

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1049

JOHN C. FLETCHER, CHAIRMAN & NEUTRAL MEMBER
E. N. JACOBS, JR., CARRIER MEMBER
RICHARD A. LAU, ORGANIZATION MEMBER

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NORFOLK SOUTHERN RAILWAY COMPANY

Award No. 76
Case No. 76

Date of Hearing - August 1, 1997
Date of Award - December 27, 1997

Statement of Claim:

1. The dismissal of Machine Operator R. D. Lanham for his alleged failure to cooperate with the rehabilitation required by DARS in connection with the improper urinalysis conducted on February 13, 1996, was without just and sufficient cause and in violation of the Agreement (System File RDL0896/MW-ATLA-96-08).
2. Machine Operator R. D. Lanham shall now be reinstated to service with seniority, vacation and all other rights unimpaired and he shall be compensated for all wage loss suffered.

FINDINGS:

Special Board of Adjustment No. 1049, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute(s) herein; and, that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

At the time of the incident giving rise to Claimant's dismissal he had been employed as a Machine Operator for approximately six years. On February 5, 1996, Claimant was enroute from his home to his work site, but could not complete the trip because of icy road conditions. After notifying Carrier of his inability to report for work that week he started the return trip to his home. On the way he sustained a neck and back injury while assisting a stuck motorist. He was treated for this injury by his personal physician.

On February 12, 1996, Claimant presented Carrier with a return-to-work release from his doctor. Carrier's supervisor sent Claimant to a Company doctor to determine his ability to safely perform the duties of his position. As a

part of that examination, which occurred on February 13, 1997, Claimant provided a urine sample for a drug screen. That sample tested positive of marijuana. Claimant was timely notified of the positive results of his drug screen, and was instructed to participate in Company's DARS program.

On April 3, 1996, in a meeting with a Carrier DARS counselor, Claimant was told that the counselor felt that he had an addiction. Claimant walked out of the session and ceased to participate further in the program. On April 4, 1996, Claimant was notified that to be eligible to return to work it would be necessary to complete a rehabilitation program and submit a negative urine sample. Claimant refused.

Claimant was cited to attend an investigation on a charge that he failed to cooperate with DARS and failed to follow instructions from Company's doctor. Following the investigation Claimant was dismissed.

The Organization has appealed the dismissal on a variety of grounds, both procedural and substantive. The Board has studied the record and concludes that Organization's procedural and substantive arguments lack merit. For example it has been argued that Carrier was not privileged to require Claimant to submit to a physical examination upon his return to work on February 12, 1996, thus everything occurring afterwards is somehow or other flawed. This contention is frivolous. While off-duty Claimant sustained an injury serious enough to require that he visit a doctor and receive treatment. He presented Carrier with a return-to-duty release from the doctor. In light of the type of injury involved, back and neck, and the potential for re-injury - with attendant liabilities on the employer - it was prudent for Carrier to ensure that Claimant was physically able to work safely before allowing him to return to work. Claimant was not singled out for random testing as suggested. He was given an appropriate physical examination to determine if he was able to return to work following an off-duty injury that required medical attention, and all such examinations include drug screen.

Another example of alleged procedural defect concerns the failure of Carrier to have five witnesses, co-workers, available to testify at the investigation. Claimant said these witnesses were necessary because they observed his condition on February 12, 1996, upon his return to work when his supervisor said he was holding his neck in a peculiar manner, causing concern over his ability to work, and the need for a fitness-for-duty examination. While this Board subscribes to the notion that the failure of Carrier to provide essential witnesses at a hearing flaws the investigation, this is not the situation here. It is not lay person observations of Claimant's condition at the time he returned to work that is the issue here, but, rather, the issue is his refusal to continue in DARS after a drug screen indicated positive for marijuana. In the circumstance involved in Claimant's return to work on February 12, 1996, Carrier was entitled to require that he present himself to a Company doctor for a physical examination, regardless of what the supervisor and/or other lay persons may have observed his condition to be.

Claimant also contends that FRA regulations were not followed or were misapplied in this matter. Carrier has said that these arguments concern the validity of the drug screen itself, and that is a separate matter from that which

was involved in the investigation - Claimant's failure to cooperate with DARS and his failure to follow instructions of its doctor. Carrier says that matters concerning the drug screen and its validity have not been made the subject of a grievance, and now Claimant is barred from doing so because of the time limit requirements provided in Rule 42. With this the Board agrees.

Before this Board the Organization and Claimant emphasized its belief that subjecting Claimant to the drug screen was improper, and this requires that everything that occurred afterwards be considered null and void. Also, issue was taken over the cutoff measure of marijuana metabolites used. Etc. These contentions ignore a fatal point, Grievant showed up for work with measurable amounts of marijuana metabolites in his system and then he refused to cooperate with DARS. It is the failure to cooperate with DARS that caused his discharge.

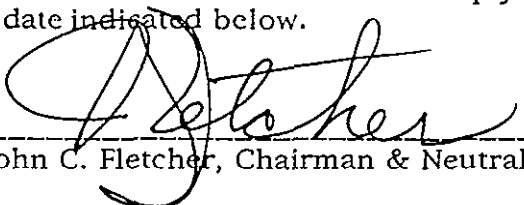
Nonetheless, this Board is willing to afford Grievant a new opportunity to cooperate with DARS in an effort to secure his job back. Within thirty days of the date of this Award, Grievant is directed to present himself to Carrier's DARS counselor and commence participation in a prescribed program. If Grievant successfully completes this program, within an appropriate time period, and provides the necessary clean sample free of prohibited substances, he shall be returned to service with full seniority and benefits, but without compensation for time lost while out of service. In the event that Grievant fails to present himself to the DARS counselor as provided above, or fails to complete the program, his discharge resulting from the investigation held on August 7, 1996 shall not be disturbed.


A W A R D

Claim sustained only to the extent indicated above.

O R D E R

Carrier and Claimant are directed to comply with this Award within thirty days of the date indicated below.


John C. Fletcher, Chairman & Neutral Member


E. N. Jacobs, Jr., Carrier Member


Richard A. Lau, Employee Member

Dated at Mt. Prospect, Illinois., December 27, 1997