

Org. File 492-57-1221
Co. File TRN 8-S-10

Decision No. 5813
Case 1314
Supplemental List No. 91

SPECIAL ADJUSTMENT BOARD NO. 18
(Train Service Panel)

PARTIES TO DISPUTE: United Transportation Union -
Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM: Request of Brakeman Thomas A. Fortna-Hanson, Sacramento District and Division, for reinstatement to service with seniority unimpaired and for replacement of wage loss and productivity credits stemming from his return to dismissed status on October 15, 1986 (without benefit of an investigation), following his conditional reinstatement to service on December 18, 1985. He was first dismissed on September 18, 1985 because of his violation of Rule G and of Rules and Regulations of the Transportation Department.

The claim includes a request that the superintendent convene promptly an investigation into the facts surrounding Claimant's return to dismissed status on October 15, 1986.

STATEMENT OF FACTS: In September 1985, based on a positive toxicological test for marijuana, the Claimant was charged with violating Rule G. After a formal investigation, the Claimant was dismissed on September 18, 1985. Subsequently, an appeal was presented to Superintendent M. L. Wells. Later, the Claimant went through a five-day clinical evaluation and it was determined that Claimant was not addicted and no drug rehabilitation was required.

On December 18, 1985, the Superintendent sent the Claimant's Local Chairman the following letter:

"Reference case of former Switchman T. A. Fortna-Hanson who was dismissed from service on September 18, 1985, for violation of Rule "G" of the Rules and Regulations of the Transportation Department, Southern Pacific Transportation Company.

"Based upon the recommendations of Family Assistance Counselor, Mr. Murray K. Eyford, I am agreeable to reinstating Mr. Fortna-Hanson to service effective January 6, 1986, with the following conditions:

"1. Mr. Fortna-Hanson may return to work with seniority unimpaired but without compensation for time lost.

- "2. Mr. Fortna-Hanson will be on probation for at least two years, and any credible evidence showing that he has deviated from complete abstinence from alcohol and other drugs will result in automatic removal from service and return to dismissed status.
- "3. Mr. Fortna-Hanson will submit to random unannounced alcohol and/or drug tests.
- "4. At the end of the two-year period, the Employee Assistance Counselor will make recommendation as to whether probation should be continued or terminated.
- "5. Mr. Fortna-Hanson must pass a carrier-directed medical examination demonstrating the ability to meet the physical demands of the job assignment to which returning.
- "6. You or the General Chairman must also acknowledge and agree to the conditions of the reinstatement."

The Claimant and the Local Chairman signed the Agreement and the Claimant was reinstated. Thereafter, the Claimant submitted urine samples on a random basis between April and October 1986. The October 8, 1986 sampling resulted in an indication of the presence of cannabinoids (marijuana). The Carrier's normal testing procedure of two different preliminary tests (TLC and EIA) by GS/MS showed a positive result for marijuana. A level of 33 NG/ML. By letter dated October 15, 1986, Superintendent M. L. Wells advised Claimant that he was returned to dismissed status by virtue of failing to have abided by Item No. 2 of his conditional reinstatement. The letter read as follows:

"This refers to reinstatement letter dated December 18, 1985, wherein you were reinstated to service on a conditional basis for violation of Rule "G" of the General Code of Operating Rules of the Southern Pacific Transportation Company.

"As a condition of that reinstatement, Item 2 of that letter states:

"'Mr. Fortna-Hanson will be on probation for at least two years, and any credible evidence showing that he has deviated from complete abstinence from alcohol and other drugs will result in automatic removal from service and return to dismissed status.'

"and Item 3 states:

"Mr. Fortna-Hanson will submit to random unannounced alcohol and/or drug tests."

"On October 8, 1986, you were requested to accompany Mr. M. G. Deem, Assistant Terminal Superintendent, to the Roseville Community Hospital to submit to a random drug test. The result from the random drug test shows marijuana to be present in your urine.

"Therefore, you have violated the conditions of your reinstatement and you are returned to dismissed status."

On January 6, 1987, a different Local Chairman presented an appeal to the Superintendent on the sole basis that the Claimant was not afforded an investigation. The appeal was denied January 26, 1987. Next, an appeal for reinstatement to service with seniority unimpaired and compensation for time lost was progressed to the Carrier's highest designated officer on January 5, 1988. By letter dated February 1, 1988, the General Chairman supplemented his letter of January 5, 1988, requesting a formal investigation be held in connection with Claimant's October 15, 1986 dismissal. By letter dated February 4, 1988, the Carrier's highest designated officer denied the claim and the request for the formal investigation. Next the Local Chairman, on February 28, 1988, renewed his request for an investigation.

On March 2, 1988, Employee Assistance Counselor, Mr. M. K. Eyford, referred Claimant to Lackner Clinic for assessment and evaluation regarding drug use. Lackner Clinic determined rehabilitation would not be needed. Upon recommendation of Mr. Eyford, Superintendent Lynch, by letter dated April 11, 1988, advised the Local Chairman Johnson that he was agreeable to reinstating the Claimant under the following conditions:

- "1. Mr. Fortna-Hanson may return to work with seniority unimpaired without compensation for time lost.
- "2. Mr. Fortna-Hanson will be on probation for at least two years, and any credible evidence showing that he has deviated from complete abstinence from alcohol and other drugs will result in automatic removal from service.
- "3. Mr. Fortna-Hanson will submit to random unannounced alcohol and/or drug tests.
- "4. At the end of the two-year period, the Employee Assistance Counselor will make recommendation as to whether probation should be continued or terminated.

- "5. Mr. Fortna-Hanson must pass a carrier-directed medical examination demonstrating the ability to meet the physical and emotional demands of the job to which returning.
- "6. The General Chairman of Local Chairman of the labor organization representing the employee will be made aware of the conditions of the reinstatement. Before the employee is reinstated, the General Chairman or Local Chairman must also sign the reinstatement."

By letter dated April 19, 1988, Claimant responded to Superintendent Lynch's offer of reinstatement advising he was not agreeable to item Nos. 1 and 2, desiring "... the right to appeal my dismissal of October 15, 1986, for compensation for all time lost and (2) the right to a ... formal investigation" Superintendent Lynch denied Claimant's request for conditional reinstatement without prejudice to his claim for lost compensation and his request for a formal investigation by letter dated May 18, 1988.

FINDINGS: The Board finds, after hearing upon the whole record and all evidence that the Parties herein are Carrier and Employe within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement and it has jurisdiction of the Parties and the subject matter, and that the Parties were given due notice of the hearing held.

DECISION: The Organization's submission before the Board largely represents an attempt to (1) overturn the Carrier's drug testing and rehabilitation policy which has been previously validated by this Board and (2) to overturn the Board's decision in Decision No. 5750 which upheld the validity of conditional reinstatement after Rule "G" violation, wherein an employee agrees to return to a dismissed status in the event the conditions of their probation are violated. More specifically, it was held in Decision No. 5750 that under such circumstances the employee isn't entitled to a formal investigation under Article 57 Section B(1). Instead, if they wish to challenge their reversion to a dismissed status they must do so under Article 57 Section A. It was stated:

"In this case, there is a factual dispute. While an employe can--as Mr. Howard did--waive his right to an investigation as a condition of a probationary reinstatement, the Carrier's right to take future disciplinary action is not unchecked. The Carrier must have a factual basis for their action and the

Organization must have a vehicle to challenge those actions.

"The vehicle isn't Article 57 Section B (1) but Article 57 Section A which states:

"Section A. If a trainman believes he has been treated unjustly, he has the right to present his case, in writing, or through his Local Chairman, to the Superintendent with such evidence as he has to offer. The Superintendent will investigate the matter and render his decision in writing without unnecessary delay. If such decision is unsatisfactory to the trainman, on written notice to the Superintendent it may be appealed to the delegated general officer. The General Chairman, UTU, will be furnished a copy of the decision rendered on appeal.'

"Thus, where a Carrier returned an employe to dismissed status the Organization may challenge that action. When challenged, the Superintendent is obligated to adequately investigate the matter and render his decision in writing. Moreover, the decision of the Superintendent must be supported by sufficient evidence to justify their action."

The Board does not intend to change or waiver in its stance on the issues presented in Decision 5750. However, we will, for the sake of clarification and emphasis, expand upon our reasoning. First, an employee with the participation of the Union, can waive their right to an investigation under Article 57 Section B (1). Moreover, there is nothing preventing the Carrier from making this a requirement for reinstatement after an employee has been found guilty, during the course of a previous investigation, of violating Rule "G". For instance, Article 57 Section J doesn't so prohibit since it is subordinate to the application of Article 57 Section B which under these circumstances isn't applicable.

The fact is that the Employer, in offering conditional reinstatement on the terms presented to Mr. Fortna-Hanson, is essentially asking the employee to agree to revert to dismissed status and essentially have his case decided on the basis of the original investigation. This requirement must be viewed in light of one other fact that this Claimant and his Local Chairman have lost sight of. This is that the Claimant violated Rule "G" in the first instance and was discharged for a very serious rule violation. The fact the Carrier offers the Claimant a second or even third chance in some cases (with stringent restrictions) isn't offensive when viewed in light of the fact a second or third

chance is more than many employers ever give employees found to have significant amounts of illegal drugs in their system.

Permanent discharge on the basis of a single violation of Rule "G" has been upheld many, many times.

Thus, the distinction between this and other discipline cases is that the Claimant had previously committed a dischargeable offense (based on a Article 57 Section B (1) investigation) and in order for him to get his job back has, in effect, thrown himself on the mercy of the Carrier. He violated Rule "G" in the first instance and from that point is on the outside looking in. Clearly, in offering the Claimant an opportunity to return to the fold, it is not unreasonable for the Carrier to require, as a condition of reinstatement, that an Article 57 Section B (1) investigation be waived, and that the Claimant revert back to his original status, and thus, to have his future employment rights be governed ultimately by the facts of the "original" offense.

The Board is empathic to the comments of the Claimant in his presentation before the Board. For instance, we note that he indicates in his presentation to the Board that he signed the original reinstatement agreement under financial distress. While we can't do anything about that we can state that if this Claimant or any other Claimant believes that in the first instance (in this case the September 8, 1985 charge), they are not guilty and find the conditions of reinstatement onerous, then they shouldn't sign such an agreement. They should progress their claim to the Board. If the facts show they are not guilty they will be exonerated. Yet they should also be advised that if guilty the Board will uphold their discharge and their only chance of returning to work in that case is participation in the Carrier's program. This is a decision they must weigh and make.

We also take the Claimant as sincere when he stated to the Board he would not have signed the original reinstatement agreement if he understood he was waiving his right to an investigation. However, if he had some questions as to its meaning he should have addressed them to his Local Chairman at that time. Yet, for the future we will direct the Carrier to modify the language in its reinstatement agreements to make the waiver of a investigation under Rule 57 Section (B), clear and unmistakable.

The Claimant should also realize that since the issuance of Decision No. 5750 it has been the position of this Board that an employee, in the Claimant' situation, is not without an avenue to challenge the results of random drug tests, taken pursuant to a conditional reinstatement agreement. The employee or his representative can raise the issue under Article 57 (A).

Specifically, the employee or his local chairman can state their case in writing as to why they believe the positive test to be false and/or not to be cause for reverting the employee to a dismissed status. The Superintendent must investigate and respond to these allegations. At a minimum the Superintendent must be able to establish that the sample was collected, sealed, labeled and shipped to the laboratory in accordance with the precise procedure previously validated by this Board. Moreover, he must provide evidence that the control or accession number of the sample is the same as on the report and that the three confirmatory tests showed the employee tested positive in violation of Rule "G".

In this case the initial protest never made any substantive challenge to the test. The only issue raised was the fact an investigation under Article 57 Section (B) was not held. Since this original protest had no merit, the only remedy we can order is a renewal of the Carrier's offer of April 11, 1988.

AWARD

The Carrier is ordered to offer the Claimant reinstatement per its letter of April 11, 1988.

Gilbert H. Vernon
Gilbert H. Vernon
Chairman and Neutral Member

P. G. Sears
P. G. Sears
Carrier Member

Glynn Gallagher
Glynn Gallagher
Employee Member

Dated this 21st day of September 1988
San Francisco, California.