

PUBLIC LAW BOARD 1760

Case No. 102

Award No. 102

Parties Norfolk and Western Railway
to and
Dispute Brotherhood of Maintenance of Way Employees

Statement Claim on behalf of P.S. Ware appealing his dismissal
of assessed as the result of a September 29, 1988,
Claim investigation for insubordination.

Findings: The Board, after hearing upon the whole record and evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated , that it has jurisdiction of the parties and the subject matter and that the parties were given due notice of the hearing held.

On September 2, 1988, Claimant was a member of Paint Gang 227. On said date Carrier's General B & B Supervisor, C. Russell, received information concerning Claimant's behavior on the job. Supervisor Russell had a conference with Claimant's immediate Supervisor, Foreman R. A. Morris, regarding Claimant's performance on the job. Russell then contacted Carrier's Division Chief of Police, R. A. Phillips, who, together with Supervisor Russell, had a conference with Carrier's Medical Director, Dr. J. P. Salb. Dr. Salb expressed his concern that Claimant, along with other named employees, did not meet Carrier's medical standards to remain in service. He therefore directed that the

gang should be observed and, in the event that there was an observation that presented cause to believe that an observed employee was under the influence of drugs or alcohol, they were to be removed from service and charged with Rule G; Dr. Salb also issued instructions that the employee or employees were to be taken to a medical facility for a fitness to remain in service physical.

On September 7, Supervisor Russell and a Carrier Police Officer observed the gang at its work station in Bordon, Illinois. There was no observation that anyone appeared under the influence but Supervisor Russell approached the gang and instructed the employees that they were to discontinue their work and would be taken directly to a fitness to remain in service physical in accordance with Dr. Salb's instructions. Claimant, at the work site, did not object to these instructions but, while in route to his hotel in Lychfield, Illinois, informed Foreman Morris that he was marking off and would not submit to the physical. On arriving at the motel in Lychfield, Morris informed Russell that Claimant Ware had stated that he would not submit to the physical examination. Russell and Carrier Police Officer Merchant went to Claimant Ware's motel room where the instructions were repeated that he was required to submit to the physical examination. Claimant steadfastly refused, stating he was marking off and going to his own doctor and that he would submit to the test the following Monday, five (5) days later. All other members of the gang submitted and two (2) were found fit to remain in service. One (1) other employee, Johnson, was found to have tested positive for marijuana; Johnson was withheld from service and subsequently retested with negative results and was returned to service.

Claimant was removed from service under date of September 19, 1988, and cited to attend an investigation wherein he was charged with insubordination for his repeated refusals of direct instructions to submit to a physical examination to remain in service. The investigation was conducted, as scheduled, on September 29, 1988, and resulted in Claimant's being found culpable for the charges and dismissed from all further service.

Claimant testified, in defense to the charges, that on the day in question, September 7, he recalled Supervisor Russell and a Carrier Detective showing up at the work site. He recalled hearing an instruction, but not too clearly, that they were all going to submit to a physical examination. He testified that he informed Foreman Morris on the way back to the motel that he was suffering from a venereal disease and that he had a previous doctor's appointment to address that condition and it could only be taken care of on "certain days". Claimant indicated that he would submit to the physical on Monday, the day when he was scheduled to return to work. Claimant indicated that he marked off and considered himself off Company time when they arrived at the motel. He acknowledged that he did not tell his Foreman of the previous doctor's appointment when he reported for work and that it only came up when he had the "opportunity" to tell the Foreman, at lunch.

Claimant acknowledged that he received the instruction that he was to submit to the examination, that he would be under pay, but, again, he reiterated that he informed the Supervisor that he would take it on the Monday of his return, the 12th.

Claimant testified in response to a query as to what his end of the conversation was:

"...I told him that I took a physical when I came to work. And I had a previous doctor's appointment, and I had a venereal disease and I was going to go get it taken care of. I'd take his physical when I returned to work. And he said something about he's Okay, he's going to pull me out of service. Well, he never told me that if I didn't take it...well, he never told me that it was going to be a drug test, and all this other stuff. He never, at no time, divulged what the whole incident was about. He just wanted me to take a physical, which I felt that I was being discriminated against, because none of the other gangs had to take it."

There was not a great deal of inconsistency or conflict between Claimant's version and what was said and done on the date in question and Carrier's witnesses. Carrier concluded that Claimant was insubordinate and dismissed him for all further service.

The thrust of Organization's argument seeking to have Claimant restored to service is that the implementation of the drug policy was conducted, in this case, in a manner that was prejudicial and discriminatory to all members of the gang when Supervisor Russell used a "drag net" to bring all of the members in when, in fact, there were only two (2) members who were subject to inquiry, Johnson and Claimant. Organization strenuously objects to the implementation of the policy in this manner as being wholly inconsistent with its understanding of the intent and purpose of the policy and its implementation. Organization asserts that the only corrective action that could be taken to address this situation and put Carrier on notice that this "drag net" approach is improper and inconsistent with its understanding of the implementation of the policy would be to restore Claimant to service.

The Board has carefully reviewed the transcript and finds that, while there may have been over reaching by the Supervisor in causing all the members of the gang to be required to submit to the

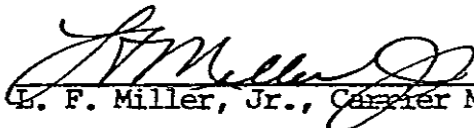
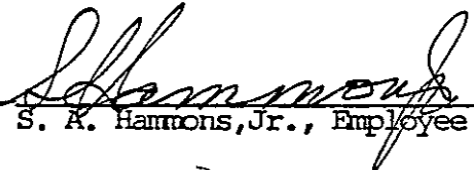

physical-to-continue-in-service-exam, no prejudice occurred against Claimant's interest in the circumstances presented. Carrier was given specific information concerning Claimant and another employee's work performance and work habits. Based upon that information a Carrier Supervisor and a Carrier Police Officer went to the work site and observed the targeted employees. For reasons that remain unexplained the Supervisor concluded that all members of the gang should be required to submit. All the affected employees were continued under pay and were transported, at Carrier's expense, to the testing site and returned to their motel. Again, there appears to be no justification for including the other employees but we cannot conclude therefrom that there was some substantial prejudice that occurred against Claimant in these circumstances.

Claimant asserted in the investigation that he was the "victim of discrimination" because his gang was black. The hearing officer elicited from Claimant the fact that the gang was made up of two (2) white workers and two (2) black workers and there was no substantial difference between his gang or any other gang. We find no basis to support such an allegation of discrimination in the facts presented in this case.

Carrier was within its rights to reject Claimant's assertion that he had a prior doctor's appointment to address an averred venereal disease condition, particularly when, as here, Claimant failed to tell his Supervisor of the prior appointment when he reported for work, never testified as to when the specific date and time the appointment was and never produced any documentation to support such an assertion.

Accordingly, on the basis of the evidence reflected in the transcript the Board is compelled to conclude that this claim must be denied.

AWARD: Claim Denied.

 <u>L. F. Miller, Jr., Carrier Member</u>	 <u>S. A. Hammons, Jr., Employee Member</u>
 <u>Arthur T. Van Wart, Chairman and Neutral Member</u>	

Dated: October 12, 1989.