out of service on August 14. The Carrier served a Notice of Investigation on August 18 and held the Investigation on August 24, well within the 15-day time limit.

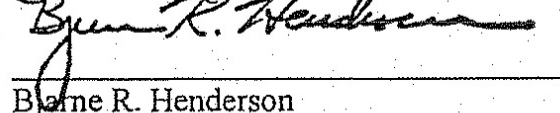
As provided in FRA regulations, the Carrier may not act on a drug test lab report until the MRO interviews the employee. By FRA rule, carrier management is not allowed to see the test results until the MRO releases them. As Third Division Award 37581 (Meyers) points out, the information must become known to a Carrier officer who has the authority to invoke the disciplinary process before the time limit begins to run. We furnished other Awards, including Third Division Award 32011 (Meyers) Special Board of Adjustment No. 1063, Case 618 (Conway) and Public Law Board No. 3304 Award No. 459, Carrier's Exhibit No. 30, which explain the proper interpretation of the time limit rule in drug-alcohol testing situations. The Board did not find these Awards to be in error or explain how the Board decided that the Vice General Chairman's belated objections on page 33 took precedence over FRA regulations and the Hearing Officer's actual findings and prior precedent. An affirmative defense requires proof. The Organization provided assertions.

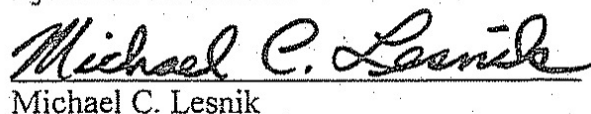
The author of the opinion also failed to explain the reasoning behind the Board's contrary to established precedent findings that the Carrier violated the Time-Limit-On-Claims Rule. This contradicts the customary interpretation that a Carrier letter mailed on the 60th day complies with the language of the Rule. "In our view, the later Awards are consistent, and hold that placing a denial or a response in the U. S. Mail on the 60th day satisfies the notification requirement." (Sickles Fourth Division Award 4899 and Third Division Award 31893, Marx) Moreover, it is well established that a late declination does not require the Board to reinstate a serious rule offender. Back pay for the period of default [two days according to the Board] is the proper penalty.

An Award is only as good as the reasoning supporting it. We dissent.


John P. Lange


Martin W. Fingerhut


Blaine R. Henderson


Michael C. Lesnik