

Proceedings Before Public Law Board 4430

AUG 26 1988

Award No. 2
Case No. 11-Y

Parties to Dispute:

The United Transportation Union
The Chicago & North Western Transportation Company

Statement of Claim:

Claim of Switchman Peter J. Hill, Eastern Division, for reinstatement to the services of the Chicago & North Western Transportation Company, with vacation and seniority rights unimpaired, in addition to the payment of any and all health and welfare benefits until reinstated, and that he be compensated for any and all lost time, including time spending an investigation held on September 27, 1986 when charged with "your alleged subordination when you refused to supply a urine sample in connection with reasonable testing when so directed by Trainmaster T. Lenzen at approximately 4:38 p.m. on September 8, 1986 at Proviso Terminal. Request and claim based on provisions of yard rule of the applicable schedule."

Findings:

This Board upon the whole record and all the evidence, finds that:

The Carrier and Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

Claimant was dismissed from service, after investigation, for refusing to supply a urine sample in connection with reasonable cause testing when requested to do so by a management official on September 8, 1986.

The circumstances surrounding the Claimant's dismissal are as follows:

On September 8, 1986 the Claimant was employed as a Switchman on Switch Job 02 at Proviso Terminal. During the time he was on duty, the assignment ran over a derail. Since the Claimant was on the lead car at the time, he was directed to submit to drug and alcohol testing in accordance with the FRA regulations regarding reasonable cause testing.

At the investigation hearing it was determined that the Claimant refused to take a urine test for two reasons. First, based upon constitutional rights, he felt that he was entitled to seek counsel and also some indication from his doctor of whether or not a urine test could prove positive through passive inhalation of marijuana. The second objection related to the fact that he felt that since he could in no way have been directly responsible for the accident which occurred that he should not have been subjected to reasonable cause testing under FRA regulations. Both of these issues will be addressed in the course of this Award.

The Carrier maintains that it properly directed the Claimant to submit to urine testing under the reasonable cause provisions of the FRA regulations on drug and alcohol abuse. It points out that this instruction was clearly understood by the Claimant, and he knew the implications of it, as well as of his refusal to comply. Under these circumstances, the Carrier maintains that the Claimant engaged in an act of insubordination as set out in the Company's policy on drug abuse.

On the face of it, there is absolutely no basis for the Claimant to refuse to submit to a urine test. The Carrier has developed its policy on drug and alcohol use, with the full encouragement and endorsement of the Federal Railroad Administration, in an effort to reduce the instances in which employee-related drug or alcohol use could or do lead to work-related injuries or accidents. Accordingly, the Claimant should have subjected himself to the urine test even though he might have later wished to challenge it at a Company investigation hearing.

The Claimant testified that one of the bases for his refusal to submit to testing was his fear that his passive exposure to other people smoking marijuana in the recent past might have permitted a level of cannabinoids to enter his system which would result in a positive test. This concern on his part is well founded in the literature on drug abuse where there is substantial evidence to support the view that passive inhalation can lead to positive testing. However, with respect to the Carrier's policy regarding drug testing, the threshold tests for finding drug use have been established at a sufficiently high level to reduce significantly the probability that any passive inhalation would show up in the test results. It should be noted, however, that in this case the Claimant obtained, upon the advise of either counsel or his medical doctor, both urine and blood testing the day following the incident and both tests recorded negative.

The issue of whether the Carrier exercised reasonable justification under the circumstances to require testing under the reasonable cause policy must also be explored. In many cases there is no way to determine whether and to what extent any single member or members of a crew might be potentially responsible for an incident or accident occurring. Under these circumstances it is quite appropriate for the Carrier officials to decide that all members of the crew should be tested. However, a rule of reason must be used in applying this criteria. In the instant case, it was clearly establishing at the hearing by both management officials and the Claimant that the Ramp Foreman was responsible for failing to remove the portable derail from the track in question, and that the existence of the derail on the track was the

proximate cause of the derailment. Immediately after coming around the curve on the track in question, the Claimant spotted the derail and immediately notified the Engineer by radio. However, by the time the Engineer was able to stop the train, the leading trucks went over the derail. Shortly after the incident the Ramp Foreman arrived at the scene and stated that he had released the track, unlocked the switch, removed the blue (cautionary) flag but failed to remove the portable derail.

At the investigation hearing the representative of the Claimant requested that the Ramp Foreman be called to testify but this request was declined by the investigating officer. To the best of this Board's knowledge, the Ramp Foreman was not penalized in any fashion for the accident which occurred.

In the light of the circumstances in this case, we feel that the action taken by the Carrier was inappropriate. It was totally inappropriate for the Claimant to refuse to take the urine test immediately following the incident. However, it was similarly inappropriate, at least at the investigation, to conclude that the Claimant's actions, or lack of actions, automatically gave rise to the assumption that he was responsible for the accident. Under these circumstances, the Carrier should have been even more agreeable to accepting the Claimant's urine and blood test findings which were taken on the day following the incident.

Two principal factors arise in this case which the parties should take into account in future drug cases. First, under no circumstances should employees refuse to take urine tests if requested by the Carrier, and similarly, Carrier officials should advise employees in any reasonable cause testing that they can also have a blood test at Carrier's expenses if they so desire.

The second factor is that Carrier officials must more closely examine the question of whether or not an employee or group of employees is/are potentially responsible for an accident occurring and under the circumstances are automatically subjected to drug and alcohol testing under the reasonable cause policy. Irrespective of the Carrier officials' actions, however, the employees cannot decline the taking of such tests on the grounds that an objective analysis of the circumstances would lead to the conclusion that they could not have caused the accident. This is a matter which must be addressed subsequently by Carrier officials either at the investigation hearing or on subsequent appeals reviews.

Under the circumstances of this case, the Board finds that the Claimant should be reinstated because there is a significant basis to question whether the reasonable cause policy was appropriately applied. However, the reinstatement should be without any compensation for lost time since the Claimant had no basis for declining to have the urine test administered.

Award:

The Claimant shall be reinstated to service but not compensated for any time lost.

Donald F. Markgraf
Donald F. Markgraf, Employee Member

Barry E. Simon
Barry E. Simon, Carrier Member

*I dissent, as to
No. 11 payments*

John N. Gentry
John N. Gentry
Neutral Member and Chairman

Chicago, Illinois
August 15, 1988