

PUBLIC LAW BOARD 6159

Case No. 49
Award No. 49
Carrier's File No. 1216834
Organization's File No. 1629-30-5557.00D
NMB Code 119/173
Claimant Switchman R. J. Caratache

PARTIES TO THE DISPUTE:

UNITED TRANSPORTATION UNION

AND

UNION PACIFIC RAILROAD COMPANY

Statement of Claim:

Request of Switchman R. J. Caratachea, Tucson Service Unit, for reinstatement to service with seniority unimpaired, and replacement of wage loss and vacation credits, resulting from his dismissal from service on September 29, 1999, until returned to service. Request is also made that this incident be expunged from his personal record.

Findings:

Upon the entire record and all the evidence, this Board finds the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction of the parties and over the dispute involved herein.

The Claimant in this case was first employed as a track laborer in September, 1995. He transferred to the position of Switchman in April, 1998. As part of the random Drug & Alcohol testing requirements, he was directed to supply a urine sample on October 6, 1998. The sample tested positive for amphetamines.

On October 14, 1998, the Carrier sent the Claimant a Notice of Formal Investigation by certified mail, return receipt

requested. Therein, the Carrier directed him to attend a formal Investigation and hearing on the charges that he "allegedly used an illegal or unauthorized drug as evidenced by the positive test result of the FRA random test administered to you, in accordance with Union Pacific Railroad's Drug and Alcohol Policy (effective March 1, 1997). The Carrier cited a violation of Union Pacific Operating Rule 1.5 of the General Code of Operating Rules (effective April 10, 1994), as well as, the Transportation Code of Federal Regulations Title 49, Section 102(drug).

Concurrent with the Notice of Investigation, the Carrier also sent the Claimant a Waiver/Acceptance of Discipline. In part, the Waiver contained the following:

. . . .
It is my understanding that you are eligible for the Companion Agreement and that you wish to waive this formal investigation and accept dismissal in connection with the charges referred to above, for your violation of Rule 1.5 of the General code of Operating Rules (effective April 10, 1994), Union Pacific Railroad Drug and Alcohol Policy (effective March 1, 1997) and the Transportation Code of Federal Regulations Title 49 Part 219 Section 102(drug).

Terms for One-Time Return to Service - General

You will be eligible for return to service on a probationary basis upon advice that you have successfully completed the education, counseling and/or treatment determined to be necessary by Employee Assistance, including any drug and alcohol testing requirements of your program or personal plan, and you have tested negative for drugs (and alcohol if appropriate) in the return-to-duty test administered and reviewed by the office of the UP Medical Director. The probationary period will be for a twelve (12) month period commencing with the first day you return to service. **Your reinstatement is to be on a leniency basis with vacation and seniority rights unimpaired and without pay for time lost and with the understanding that any claims filed on your behalf will be dismissed in their entirety.**

Conditions for Return to Service and Remaining in Service

. . . .

You must become drug or alcohol free by successfully completing any education, counseling or treatment determined to be necessary by the Company's Employee Assistance.

. . . .

You must test negative for drug and alcohol in a return-to-duty test which will be administered and reviewed by the office of the Union Pacific Health Services.

. . . .

Following reinstatement you must submit to follow-up drug and alcohol testing as required by Federal Regulations and Union Pacific Railroad's Drug & Alcohol Policy and as determined by Employee Assistance for at least three (3) years from the date of your return to service. In addition, you will also be required to submit to drug, alcohol or drug and alcohol testing as directed by Employee Assistance in conjunction with required education, counseling or treatment. . . .

You must remain drug free permanently after returning to service.

You must avoid any violation of any Company rule with reference to drugs or alcohol.

Failure to comply with these instructions may be grounds for immediate disciplinary action by railroad management; provided however, that failure to comply with these instructions and or the terms and conditions of the Companion Agreement during the 12 month probationary period will result in your immediate return to dismissed status without benefit of a formal hearing.

By Waiver/Agreement letter dated October 25, 1998, the Claimant accepted the terms of the conditional reinstatement, including participation in the Employee Assistance Rehabilitation/Education Program.

By certified letter dated September 29, 1999, the Claimant was notified that the Claimant had tested positive for drugs on the UP follow up test administered on September 22, 1999. The Claimant was immediately returned to dismissed status and instructed to return all railroad property.

The Union appealed the Claimant's return to dismissed status and file the instant claim.

CARRIER'S POSITION

The Carrier argues the basis for Award 38 is in error both in terms of analysis of the case and in jurisdiction. Further, they maintain, the Organization has accepted the benefits of the Carrier's Drug and Alcohol Policy since the UP/SP merger and therefore, established by its actions, concurrence with the Policy with regard to the probationary reinstatement provisions.

It is the Carrier's position that the Claimant was reinstated in a probationary status, which was terminated and he was properly returned to dismissed status. The Carrier argues that the District Court decision by Judge Garcia which overturned a decision by Referee Gil Vernon was in error. They contend his decision was restricted to the case before him since District Courts only interpret law, they do not make law. They submit Judge Garcia's decision was wrong in as much as he interpreted what the UTU/UP agreement required which was clearly out of his jurisdiction, as set forth by the US Supreme Court, which has held that decisions involving interpretations of contracts must be left to the disputes resolution provisions of the Railway Labor Act. They insist Referee Gil Vernon made an appropriate decision in the Fortna-Hanson case and should not have been overturned.

In the instant case, the Carrier points out that the Claimant voluntarily waived his right to a formal investigation to determine the validity of the testing procedures and the findings of a positive test for amphetamines. They assert the Organization had no problems with the Claimant waiving this right and accepting dismissal. They contest the Organization's current position that the Claimant could not have waived an investigation in futuro concerning an identical test which reached identical conclusions.

The Carrier maintains that both parties in agreeing to a probationary reinstatement agreement are taking a risk. The Carrier is taking a very serious risk that an admitted drug user will be rehabilitated and become a safe employee. The Claimant is taking the risk that he can overcome his addiction and keep his job. The Carrier asserts it is only willing to take this serious risk if the employee agrees to waive a future investigation and accept dismissal as he did when he was caught the first time. The Carrier questions the difference in the Claimant being willing to waive a formal hearing in the first instance and the Organization's maintaining he cannot waive the hearing in the second. In both cases, the potential hearings were caused by positive drug tests.

The Carrier indicates they have applied their Drug and Alcohol Policy and/or Companion Agreements for fifteen years in the same manner it was applied to the Claimant. They claim every UTU Committee including the SP Western Lines has accepted the benefits of a Companion Agreement or the policy. They say in this case the Organization wants to accept the upside to the agreement without accepting the quid pro quo of returning the Claimant to dismissed status without an Investigation. Because of the uncertain status of this issue, the Carrier contends they may not offer the program unless the General Chairman signs the reinstatement agreement.

The Carrier also insists the District Court Judge did not abide by the finding of the US Supreme Court that the scope of review of railroad arbitration awards under the Railway Labor Act is "among the narrowest known to the law". In this regard, the Carrier references Principles of Railway and Airline Labor Law which deals with the scope of review of arbitration awards.

The Carrier submits that as in the Fortna-Hansen case, the Claimant in this case was not being newly disciplined, but, he had already been disciplined and was dismissed. They contend he was not in a position to demand employee rights; he had voluntarily placed himself outside the employee ranks. They insist it was proper for the Carrier to allow the employee to return to work only on a probationary basis, especially in light of the seriousness of the violation. They argue that both the Claimant and the Organization agreed to the terms of the agreement. By the conditional reinstatement agreement, they assert, the Claimant was no longer a full-fledged employee and would not be until he completed the conditions of his probation. They reference Gil Vernon's Award as a recognition of this fact when he ruled that Rule 57(J) was not applicable because it was subordinate to Rule 57(B), which is applicable in this type of case. They quote Vernon as distinguishing this case from others:

Thus, the distinction between this and other discipline cases is that the Claimant had previously committed a dischargeable offense. . . And in order for him to get his job back has, in effect, thrown himself on the mercy of the Carrier. He violated Rule "G" in the first instance and from that point is on the outside looking in.

The Carrier holds that Judge Garcia missed this point completely. They reference Referee Vernon's recognition of the Carrier's Companion Agreement as a leniency reinstatement and his correct determination that it was a quid pro quo for the waiving of any future Investigations, thus, having his future employment rights governed by the facts of the "original" offense. They say

Referee Vernon's decision cannot be attacked by a judicial review. They offer the decision is based on a long history of dealing with Railway Labor Act grievances and that in making his decision, the Referee logically considered the agreement provision upon which the Organization based its appeal. To the contrary they insist, Judge Garcia relied on the criminal law, not railroad arbitration precedent. They assert the terms of the Companion Agreement are in line with accepted railroad industry practice.

The Carrier points to the Claimant's initial admission that he used illegal drugs and willingly accepted dismissal. Therefore, according to Referee Vernon's correct decision, he was on the outside looking in. He along with his Union Representative agreed that he would be returned to work on a probationary basis and if he tested positive to drug use within his 12-month probationary period he would be returned to dismissed status. The Carrier maintains that once the Claimant accepted a reinstatement conditioned on his return to a probationary status, he remained in that status until he successfully completed the terms of the agreement.

The Carrier submits the Claimant was afforded a hearing after he tested positive during his probationary period. The test results were reviewed by the Carrier's Medical Review Officer and discussed with the Claimant. If the Claimant or the Organization had problems with the results, the Carrier insists they could have appealed the Medical Review Officers determination under Article 57, Section A, as concluded by Referee Gil Vernon in his decision.

The Carrier encourages the Board to review this case without consideration to Judge Garcia's Decision. They point out that the District Court decision only deals with the Fortna-Hanson case, since the District Court does not make law. Besides, they maintain, Judge Garcia's decision was in error.

Moreover, the Carrier insists the Organization is acting in bad faith. They hold that the Organization is willing to accept the advantages of the Companion Agreement to get their members back to work, but, they are unwilling to agree that the employee is returned to dismissed status once he violates the terms of the agreement.

ORGANIZATION'S POSITION

The Organization contends that Article 57 of the current Trainmen's Agreement is controlling in this case. They reference Sections B.1 and B.2 of the Article which requires that any employee must be given a fair, expeditious and impartial investigation before they can be disciplined or removed from service.

In this case, the Organization maintains the Carrier committed a fatal flaw in not conducting an Investigation before returning the Claimant to a dismissed status on September 29, 1999. The Organization argues the Carrier had a contractual obligation to investigate the circumstances surrounding the results of the urinalysis taken on September 22, 1999. Contrary to the Carrier's anticipated argument that no investigation was required because the Claimant violated the terms of his conditional reinstatement, the Organization contends the Carrier never made the attempt through an Investigation to determine that the Claimant had in fact violated the terms of the agreement. They insist that in order to have any semblance of credible evidence to substantiate the claim, the evidence had to be presented to an impartial hearing officer and be subject to cross-examination.

The Organization references Decision 5813 of Special Board of Adjustment 18. Therein, the Claimant was returned to dismissed status in that case, as the Claimant was in this case. The Board upheld the right of the Carrier to return the Claimant to dismissed status without the benefit of a hearing. The

Organization appealed that case to the District Court where Judge Garcia remanded the matter back to the Parties and the Carrier was directed to conduct an Investigation to determine the validity of the alcohol/drug screen test. To further support their position, the Organization goes on to quote Judge Garcia, who held, "Under any principal of law you're entitled to a hearing of some kind on that violation of probation."

The Organization also references another Decision rendered by Special Board of Adjustment 18. In Decision 5750, Neutral Gil Vernon held that the "...Carrier's right to take future disciplinary action is not unchecked. The Carrier must have a factual basis for their action and the Organization must have a vehicle to challenge those actions." The Organization insists that vehicle is Article 57, Sections B.1 and B.2. They maintain that Article 57, of the SP Trainmen's Collective Bargaining Agreement in the Fortna-Hanson Case, is part and parcel of the same agreement on the UP Western Lines that is still in effect today. They also claim that Article 30 of the Switchman's Agreement (Discipline Rule) is the switchman's counterpart agreement provision. It also remains in effect today as the UP Western Lines Discipline Rule for switchmen.

The Organization asserts that contrary to the claims of the Carrier, the Organization did notify the Carrier that requiring an employee to waive his right to future investigations was improper. They insist they asked the Carrier to take immediate steps to bring the Union Pacific into compliance with the Court Order.

The Organization maintains the absence of a formal hearing left no avenue to challenge the conduct of the medical professionals involved in the conclusion that the Claimant violated the terms of his reinstatement agreement. They insist this is unfair. They also point out that the determination that the Claimant had violated the terms of his reinstatement was made by a Carrier Officer who has no medical training.

They point to irregularities in the collection process which were cited by the Claimant, but, which were never considered due to the fact there was no hearing. They reference Award No. 24789, First Division, National Railroad Adjustment Board. There the Board found that "To find that Carrier's reliance solely on the lab report in this case proved Claimant's guilt would be tantamount to finding that the lab report was infallible." The Organization asserts that without a fair and impartial Investigation there is no credible evidence to demonstrate the Claimant's guilt.

The Organization argues that it is improper to require employees to waive their right to future Investigations.

DECISION

The Board has reviewed the facts of this case thoroughly. It is with great hope that the Decision rendered by this Board will put this issue to rest.

There is no doubt the Transportation Industry in general, the Railroad Industry in particular, has been put under a great deal of scrutiny relative to employee alcohol/drug abuse. Public Policy on this issue has emerged and is well established; there should be a zero tolerance for drug use in the industry. However, that having been established, the Railroad Industry was none-the-less encouraged to provide employees with an opportunity for rehabilitation, both by the government and by arbitral authority. Railroads were among the first employers to develop effective Employee Assistance Programs to provide assistance to their employees. This effort was applauded as a viable program to provide employees an opportunity for rehabilitation and a return to productivity. Carriers also encouraged employees to accept the assistance of the EA Program by offering employees with established seniority, conditional reinstatement agreements. The Union Pacific incorporated Companion Agreements into their

program, which in many cases were signed and agreed to by various General Committees, although not this General Committee. In part, the Companion Agreement gives an employee the opportunity for a conditional reinstatement. In exchange, the employee admits guilt and waives a formal hearing. The Agreement also provides that the employee, after successfully completing the EA Program, will be returned to work in a 12-month probationary status. If during that time he violates the terms of the conditional reinstatement, he will be returned to dismissed status without benefit of a formal Investigation.

The issue the Board must decide is whether the Carrier has the prerogative to return the Claimant to dismissed status without the benefit of a hearing, if a drug test comes back positive during his probationary period. In Award 38, this Board ruled that the Carrier could not return the Claimant to dismissed status without the benefit of a formal Investigation. We affirm our Decision in that case.

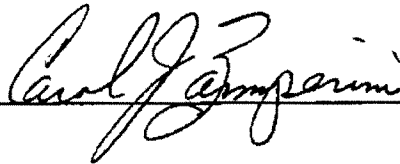
It is well established by arbitral authority that conditional reinstatements are appropriate, if not always wise. An employee receives the benefit of being returned to work, as long as s/he complies with the conditions cited in the reinstatement. In essence, the employee who accepts a conditional reinstatement has agreed that the commission of a certain rule violation or violations will constitute cause or just cause for termination. In the case before us, the Claimant agreed that the use of alcohol/drugs during his probationary period would result in a return to dismissed status. In doing so he agreed that his use of drugs would constitute cause for dismissal. However, by signing the agreement, it was not intrinsic that he waived his right to challenge the validity of the evidence used to establish his guilt. Inherent in any just cause standard is the presumption that the violation is proven. In this case, the proof lies in the validity of the drug screen test and its results. If the test was proper, the Carrier had just cause to dismiss the Claimant, the Claimant would have no

recourse. However, if the test in any way was invalid, whether it be in the collection process or the test itself, the Carrier did not have cause to return the Claimant to dismissed status. While the Claimant could not challenge the cause of the dismissal, the proven use of drugs, he could challenge the validity of the test.

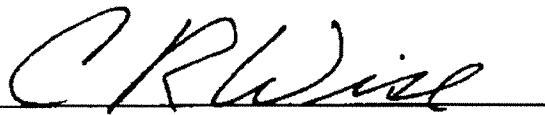
While this Board believes an employee who signs a conditional reinstatement can agree that a specific violation will constitute cause for dismissal, we do not believe an employee can waive his rights to challenge the validity of the evidence used to establish his guilt. Once the evidence is deemed credible, there can be no challenge as to whether the violation is cause for discharge, there can be no argument of mitigating circumstances and there can be no argument the dismissal was improper. The employee has already agreed that guilt justifies a return to dismissed status. To this Board that is the significance of a conditional reinstatement. It does not mean that the employee has waived all his rights. It certainly doesn't mean in this case that the Claimant waived his right to challenge discipline issued for other alleged rule violations such as failure to protect his assignment or theft. The Board believes it is incorrect to hold that in admitting to drug use and agreeing that any subsequent drug use will be grounds for dismissal requires that the employee forfeit the opportunity to challenge the validity of the evidence. It is inconceivable that an employee would agree that he could be dismissed for an unsubstantiated charge. When someone signs a conditional reinstatement they are agreeing to be dismissed for a particular rule violation, but, they are assuming the violation will be proven. We concur with the Organization that the only way to establish the validity of the evidence is through an Investigation under Article 57, Section B.1 and B.2.

AWARD

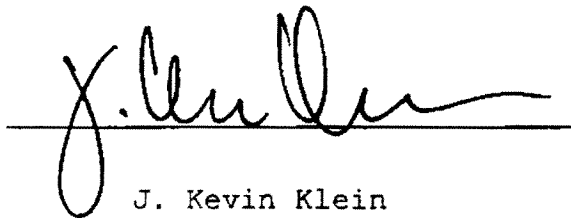
The case is remanded to the Parties and the Carrier is directed to conduct an Investigation under Article 57, Section B of the Agreement relative to the follow-up urine sample, alcohol/drug screen test, of September 22, 1999, to determine the validity of the testing procedures, as well as, the test itself. If the test is determined to be valid then the Claimant will be returned to dismissed status. If, on the other hand, either the collection process and/or the test is shown to be faulty or invalid, the claim is to be sustained in its entirety.



Carol J. Zamperini
Impartial Neutral and Chairperson



Charles R. Wise
Carrier Member



J. Kevin Klein
Employee Member

Submitted this 30th day of September, 2000.