

BEFORE PUBLIC LAW BOARD NO. 5027

Case No. 4

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
UNION PACIFIC RAILROAD COMPANY (FORMER MISSOURI-KANSAS-
TEXAS RAILROAD)

STATEMENT OF CLAIM: Claim of the System Committee of the
Brotherhood that:

1. Carrier violated Article 23 of the Agreement when trackman J. Webster was dismissed from service on April 2, 1990.
2. The Claimant shall have his record cleared of the instant matter, he shall be reinstated to the Carrier's service with seniority and all other rights restored and he shall be paid for all time lost.

FINDINGS:

Claimant J. Webster was employed by the Carrier as a trackman.

On February 28, 1990, the Carrier notified the Claimant to appear for a formal investigation in connection with the following charges:

. . . your alleged failure to safely operate and damage Company vehicle Unit No. 1561 at approximately 11:05 a.m. on February 27, 1990, at Eureka Yard, Houston, Texas while working as trackman.

You are being withheld from service pending this investigation.

On March 8, 1990, the Claimant was sent another notice of investigation by the Carrier as a result of the results obtained from the Claimant's drug test taken on the date of the accident in question, February 27, 1990. The notice charged the Claimant

with a violation of Rule G as follows:

. . . violation of Rule G of the Safety, Radio and General Rules for All Employees, while operating Company vehicle Unit No. 1561 at approximately 11:05 a.m. on February 27, 1990, at Eureka Yard, Houston, Texas while working as trackman.

After several postponements, the hearing took place on March 27, 1990, in relation to the two notices with the Claimant present but without Organization representation. On April 2, 1990, the Carrier notified the Claimant that he had been found guilty of all charges set forth in the notices when he was being assessed the discipline of dismissal.

The Organization filed a claim on the Claimant's behalf, challenging his dismissal on the grounds that the Carrier's actions on March 27, 1990, prevented the Claimant from being assisted at the investigation by the representative of his choice. The Organization argued that the Carrier's action was a violation of Article 23 and that the Carrier did not prove the charges leveled against the Claimant because the investigation was held improperly.

The Carrier argues that no procedural defect occurred during the handling of the Claimant's grievance which warrants setting aside the discipline assessed. Moreover, the Carrier contends that it was clearly established that the Claimant was properly found in violation of Rule G. The Carrier contends that the Claimant did not object at the hearing that he did not have a representative present.

The parties being unable to resolve the issues, this matter

came before this Board.

This Board has reviewed the record in this case and we must sustain the claim based upon the procedural argument raised by the Organization.

The record reveals that the Claimant's hearing was scheduled for March 27, 1990, after several postponements. The Carrier admits that the Claimant's representative, Mr. John P. Self, contacted the Carrier on March 24, 1990, and requested a continuance because Mr. Self had been injured and would be unable to attend the hearing on March 27, 1990. According to Mr. Self, the Carrier agreed to the continuance. Mr. Self was surprised and outraged when he discovered on March 28, 1990, that the hearing had actually taken place in his absence. The Carrier contends that it has reviewed the transcript and that it has determined that the Claimant was guaranteed all of his due process rights even though he had no representative present. The Carrier contends that the transcript contains sufficient evidence of the Claimant's guilt, and, therefore, there is no reason to set aside the dismissal.

This Board has reviewed the transcript in its entirety and we find that the Carrier had no business going forward with the hearing in the absence of Mr. Self.

First of all, the contract requires in Rule 3 that employees be given the opportunity to be assisted by a representative. The record reveals that the Claimant and the Carrier were expecting Mr. Self to appear to represent the Claimant on March 27, 1990. At the hearing on March 27, 1990, the Claimant was asked:

Q: Mr. Webster, do you desire to have any representation present in this investigation? And if so, would you please state if he is present and his name.

A: He is not present. J. P. Self is supposed to be here, but he is not present.

Subsequently, Mr. J. W. Skinner, the Carrier representative stated:

....if Mr. Self should show up any time during this investigation, he will be allowed to enter; he will be allowed to represent Mr. Webster. At any time that he should show up and enter this investigation, he will be allowed to do so.

Subsequently, the Claimant, who had 25 years of service before his dismissal, was asked:

Q: At this time, Mr. Webster, are you ready to proceed on with this investigation?

A: I guess we can.

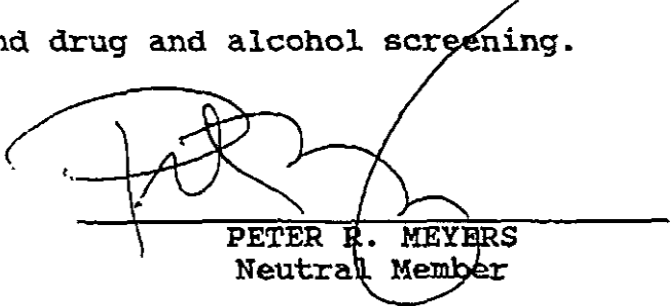
This Board has reviewed the balance of the record and we hereby find that the Claimant was not afforded his contractual right to a due process investigation and the right to a representative. The record reveals that Mr. Self had requested that the March 27, 1990 hearing be continued until he recovered from his injuries. It is not sufficient for the Carrier to review the record of the hearing and determine on its own that the due process rights of the Claimant were protected.

The failure of the Carrier to provide the Claimant with a fair investigation represented by the representative of his choice requires the sustaining of this claim. However, the record reveals that the Claimant was ineligible for service at the time that he was removed from service because he was under

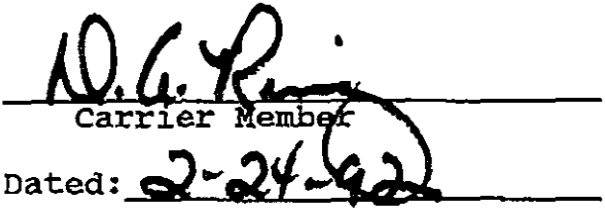
the influence of alcohol and/or drugs. In order to return to work, the Claimant will have to pass a complete physical, including drug and alcohol screening. If the Claimant successfully passes the physical examination with the drug and alcohol screening, he shall be returned to work but without back pay. This Board finds that the record contains enough evidence to support that the Claimant was properly removed from service because he tested positive for cocaine and the Carrier cannot be held responsible for the back pay since then since there is no evidence in the record that the Claimant has been sufficiently healthy and "clean" to return to work since his removal.

AWARD

Claim sustained in part. The Claimant shall be returned to work without back pay as soon as he passes a Carrier physical examination and drug and alcohol screening.



PETER R. MEYERS
Neutral Member



N.G. Remy
Carrier Member



John P. Seif
Organization Member

Dated: 2-24-92