NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6790

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 1
and)
) Award No. 1
THE ALTON AND SOUTHERN RAILWAY COMPANY)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: November 15, 2004

STATEMENT OF CLAIM:

1. The dismissal of Trackman Danny O. Chapman for his allege second violation of Rule 1.5 of the General Code of Operation Rules on Tuesday, November 18, 2003 was without just and sufficient cause and in violation of the Agreement (Carrier's File 1391054 D).

2. As a consequence of the violations referred to in Part (1) above, Trackman Danny O. Chapman shall now be returned to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

FINDINGS:

Public Law Board No. 6790, 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 December 1, 2003 Carrier notified Claimant to appear for an investigation on December 4, 2003. The notice charged Claimant with a second violation of Rule 1.5 on November 18, 2003. The hearing was postponed to and held on December 22, 2003. On January 6, 2004, Claimant was notified that he had been found guilty of the charge and dismissed from service.

There is no question that Carrier proved the charge by substantial evidence. The results of the drug test administered to Claimant were positive for cocaine. There were no irregularities in the testing procedure. Moreover, Claimant admitted using cocaine and admitted that he was guilty of the charge.

The critical issues in this case are procedural. The claim turns on whether the dismissal of an admittedly guilty Claimant should be overturned on the ground that Carrier violated Rule 20A(a). The Rule provides:

> An Employee in the service sixty (60) calendar days or more, and whose application has been approved, will not be dismissed, or otherwise disciplined, without being given a fair and impartial hearing. If the offense is considered sufficiently serious, the employee may be suspended pending the hearing and decision. At the hearing, the employee may be assisted by representatives of the Brotherhood of Maintenance of Way Employees. The hearing will be held within ten (10) calendar days of date when charged with the offense or held out of service. Decision will be rendered within fifteen (15) calendar days after completion of hearing. Prior to the hearing the employee and his General Chairman will be notified in writing of the specific charges against him, after which he will be allowed reasonable time for the purpose of having witnesses and representatives of the Brotherhood of Maintenance of Way Employees present at the hearing.

The Organization advances the following procedural arguments that warrant discussion.[1] 1. The hearing scheduled for December 4, 2003, was untimely because it was more than ten calendar days after Claimant was withheld from service. 2. Claimant and his representative were given insufficient notice of the December 4, 2003, hearing. 3. Carrier improperly unilaterally postponed the December 4 hearing to December 22, 2003. We shall consider each argument in turn.

1. Timeliness of the Hearing Scheduled for December 4, 2003. As quoted above, Rule 20A(a) requires that the hearing be scheduled within ten calendar days of the date an employee is held out of service. The parties dispute when Claimant was held out of service.

The record reveals that on November 18, 2003, Claimant was one of several employees selected for a random drug test. Claimant provided a urine sample which was rejected because it was adulterated. At around 8:45 a.m., Claimant was instructed to provide a second sample, this time under direct observation. At 11:30 a.m., the Director Track Maintenance learned that Claimant had yet to provide the second sample. Because an employee who fails to provide a sample within three hours is considered to have refused to provide a sample, the Director Track Maintenance spoke with Claimant and counseled him to provide the sample. Claimant eventually did so and the process concluded at approximately 1:45 p.m. However, when Claimant provided the second sample, he initially urinated into the stool and had to be told to urinate into the collection cup.

The Director Track Maintenance testified that because of the suspicious nature of the specimen collection, he decided that Claimant should not work until the results of the test were

[1]The Organization has advanced other procedural arguments which we find so lacking in substance as not to warrant specific discussion.

received. He further testified that he drove Claimant home, told Claimant to remain off the property until the test results were received and told Claimant that he would be paid during this interval. Claimant testified and denied that the Director Track Maintenance told him he would be paid, but on further examination by the Hearing Officer, stated that the Director did not say he would not be paid. Carrier credited the testimony of the Director Track Maintenance. We see no reason to deny the credibility determination made on the property the deference to which it is generally entitled.

Because Claimant was still under pay during the days following November 18, 2003, he was till in the service of the Carrier and was subject to any reasonable, lawful directive not in violation of the Agreement. The Agreement does not prohibit Carrier from directing an employee to stay home and still be paid. Indeed, in light of Claimant's very suspicious behavior during the sample collection, Carrier's directive to him to stay home and be paid was most reasonable. Accordingly, we conclude that Claimant was not held out of service until Carrier ceased paying him and that the December 4 scheduled date of the hearing was within ten calendar days of the date Claimant was held out of service.

2. Sufficiency of the December 1, 2003, Notice. The Organization argues that the December 1 notice provided insufficient time for Claimant and his representative to prepare for the December 4 hearing. Furthermore, the Organization observes, Claimant did not receive the notice until December 12, i.e., eight days after the scheduled date of the hearing.

We observe first that Claimant did not receive the notice until December 12 because that was the date he picked it up at the Post Office. Carrier mailed the notice certified mail on December 1. In so doing, Carrier complied with its obligation under the Agreement. However, Carrier took further steps to protect Claimant's rights. On two occasions on December 2 and three occasions on December 3, Carrier attempted to hand deliver the notice to Claimant's residence. Each time, Claimant was not there. Of course, Claimant knew he had used cocaine, knew that Carrier was awaiting the results of the November 18 drug test, and knew that because he had used cocaine the test would very likely come back positive. Under these circumstances, it is reasonable to infer from Claimant's failure to pick up the notice at the Post Office prior to December 12 and his failure to be at home on five occasions at different times of the day that Claimant was seeking to avoid service of a notice of investigation that he understood would be forthcoming. Claimant may not avoid service and then contend that service was not timely. As indicated above, Carrier more than complied with its notice obligations under the Agreement.

As to the sufficiency of the time to prepare for the December hearing, we note that the Agreement does not specify a minimum number of days' notice that must be given. The only evidence in the record as to the practice on the property was another notice that the Organization represented to be typical. That notice was issued two days before the date on which the hearing was scheduled. Moreover, given that Claimant admitted his cocaine use and his guilt and had no witnesses to call, we fail to see how providing additional days of notice would have assisted Claimant in any way or how the provision of three days' notice prejudiced Claimant in any way. We conclude that by issuing the notice on December 1 and mailing it certified mail Carrier

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complied with Rule 20A(a).

3. Unilateral Postponement. The Organization is correct when it urges that Carrier unilaterally postponed the hearing from December 4 to December 22. However, Carrier did so because Claimant and his representative failed to show up for the December 4 hearing. Carrier could have proceeded with the hearing on December 4 in absentia. The unilateral postponement was done for the sole purpose of affording Claimant and his representative another opportunity to attend and present a defense. It would be a perverse reading of the Agreement to hold that by going the extra mile to afford Claimant due process Carrier violated his procedural rights in a manner that requires overturning his dismissal. We decline to engage in such perversity.

Accordingly, we hold that Carrier did not violate Rule 20A(a). We turn to the penalty imposed. This was Claimant's second Rule 1.5 violation. The record reflects that in 2001, i.e. less than ten years prior to the instant Rule 1.5 violation, Claimant tested positive in violation of Rule 1.5 and was allowed to participate in Carrier's Rehabilitation Education Program. The instant 1.5 being Claimant's second drug offense, we cannot say that the penalty of dismissal was arbitrary, capricious or excessive.

AWARD

Claim denied.

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, February 10, 2005