PUBLIC LAW BOARD 6159

Case No. 53
Award No. 53
Carrier's File No. 1218445
Organization's File No. 923-57-5565.00D
NMB Code 119/173
Claimant Conductor J. Johnson

PARTIES TO THE DISPUTE:

UNITED TRANSPORTATION UNION

AND

UNION PACIFIC RAILROAD COMPANY

Statement of Claim:

Request of Conductor J. Johnson, El Paso Service Unit, for reinstatement to service with seniority unimpaired, and replacement of wage loss and vacation credits, resulting from his dismissal from service on February 17, 2000, 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 established seniority with the Carrier on March 2, 1998. On April 10, 1999, the Claimant was required to submit to a random drug screen test. He provided a urine sample, as required. The sample came back positive and the Claimant was in jeopardy of being dismissed. In lieu of an Investigation, however, the Claimant admitted guilt, waived the Investigation and accepted dismissal. However, because he was a first time offender, he was offered a conditional reinstatement. In part, the reinstatement provided 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. . .

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

. . .

5. You must test negative for drug and alcohol in a return-to-duty test. . .

. . .

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.

The Claimant signed the Waiver Agreement on April 20, 1999 and returned to service on August 10, 1999. On February 8, 2000,

the Claimant was asked to provide a urine sample for a follow-up drug screen test. The sample tested positive for cocaine, the same drug which was found in his urine sample in the first instance. The Carrier then revoked his probationary status and returned him to dismissed status per the Companion Agreement he signed on April 20, 1999.

The Organization appealed the Carrier's actions on the basis they did not afford the Claimant a hearing as required by Agreement. The Carrier denied the appeal on the basis of the Companion Agreement signed by the Claimant. The Organization processed its appeal through the appropriate channels and it is now before this Board for review.

CARRIER'S POSITION

The Carrier in presenting its argument in this case, argues that the decision issued by a majority of the Board in Case No 38 was incorrect, as was the District Court case which was used as a basis for that decision. They contend the Claimant upon accepting the terms of the Companion Agreement was returned to probationary status and when he tested positive for drugs within this probationary period, the Carrier was within its rights to dismiss the Claimant without an Investigation. They insist District Court Judge Garcia was incorrect when he concluded otherwise.

The Carrier maintains the correct position was opined by Referee Gil Vernon in SAB 18 Award 5813. They assert Referee Vernon based his decision on many years of experience within the railroad industry. They claim Referee Vernon understood the Carrier only allowed the employee to return to service in a probationary status. The Carrier points to Referee Vernon's contention that, "the Organization has missed the point, the

Carrier didn't even have to put him back." They further quote from Referee Vernon's award, wherein he wrote:

> 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 contends Referee Vernon recognized that at the time an employee signs the Companion Agreement, he is no longer a full-fledged employee who may-not, by contract, be required to waive an investigation, but, once he signs the agreement, he becomes probationary. They point out that Referee Vernon realized that at that point Rule 57(J) of the agreement is not applicable because it is subordinate to Rule 57(B), which is itself inapplicable in this type of case. The reason for that, asserts the Carrier is that Rule 57(B) only applies to those who are about to be dismissed not to those who have been dismissed and are reinstated into a probationary status on a leniency basis.

The Carrier argues that a companion agreement is a formalized leniency reinstatement which, as arbitration boards have held can only be suggested and not required of the Carrier. The Carrier points to Referee Vernon's opinion in this regard:

> Clearly, in offering the Claimant an opportunity to return to the fold, it is not unreasonable for the carrier to require, as a condition of reinstatement, that an Article 57 Section B (1) investigation be waived, and that the Claimant revert back to his original status, and thus, to have his future employment rights be governed ultimately by the facts of the "original" offense."

The Carrier contends that as a leniency case Referee Vernon's award should have been even more unassailable from judicial review. They say it is clear Judge Garcia's decision drew its essence from criminal law and clearly demonstrated he was unfamiliar with railroad arbitration precedent. They contend

the due process procedures on the property are not governed by the constitution and an arbitrator has the authority to determine whether the employee, an admitted drug user, has been afforded his contractual protections and are in line with industry practice.

The Carrier argues that the Board is not bound by the Decision issued by Judge Garcia. They submit the Claimant admitted to using drugs and accepted dismissal in the first place and was no longer an employee. They say he signed the companion agreement in the presence of his representative. They insist he and his representative agreed that the Claimant would be reinstated in a probationary status and would waive an investigation if he was found to have used drugs during his probationary period.

The Carrier points out that during the probationary period a positive urine sample meant that the employee would be returned to dismissed status not be dismissed. Contrary to a new dismissal, this merely meant the Claimant would be returned to a pre-existing, but, interrupted condition. Claimant's due process rights, they maintain, were protected in the first instance, but, he lost those rights when he admitted drug use and became a dismissed employee. He would not regain those rights until he successfully completed his probationary period.

The Carrier also believes the Claimant was afforded a sort of hearing or explanation as to the reasons he was being dismissed. They argue that the Medical Review Officer contacts the employee and explains the positive test, the Claimant then receives a letter from the Superintendent explaining why the employee is being returned to dismissed status. The Carrier asserts that if the Claimant or his representative have a problem with the test results of the test results or procedures, they are able to contact the Drug & Alcohol Manager and in addition, they can have the split sample tested, which was done in this case. They insist every test is scrutinized carefully and should be

deemed valid. They insist the Board should not believe the Claimant was tossed out based on rumor or innuendo.

The Carrier also reviewed the procedures initiated by the EAP Manager to assure an employee reinstated under the companion agreement participates in the rehabilitation program. They believe the process used provides every opportunity for the employee's success in the program.

The Carrier asks the Board to consider the inconsistent position of the Organization relative to an employee's ability to waive a hearing. They contend that in the first instance when the Claimant admitted guilt, neither the representative or the Organization argues that the Claimant could not admit guilt and waive his right to a hearing, despite the language of Rule 57(J). The Carrier maintains that in that case, the Organization obviously recognized the advantage to the Claimant. However, they assert, the Organization wanted strict adherence to the contract when the Claimant again tested positive and was returned to dismissed status.

In summary, the Carrier strongly urges the Board to review the instant matter without consideration to Judge Garcia's Decision which it finds to be in error. They believe that the Carrier's policy of leniency, which requires the employee to avail himself of the rehabilitation process protects the Carrier, upholds public policy and provides the employee with his best chance for recovery. They also reiterate that Judge Garcia's Decision was an ad hoc decision which is not binding on the parties. They submit the Board should follow the precedent established by Referee Vernon, as well as, numerous other awards on this property. They say to do otherwise would be to act against clear public policy.

The Carrier asserts the Organization is acting in bad faith. They contend the Organization has never written to Local Chairman advising them not to enter into companion agreements. Moreover,

they say, the Organization has never appealed the 14 cases where employees have accepted the companion agreement, have completed their probationary periods and are now fully reinstated. They argue that it is only when such an employee violates the terms of the agreement and is returned to dismissed status that the Organization declares the agreement as bogus and unenforceable.

The Carrier insists in these companion agreements they assume a great deal of risk reinstating an employee who could be dangerous to himself, co-workers or the general public. They maintain it is appropriate the employee be asked to assume some risk also.

ORGANIZATION'S POSITION

The Organization argues that procedurally, Article 57 of the current Trainmen's Agreement is controlling in this case. They cite Sections B.1 and B.2 of Article 57, which read in part:

> 1. No trainman covered by this agreement will be disciplined or discharged without a fair and impartial investigation before a proper officer of the Company. At such investigation he is entitled to be represented by his Local Chairman or by an employee of his choosing in the same grade of service on the trainman's seniority district. . .
>
> 2. If a trainman is removed from service for proper cause prior to formal investigation, the investigation must be prompt, ordinarily within five days except for extenuating circumstances. . .

The Organization reviews the circumstances of this case up to the Claimant's return to dismissed status. They maintain the Carrier committed a fatal flaw in this case when they failed to investigate the circumstances surrounding the results of the urinalysis taken on February 8, 2000. The Organization contests

the Carrier's argument that no investigation was required because the Claimant was governed by the terms of his return-to-work agreement, which set forth that a failure to comply with its terms would result in a return-to-dismissed status. However, the Organization insists such an argument is misleading. The Organization would not argue with the return-to-dismissed status if the facts show that the Claimant violated the agreement. They insist that in order to demonstrate that, the Carrier must present the evidence to an impartial hearing officer and be subject to cross examination. They protest the unilateral examination of hearsay documents, which are sorted out and filtered behind closed doors in a prosecutorial atmosphere. They say this diminishes the credibility and reliability of the evidence. They say absent credible evidence the self-executing provisions of the return-to-work agreement cannot be invoked.

To support their position, the Organization points to Decision 5813 of Special Board of Adjustment 18, the Fortna-Hanson claim. In that case, they assert, the Claimant accepted a return-to-work agreement with a two year probationary period. The Claimant allegedly violated the agreement and was immediately returned to dismissed status. The Carrier refused an Investigation, but, subsequently did reinstate the employee but insisted he waive any future rights to a formal hearing. The Claimant refused and his case was progressed to Special Adjustment Board 18. The Board in that case concurred with the Carrier and upheld the Carrier's right to include, as a precondition of reinstatement on a leniency basis an employee be required to waive his rights to a formal hearing in connection with future incidents involving violations of his probationary conditions.

The Organization references their appeal of this case to District Court and the Decision rendered by Judge Garcia in the matter. The Court concluded that the Neutral's decision in the Fortna-Hanson case was mistaken. The Organization points out that Judge Garcia ruled that Fortna-Hanson was entitled to an

Investigation into the facts that he allegedly violated the terms of his reinstatement agreement. Furthermore, the Organization maintains, the Judge's decision made it clear that an employee cannot waive his right to an Investigation under the Trainmen's Agreement. The Organization quotes Judge Garcia, who in one part of his Decision states:

> Under any principal of law you're entitled to a hearing of some kind of that violation of probation. (Organization's emphasis)

The Organization also points to Decision 5750 of Special Adjustment Board, which held in part 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 submits the Court's reference to the provisions of Article 57 of the SP Trainmen's Collective Bargaining Agreement in the Fortna-Hanson Case is still in effect in the UP Western Lines Agreement.

Contrary to the Carrier's assertions, the Organization insists that it's general committee has notified the Carrier that requiring employees to waive future investigations as a condition of accepting leniency-probationary reinstatements in connection with violation of rules involving improper use of alcohol and/or drugs was improper. They contend they have asked the Carrier to take immediate and appropriate action to be in compliance with Judge Garcia's order.

The Organization asserts that the Carrier is obligated to consider evidence at a formal hearing, which is to be held in accordance with the collective bargaining agreement. They point out that Judge Garcia's Decision was unchallenged and states in no uncertain terms that an employee or his local representative does not have the ability or authority to waive agreement rights to a formal investigation in connection with future violations of

probationary conditions. They say the Claimant requested a formal hearing to examine the evidence, but was denied. The Organization believes this is sufficient to overturn the discipline.

As to the merits, the Organization asserts there is no transcript record from which to develop the facts of this case. They insist that if a formal hearing had been held there were arguments which should have been addressed which would have allowed the Claimant to develop an affirmative defense.

They argue the Claimant was just two months short of fulfilling his probationary period. The Organization quotes from a letter written by the Claimant in which he proclaims:

> . . .as I deny (and have from the beginning) using any illegal drugs. I was tested 3 times within a 10 day period. First on 2-5-00 (with negative result), on 20-8-00 (with positive result), and then on 2-14-00 (with negative result). Before this series of tests, I was regularly tested as a follow-up procedure for my violation of Rule G in 1999. I passed all of these tests, as I knew that there was a possibility of being tested at any time, and I knew the consequences of testing positive. I WOULD NOT TAKE SUCH A RISK.

The Organization also submits the Claimant was denied his right to have the split sample tested. (It is noted that the split sample was subsequently tested and resulted in a positive test).

The Organization maintains the absence of a formal hearing left no avenue to challenge the conduct of the medical professionals involved in this case. They insist that is fundamentally unfair. They further assert that the Carrier Officer making the determination has no medical training. They argue that when an employee is facing permanent dismissal, the evidence against the employee should be scrutinized in a formal hearing. In this regard, the Organization references Awed No. 24789, First Division, National Railroad Adjustment Board.

The Organization reiterates that the primary issue in this case involves the requirement that employees waive their rights to future investigations.

DECISION

Obviously, the Impartial Neutral has had the dubious distinction of being on both sides of a decision on this issue. However, in the hope of bringing this issue to some sort of just conclusion, we have reviewed this matter with a great deal of intensity.

For more than two decades there has been increased pressure on the transportation industry, especially the railroad industry, to eliminate drug use among its employees. It is not only the thing to do for business reasons, including safety and productivity, it is demanded by public policy. The dangers associated with drug use among employees can be overwhelming.

When the railroad industry established a zero tolerance of alcohol/drug use, most applauded. However, there was concern the effort afforded employees little opportunity for rehabilitation and a return to productive service, nor did it allow consideration of the employee's employment history and/or mitigating circumstances. The industry responded to this concern by developing strong Employee Assistance Programs. They also offered conditional reinstatements to employees with established seniority. Union Pacific instituted Companion Agreements, which in many cases were signed and agreed to by various General Committees, although not the General Committee who represents the Claimant in the instant case.

The Companion Agreement does several things. If an employee tests positive for alcohol/drug use for the first time, it provides the employee an opportunity to admit guilt, waive a formal Investigation and be reinstated on a conditional basis. That reinstatement is conditioned upon the employee's

participation in the EA program, his abstinence from alcohol/drugs, random drug/alcohol testing and a return to probationary status for 12 months. If during the twelve month period the employee fails to comply with the conditions of reinstatement, including a valid positive alcohol/drug test, the employee is returned to dismissed status without the benefits of a formal hearing.

Therein, lies the crux of this matter. The Claimant had been reinstated on a leniency basis under a conditional reinstatement agreement. About ten months into his probationary period under the agreement, he reportedly tested positive for cocaine and was returned to dismissed status without the benefit of a formal Investigation. Although the Claimant admitted guilt to the initial charge of drug use, he denied vehemently that he was guilty of using drugs during the probationary period of his reinstatement and desired to challenge the test results. Regardless, the Carrier accepted the test as valid and enforced the terms of the conditional reinstatement.

An employee who is guilty of violating the terms of his conditional reinstatement is subject to discharge for cause. How that guilt is determined is the question which begs to be answered. If it can be demonstrated that the Claimant in this case, has tested positive for the use of alcohol/drugs, then the Carrier is justified in removing him from service. The only thing which must be verified is whether the test and test results were valid. It appears to this Board that it is in this regard the employee is entitled to be able to challenge the findings. If there is sufficient evidence the tests were conducted properly, the chain of custody was maintained, and the test is otherwise valid, then the employee has no recourse. However, if it is determined through a proper Investigation that the test was faulty and therefore the results were faulty, then the Claimant should prevail.

This Board believes the Grievant accepted a probationary status only in as much as he agreed that he would not challenge a legitimate finding that he was guilty of the use of alcohol/drugs during his probationary period. He concurred that if it was established through credible evidence that he used drugs, he would dismissed for cause and his dismissal would not be subject to appeal. However, it would be incorrect and unfair to conclude that the employee agreed to become probationary in every other respect. Would the Carrier argue that the employee who is returned on a conditional basis for drug use loses his rights to a formal Investigation on charges of absenteeism, theft, or unauthorized leave? We think not. Then why would he lose his right to challenge the legitimacy of an alcohol/drug screen test. The drug test and the use of drugs are two distinct things. In this regard, we concur with Judge Garcia, the Claimant has the right to challenge the evidence that indicates he is guilty of violating the terms of his conditional reinstatement. He has the right to challenge the validity of the test, not the right to challenge the cause of his dismissal if the test is valid.

Therein lies the difference between the view this Board holds and the decision rendered by the learned and distinguished Neutral Gil Vernon. It seems to this Board the correct avenue of appeal is through a formal Investigation to be conducted under Article 57, Section B, of the Agreement and the appeal is only for the purpose of determining the validity of the test. This presents no hardship to the Carrier. After all, if the tests are determined valid, the employee must live with his termination. However, if the evidence demonstrates the tests were invalid than the employee has every right to be returned to service and be made whole. The Carrier does not have to contend with Just Cause arguments or mitigating circumstances. This after all would be the only Investigation afforded the Claimant, he waived the original hearing and admitted to his guilt. Here, however, he challenges the accuracy of the tests and maintains his innocence. There is no way, the Claimant's admitted guilt the first time can be used to prove the guilt of the Claimant during his

probationary period. He should be innocent until his guilt is established through a valid test. This is not a matter of criminal law or the constitutional rights of individuals. This is the very basis of fairness we strive to achieve in the industrial relations arena.

This Board is aware the Carrier through its Companion Agreements provides employees with a second chance they may not otherwise have. We also recognize the risks the Carrier takes, as well as, the responsibilities of the employees who accept the offer. However, unless employees are given the opportunity to challenge the validity of the test which could end their careers, it contradicts fairness and due process.

In reviewing the previous Decisions issued by this Board, as well as the evidence presented by the Parties, this Board believes the claim should be sustained to the extent outlined in the Award below.

AWARD

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 February 8, 2000, to determine the validity of the testing procedures, as well as, the test itself. If the collection process was in accordance with accepted procedures and the test was otherwise valid, then the Claimant's termination is to be sustained. However, if 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 11th day of September, 2000.