

AWARD NO. 38
CASE NO. 38
CARRIER FILE: 60-04-0006D
ORGANIZATION FILE: 1687-52-ROSY

The next day, the Claimant sought medical treatment from his personal physician. He was diagnosed as having a "high fever and respiratory infection," and was instructed by his doctor not to return to service for two days in order to recuperate. (Inv. Tr., Ex. 4) While undergoing a physical examination at the doctor's office, the Claimant also took a drug test which proved negative for any prohibited substances in his system. (Inv. Tr., Ex. 5)

On October 29, 2003, the Carrier notified the Claimant to attend an investigation in connection with his possible violation of Operating Rules 1.6, 1.13 and 1.15, and Section 7.4 of the Carrier's Policy on the Use of Alcohol and Drugs "concerning [his] alleged refusal to submit to reasonable cause drug and alcohol test and [his] alleged leaving assignment without proper authority while working as helper on Y-BEL0201-27 on October 27, 2003." The investigative hearing was held on November 18, 2003, after which the Carrier found sufficient evidence on the charges against the Claimant and assessed him a Level S nine-month (i.e., 270 days) actual suspension for his refusal to submit to a reasonable cause drug and alcohol test and for leaving his assignment without proper authority. As a consequence of this action, the Organization filed the instant claim on behalf of the Claimant seeking to overturn the assessed discipline. The Carrier consistently denied the claim until the appeal process was exhausted. Thereafter, the parties here submitted the dispute over the Claimant's suspension to this Board for adjudication.

The Board has carefully reviewed the entire record in this case conjunctively with the respective arguments advanced by the Carrier and the Organization from procedural and substantive standpoints. Turning initially to the procedural issue as it relates to the handling and fairness of the Claimant's investigation, it is significant to note the following Carrier observation: "... BNSF recognizes that the hearing officer in this case did not hold the best hearing. In his zeal to get the [C]laimant to admit wrongdoing, he became a little heavy-handed. Under our system, hearing officers are usually line officers who do not necessarily have an understanding of how the process works. Sometimes, as appears to be the case here, the hearing officer believes it is his duty to prove guilt, when, in truth, his job is to develop the facts.***" (Carrier's Submission at 3) The Carrier avers that this factor, in addition to the Claimant's illness on the date in question, was taken into consideration when determining the extent of his discipline, resulting in a suspension rather than dismissal.

Judging by its position, the Organization not only agrees with the Carrier that the hearing officer was "heavy-handed," but further opines that his hostile questioning of the Claimant demonstrated a bias against him, impairing the impartiality of the formal inquiry. The Board, agreeing with the Carrier's and the Organization's investigative hearing evaluations, finds that the hearing officer's badgering of the Claimant in the course of the investigation compromised his indelible right to a fair and impartial hearing. Under ordinary circumstances, the deprivation of this crucial element of due process would, depending on the extent of the abridgment, either result in an arbitral determination vacating the assessed discipline or, alternatively, significantly mitigate the disciplinary action. The matters at issue here, however, do not involve ordinary circumstances. They pertain to the Claimant's purported refusal to submit to a reasonable cause drug and alcohol test following an operating incident (i.e., a derailment) and then leaving the property without authorization which, in the Carrier's judgment, was akin to insubordination. These particular infractions must be considered and balanced with the Claimant's due process rights and the substantive evidence which might exculpate him from the alleged wrongdoing.

It cannot be gainsaid that the Carrier has a right to conduct reasonable cause drug and alcohol testing when a crew is involved in an accident or serious operating occurrence like a derailment. This right stems from federal regulations which are buttressed by the Carrier's Policy on the Use of Alcohol and Drugs. Since the Claimant, at the time of the October 2, 2003 incident, had over thirty years of service with the Carrier, he should have been cognizant of the Carrier's policy and drug/alcohol testing right under described circumstances. When this situation exists, a crew member is precluded from leaving the property without authorization and prior to being tested. However, the record in this case presents a set of incontestable facts that tend to exculpate the Claimant to some extent despite his departure from the property before taking a drug/alcohol test because of illness.

Here, the Carrier's Assistant Trainmaster recognized that the Claimant was undoubtedly ill on the date in question and left the workplace before being tested. According to the Carrier, the Claimant was still physically able to provide a urine sample when instructed to do so. While mindful of the Claimant's illness, the Carrier, nevertheless, opines that he had just completed his tour of duty which demonstrates that he was not too sick or incapable to perform service as a switchman. Placing this situation in perspective, the Carrier posits that since the "tester" was in the position to take the Claimant's urine sample immediately, there is no legitimate reason to conclude that the Claimant could not have taken the test because of his physical condition before leaving the property without authority. It is clear to the Carrier that the Claimant refused to submit to reasonable cause drug and alcohol testing which warranted strict disciplinary action.

In response to the Carrier's assertions, the Organization submits that it would not have advised the Claimant to go home on October 23, 2003 without taking the required drug/alcohol test. Yet the Organization argues that his testimony revealed that he was so ill that he could not remain to take a drug/alcohol test. Continuing in this vein, the Organization contends that the Claimant apparently had never received or reviewed the Carrier's alcohol and drug policy (nor was he ever asked by the Carrier if he received and had read that policy), and did not realize the gravity of the situation when leaving the property in light of his non-compliance with the Carrier's directive that he be tested. Instead, the Organization holds to the view that Carrier supervision on the date in question observed how sick the Claimant was, but failed to take the initiative to take him to the hospital for medical treatment where he also could have been tested for drugs and alcohol. According to the Organization, the Trainmaster and Assistant Trainmaster in this instance were inexperienced and derelict in not explaining to him the grave consequences if he departed the property without taking a drug/alcohol test as directed. It is clear to the Organization that the Carrier must shoulder the responsibility for what happened without finding the Claimant insubordinate since he was never told not to leave the property regardless of his illness. Given these circumstances, the Organization considers the discipline assessed the Claimant unjustified.

As recounted herein, the factual record clearly indicates that the Claimant was ill on the date in question, and because of his illness (which was subsequently confirmed by his doctor) he left the property before submitting to a reasonable cause drug/alcohol test. In this regard, the record also points up that supervision in this instance was either inexperienced or merely failed in handling the situation involving the Claimant satisfactorily. Notwithstanding the Claimant's lame excuse that he had not reviewed the Carrier's Policy on the Use of Alcohol and Drugs, which the Board does not countenance in light of his extensive railroad service, Carrier supervision had a responsibility to apprise him of its right to conduct reasonable cause drug and alcohol testing and his obligation to take such a test when directed. In any event, both the Trainmaster and Assistant Trainmaster, who were aware of the Claimant's illness, should have made an attempt to get him medical treatment (or arranged another suitable accommodation) where, arguably, he could be tested at a later time on the date of the incident. Although supervision did not pursue this course of action, the Claimant might have sought such treatment in order to comply with the Carrier's drug/alcohol testing directive before he precipitously decided to leave the property without first obtaining authorization to do so. As noted, the Claimant had over thirty years of service with this Carrier and should have known the disciplinary ramifications for refusing to submit to a drug/alcohol test, whether such testing was required by federal regulations or Carrier policy. Suffice it to say that neither Carrier supervision nor the Claimant handled or reacted to this occurrence properly.

In light of the foregoing procedural due process ruling and substantive findings on the merits, the Board is impelled to modify the discipline assessed the Claimant without fully absolving him of fault on the charges upon which his suspension was based. Accordingly, his 270-day disciplinary suspension will be reduced to an actual suspension of 90 days. The Claimant will be entitled to pay for time lost in excess of the reduced suspension, subject to appropriate offsets. His personal employment record will reflect this modification in assessed discipline.

AWARD

The claim is partially sustained in accordance with the findings and companion ruling hereinabove.

ORDER

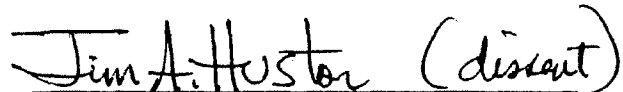
The Carrier shall comply with this Award within thirty (30) days upon receipt of a duly executed copy thereof.



Charles P. Fischbach
Chairman and Neutral Member



Gene L. Shire, Carrier Member



Jim A. Huston, Employee Member

Dated at Chicago, Illinois,
this 18th day of May, 2007