NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6089

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 6
and)
) Award No. 9
UNION PACIFIC RAILROAD COMPANY)

Martin H. Malin, Chairman & Neutral Member
R. B. Wehrli, Employee Member
D. A. Ring, Carrier Member

Hearing Date: April 6, 1998

STATEMENT OF CLAIM:

(1) The dismissal of Drawbridge Helper C. R. Williams, Jr. October 11, 1996, was in violation of the Agreement, unwarranted and an abuse of discretion. (Organization File D-257; Carrier File 1043040D)

(2) Mr. Williams' record shall be cleared of all references to this incident and he will be reinstated immediately with all rights restored unimpaired and pay for all time lost.

FINDINGS:

Public Law Board No. 6089, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On September 9, 1996, Claimant worked a shift beginning at midnight due to a malfunction on the Steel Bridge in Portland, Oregon, that had occurred on September 7. The motor controlling the wedge locks on the bridge failed and it was necessary to work numerous employees to manually release and reengage the locks.

On September 9, early in the morning, a need arose to raise the bridge to allow a tug boat to pass through. The bridge operator instructed Claimant to release the wedge locks so he could raise the bridge. Claimant did so. However, the bridge

was raised with the rail locks yet to be released. The rail locks were controlled by the signal department.

Around 8:15 a.m. Claimant went home. (There is a dispute as to whether Claimant had authority to leave.) Upon arriving at home, Claimant's wife informed him that a special agent had called. Claimant returned the call. A special agent and an ARSA Supervisor spoke with Claimant and directed him to return to take a drug test. The special agent offered to pick Claimant up and drive him to the facility. Claimant asked to think about the instruction and indicated he would call back within five minutes. Five minutes later when Claimant called back, he refused to take the drug test. In communicating his refusal, Claimant lost his temper and used profane language. Later that day, at the urging of his wife, Claimant went to a clinic of his choice and took a drug test at his own expense. The test results were negative.

On September 16, 1996, Carrier instructed Claimant to report for an investigation on September 24, 1996. The notice charged Claimant with insubordination in violation of Rule 1.6. Carrier also withheld Claimant from service.

The hearing was held as scheduled. On October 11, 1996, Carrier advised Claimant that he had been found guilty of the charge and dismissed from service.

The Organization contends that Carrier prejudged Claimant, as evidenced by its withholding him from service. Furthermore, the Organization argues that Carrier lacked legal authority to direct Claimant to submit to a drug screen. The Organization emphasizes that the ARSA Supervisor and Claimant both testified that Claimant was directed to report for a drug test as mandated by FRA regulations. However, FRA regulations did not require testing in these circumstances.

The Organization further argues that Carrier's drug and alcohol policy also did not provide a basis for requiring the test. The Organization maintains that all witnesses agreed that Claimant was not suspected of being under the influence of drugs or alcohol, that he did not violate any safety rules and that the rail locks were not his responsibility. The Organization contends that Claimant did not walk off the job to avoid being tested. Rather, he waited for more than an hour after the accident and left only after securing permission from the bridge operator. Moreover, in the Organization's view, Claimant's subsequent negative drug screen demonstrates that Claimant's refusal was not a deliberate attempt to hide illicit drug use.

Carrier contends that it properly withheld Claimant from service in accordance with Rule 48(o). On the merits, Carrier argues that it properly instructed Claimant to return for a drug test in accordance with its drug and alcohol policy. Carrier

maintains that under its policy, it tests all employees involved in an accident or similar incident unless a railroad representative can immediately determine that a specific employee had no role in the cause or severity of the accident or incident. In the instant case, according to Carrier, it could not be immediately determined that Claimant had no role in the incident and, therefore, Carrier acted properly in requiring him to be tested.

We consider the procedural argument first. We find that Carrier did not violate the Agreement by withholding Claimant from service. Rule 48(o) authorizes Carrier to withhold an employee from service for alleged serious and/or flagrant violations. Insubordination, in violation of Rule 1.6, is a serious violation.

We now turn to the merits of the dispute. There is no dispute that FRA regulations did not mandate testing in the circumstances of this case. Carrier's Drug and Alcohol Policy, Section III(E) provides:

> Union Pacific, on its own management prerogative or pursuant to existing collective bargaining agreements, will require reasonable cause drug and alcohol testing all safety-sensitive employees . . . in any one of the following situations:
>
> 1. An accident or incident in which drug or alcohol testing is not mandatory under FRA or FHWA regulations may require testing under Union Pacific authority. If the railroad representative can immediately determine, based on specific knowledge or information, that the individual employee had no role in the cause or severity of the accident/incident, then that employee shall be excluded from testing; or
>
> 2. Violation of any safety or operating rule which has the potential to result in a train accident and/or personal injury to self or others or actually results in personal injury or significant property damage;
>
> . . . . .

The parties dispute which authority Carrier relied on in directing Claimant to be tested. The ARSA Supervisor testified that he told Claimant the test was a matter of FRA and company requirements. Claimant testified that only FRA requirements were referenced. However, the Director of Bridge Maintenance, who made the decision to test Claimant and the bridge operator, testified that he relied on Carrier's policy and not FRA

regulations. He further testified that he relied on advice from the head of Carrier's drug testing program.

We find that whether the ARSA Supervisor referenced FRA regulations, either alone or in combination with Carrier policy, when directing Claimant to return for a drug screen is irrelevant. Claimant did not maintain that he was misled by references to FRA regulations. He did not refuse to be tested because he believed that the test was erroneously ordered pursuant to FRA regulations. Rather, Claimant refused to take the test because he was upset that Carrier had not instructed him to be tested before he left the property and because Carrier had not tested employees involved in a prior incident which Claimant maintained had threatened his safety.

In his testimony, the Director of Bridge Maintenance cited the express language of Section III(E)(2) of carrier's policy. We are not persuaded by the Organization's attempt to confine Carrier to Section III(E)(2) to justify the order that Claimant be tested. The Director of Bridge Maintenance testified to the following factual basis for the test:

> There was (sic) three possibilities that could have caused this to happen. One was an electronic failure that caused the rail locks to reengage. The second one, was that the person that manually threw the wedges out on the span locks, had not observed the rail locks when he was going down and possibly he threw them, the wedge locks out before the span locks had cleared. If that takes place the dogs will trip the electronic units up in the rail locks and cause them to not to disengage.
>
> And three, the third possibility was that the operator of the bridge had hit the override button, which will allow the wedges to clear, and allow him to lift the span. And due to those, we called for a drug test on everybody that was involved in the incident.

The Director of Bridge Maintenance's explanation of the basis for the test clearly did not reference a belief that either employee to be tested had violated a safety rule. Rather, it clearly referred to Carrier's inability to rule out involvement of either employee, a situation covered by Section III(E)(1). Indeed, Claimant testified that for this reason he expected to be tested. He related that the Signal Supervisor had accused Claimant of failing to observe that the rail locks had not yet been released, and he expected to be tested because of this accusation. Accordingly, we find that Carrier acted under Section III(E)(1).

We further find that Section III(E)(1) provided authority for Carrier to require Claimant to be tested. There is

conflicting testimony concerning whether Claimant was in a position to observe and over whether he was responsible for observing the condition of the rail locks at the time of the incident. Whether Claimant in fact should have observed that the rail locks were not yet released is beside the point. Under Section III(E)(1), the critical question is whether Claimant's involvement could be ruled out. Clearly, at the time the instruction to report for a drug test was given, the railroad representative could not immediately determine, based on specific knowledge or information, that Claimant had no role in the cause or severity of the accident/incident. Accordingly, we conclude that the drug test requirement was made on proper authority and that Claimant was insubordinate in refusing to take the test.

Insubordination, particularly insubordination in the form of an unjustified refusal to take a drug test, is a very serious offense. Under Carrier's UPGRADE policy, an insubordinate employee is subject to dismissal. Under these circumstances, we cannot say that dismissal was arbitrary, capricious or excessive.

AWARD

Claim denied.

Martin H. Malin, Chairman

D.A. Ring,
Carrier Member

R.B. Wehrli
Employee Member

Dated at Chicago, Illinois, October 28, 1998.

ORGANIZATION MEMBER'S DISSENT

TO

AWARD NO. 9 OF PUBLIC LAW BOARD NO. 6089
(Referee M. H. Malin)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the award is not based on the on-property handling. Such is the case here.

On page 5 of the Award the majority indicates the following:

> *"Clearly, at the time the instruction to report for a drug test was given, the railroad representative could not immediately determine, based on specific knowledge or information, that Claimant had no role in the cause or severity of the accident/incident."*

It appears that this conclusion is based, at least in part, on their statement shown on page 5 of the award as follows:

> *"...Claimant testified that for this reason he expected to be tested. He related that the Signal Supervisor had accused claimant of failing to observe that the rail locks had not yet been released, and he expected to be tested because of this accusation."*

Clearly, as the majority indicates, the above was the testimony of the "*Claimant*". There was absolutely no evidence presented at the investigation that indicated this was the Carrier's position. To the contrary, as pointed out on pages 5 and 6 of the Organization's submission, there was significant testimony presented by Carrier Witnesses, i.e. Messrs. Edwards, Kernan and Marlan, which was reiterated by Hearing Officer Oakden, that clearly established the railroad had determined in line with Section III (E) 1. of its policy that, based on specific knowledge and information, the Claimant had no role in the cause or severity of the incident.

While the majority makes reference on page 4 of the award to B&B Supervisor Edwards' testimony indicating there were three (3) possibilities that could have caused the incident, the Organization member directed the Board's attention to the unambiguous testimony of the same Mr. Edwards as shown on page 24 of the hearing transcript that clearly established that the railroad ruled out the Claimant's possible connection with any one of the three (3) possibilities. That quote is as follows:

"This whole incident is taken that at that particular time Mr. Williams responsibility was to go down and to check to see if the things were open, it was clear to throw the wedge locks, so it would dis-engage from the span locks, so that the bridge was safe to move. ***At that time, Mr. Williams done as he was required."***

The quotes of the other Carrier witnesses, as shown on page 24, reflect the same fact of the matter.

As the testimony of the Carrier witnesses indicates, the Carrier's position at the time of the incident was that Claimant had no role in the cause or severity of the incident. In light of this fact, the conclusion of the majority that *"...the drug test requirement was made on proper authority"* is without foundation or merit. Further, the drug test requirement in this particular case should have, therefore, been correctly categorized by this Board as random testing and invalid.

One additional point, on page 1 and 2 of the award, it is correctly stated that "*The rail locks were controlled by the signal department.*" This correct conclusion coincided completely with the Carrier's view of the situation and provided the basis for the Carrier witnesses and the hearing officer to agree that the Claimant "*... done as he was required.*" As a result, one must ask ***"How could Claimant have a role in the cause or severity of the incident if, as the record shows, the rail locks were out of the Claimant's control and 'he done as he was required?"***

It is this Board member's opinion that the majority ignored the obvious facts developed on the property in this case, presenting a position that is unfounded and contradictory in nature. As a result, it is believed this award is palpably erroneous, of no precedential value and I, therefore, dissent.

Respectfully submitted,

R. B. Wehrli
Organization Member

CARRIER MEMBER RESPONSE
TO
ORGANIZATION MEMBER'S DISSENT
TO
AWARD NO. 9 OF PUBLIC LAW BOARD 6089
(Referee Martin H. Malin)

The Referee in this case did not err in his decision to deny the claim. Contrary to the assertion of the Organization Member the Award is based on ample precedent and therefore is not palpably erroneous. The Carrier considers the Award to have precedential value and will cite the findings in similar disputes.

In his "Dissent" the Organization Member dwells on the issue of whether or not the Carrier could require a drug test in the course of the accident investigation. As pointed out on Page 4 of the Award, the Director of Bridge Maintenance testified the factual basis for the test was one of three things: (a) that the locks were engaged and Claimant did not see them; (b) that the other operator hit the override button and raised the bridge; or, (c) that there was an electronic malfunction. Consequently, the conclusion of the Organization Member that the Claimant had been ruled out of having a possible role in the cause or severity of the accident is misplaced.

Further, it is incumbent upon the Carrier Member to point out that the Organization Member's "Dissent" is predicated upon events and testimony that transpired subsequent to the incident under investigation. For example, the reference of whether or not the Carrier could require the Claimant to submit to a drug screen was never an issue until the BMWE Representative raised it at the Disciplinary Hearing. The Organization Member adeptly skirts the charges contained in the Notice of Hearing and does not address the alleged violation.

The Organization Member's "Dissent" fails to address the actual charge. The Notice of Investigation and Charge concerned whether or not the Claimant was insubordinate when he lost his temper and used vulgarity to the Supervisor and Special Agent as he was being instructed to report for a drug screen in connection with the accident investigation. Based upon his actions and his admission, the Board was correct in finding that "*Insubordination, particularly insubordination in the form of an unjustified refusal to take a drug test, is a very serious offense.*" The discipline was therefore justified.

While the Organization Member would apparently like to reargue his "ex parte" submission, in order to avoid writing a rebuttal submission, the Carrier Member simply affirms the Carrier's position that the Award is correct, has precedential value and will be applied.

Respectfully submitted,

D. A. Ring
Carrier Member