PUBLIC LAW BOARD 3882

AWARD NO. 220
CASE NO. 232
UTU FILE: NG-33001
CSXT: 4(00-0601)

PARTIES TO THE DISPUTE: **UNITED TRANSPORTATION UNION**
VS.
CSX TRANSPORTATION, INC.
(Former Chesapeake and Ohio Railway-Proper)

ARBITRATOR: **H. RAYMOND CLUSTER**

DECISION: **CLAIM SUSTAINED FOR REINSTATEMENT AND BACK PAY BEGINNING ON APRIL 19, 2000, UNTIL SUCH TIME AS HE IS REINSTATED OR DECLINES TO TAKE OR FAILS THE USUAL TESTS REQUIRED TO REINSTATEMENT.**

DATE: **AUGUST 25, 2000**

STATEMENT OF CLAIM

"Claim of Conductor L. A. Dove, ID 237652, who was dismissed as a result of Board of Inquiry No. 16046 held October 13, 1999, for reinstatement to the service of CSX Transportation, Inc. (former Chesapeake and Ohio Railway Company), pay for attending investigation and pay for all time lost, including the wage equivalent of fringe benefits from August 15, 1999, until restored to service and removal of unfavorable entry from service record."

FINDINGS

On August 15, 1999, Claimant was required to submit to a FRA Random Toxicologolical Test. His specimen was submitted in due course to a FRA approved laboratory. The laboratory determined that the urine specific gravity was less than or equal to 1.001 (the same as plain water), and the urine creatinine was less than or equal to 0, and thus uncharacteristic of normal human urine. Under FRA regulations, when an employee submits such a specimen outside of normal limits, no further test is made, the employee loses the option of a re-test of the primary specimen and also the right to an analysis of the split sample; further, he is deemed to have refused to submit to testing, and

must be withheld from service for nine months. The laboratory notified the Medical Review Officer of its finding; the MRO passed them along the Carrier's Chief Medical Officer, who in turn notified Claimant by letter of August 19, 1999, that he was disqualified from service. Subsequently, Claimant was charged with insubordination by refusing to provide an adequate specimen, and after formal investigation held on October 13, was dismissed from service on October 20, 1999.

In support of the claim for reinstatement and pay for time lost, the Organization raises a number of procedural issues. First, that when Claimant and his representative appeared at the time and place set for the original investigation, they were informed by Carrier at that time without prior notice that the investigation was postponed. The evidence shows that the local chairman had agreed in advance to the postponement, but through a combination of factors including negligence and oversight by Carrier, Claimant and his representative were not informed. While this was regrettable and caused inconvenience to Claimant and his representative, the investigation was rescheduled and held at a later time and Claimant's right to a fair hearing was not affected by the inconvenience.

The second and third objections relate to the conduct of the hearing. Carrier's Chief Medical Officer, Dr. Goldman, testified and was cross-examined over an open telephone circuit; the Organization alleges that the failure of the CMO to be physically present at the investigation deprived Claimant of the right to confront him and thus denied him the fair hearing to which he was entitled under the rules. The Organization also requested that the person who collected the urine specimen, his supervisor and the Medical Review Officer be present as witnesses at the investigation. Carrier in fact requested the collector, not employed by Carrier, to be present, but he declined; as to the other two, Carrier deemed their presence as witnesses to be unnecessary to develop the relevant and material evidence.

There could be circumstances in which the failure of a witness to testify in person rather than over the telephone, or the failure of Carrier to produce requested witnesses, would violate an employee's rights to due process and a fair trial; however, the issue must be judged on the facts of the particular case. Our study of the record in this case convinces us that Claimant's rights were not prejudiced on either ground. There is substantial evidence in the record, including the chain of custody documents, Claimant's testimony, and official notification from the MRO to Dr. Goldman (without the necessity of considering Dr. Goldman's testimony) to support a finding that Claimant's specimen as properly collected, sealed in his presence, and sent untarnished to an authorized laboratory, which analyzed it and furnished the results described above to the Medical Review Officer, who in turn furnished them to Carrier. In our view, these basic facts were not subject to being altered by Carrier's Chief Medical Officer's testifying in person, or by any testimony the requested witnesses would have been able to give if they had been present and testified at the investigation. In reaching this conclusion, we have considered the evidence proffered by Claimant that the collector, after examining the temperature tape on the collection vessel, remarked to Claimant that he saw something he had not seen before, and called his supervisor to discuss it. The collector and the supervisor resolved the matter to their satisfaction; the collector signed off on the specimen temperature as within acceptable limits; and, as set forth above, the specimen was sealed in Claimant's presence and forwarded to the laboratory with the required safeguards.

The Organization further asserts that Carrier violated Schedule Rule 87 which requires the furnishing of all papers concerning investigations upon the Organization's request, in that the transcript of investigation furnished by Carrier in this case on November 15, 1999, did not contain the eleven exhibits admitted into the record during the investigation. The Organization informed

Carrier of the omission by letter of December 1, 1999, but in its response to that letter dated January 25, 2000, Carrier neither referred to or furnished the missing exhibits. Carrier offered no explanation or defense for its failure to supply the exhibits.

It has been held in some awards, including on this property, that such a failure to supply all papers connected with an investigation constitutes a violation of employee rights under the discipline rule; and discipline has been voided on such ground in those cases without consideration of the merits of the claim. However, we have not been cited a case where the mandatory nine-month suspension of employees under FRA Regulations has been set aside on the ground of failure to supply papers in violation of Rule 87, and we do not think we are justified in taking such action in this case.

However, based upon the Rule 87 violation and the Organization's uncontested allegation that in two other cases indistinguishable from the one before us, Carrier has administered the lesser discipline of a thirty-day suspension to run concurrent with the nine-month federally mandated suspension, we will set aside the discipline of dismissal imposed by Carrier up Claimant.

Claimant's nine-month FRA-mandated suspension began on August 19, 1999. It therefore ended on April 18, 2000, at which time Claimant should have been offered reinstatement subject to the usual tests, including a toxicological test. Claimant is therefore entitled to back pay beginning on April 19, 2000, until such time as he is reinstated or declines to take or fails the usual tests required for reinstatement.

AWARD: Claim sustained for reinstatement and back pay beginning on April 19, 2000, until such time as he is reinstated or declines to take or fails the usual tests required to reinstatement.

H. R. Cluster, Chairman and Neutral Member

R. K. Sargent, Employee Member

Patricia Madden, Carrier Member

9/1/2002
Date

PLB NO. 3882

AWD NO. 220

CARRIER MEMBER'S DISSENT
TO AWARD NO. 220 OF
PUBLIC LAW BOARD NO. 3882

Exception is taken herein inasmuch as the only positions taken by the Organization during the on-property handling were procedural in nature – as such, the Board had only jurisdiction over those arguments. It was not until the writing of its Submission that the Organization alleged that the Claimant received disparate treatment. This argument was not even presented during the oral argument, yet the Board found that "....the Organization's uncontested allegation that in two cases indistinguishable from the one before us, Carrier has administered the lesser discipline of a thirty-day suspension..." was reason to set aside the dismissal of the Claimant.

There are several things inherently wrong with this picture —

- The Organization allegation was uncontested since it was not made to the Carrier as required by the Railway Labor Act

- Case No. 230 of this Board was erroneously relied upon by this Board. In that case, a 30-day suspension was assessed rather than a dismissal since it was felt that the integrity of the urine specimen in question might have been compromised by the testing procedure used. Hence, it is quite distinguishable from the instant case. Also, this case was ultimately settled by the Parties "....without prejudice to the position of either party and would not be referred to in the handling of any other matter." Based on this, it is obvious that any reference to Case No. 230 is misplaced.

- The Board has also erroneously relied on the 30-day suspension assessed in the case involving a Mr. Chappell as a result of Board of Investigation No. 16007. A review of that case reveals that the Claimant was not dismissed in view of perceived chain of custody problem. Thus, Mr. Chappell's case is very distinguishable from the case at bar.

Not one shred of evidence was submitted to this Board that would prove that the Carrier has a practice of issuing 30-day suspensions rather than dismissals when employees are found at fault for failing to provide an adequate urine specimen for toxicological testing. It is only when extenuating circumstances come into play that lesser disciplines are even contemplated. In view of the fact that the FRA mandates nine-month suspensions for these infractions, common sense dictates that any lesser penalty imposed must have a reason. Perhaps this Board would have been wiser to at least require some evidence that the two cases were, as alleged, "indistinguishable" from this case.

For the above reasons, Award No. 230 is without value as precedent and I find it necessary to dissent.

Respectfully submitted,

Patricia A. Madden

Patricia A. Madden
Carrier Member