SPECIAL ADJUSTMENT BOARD NO. 180

AWARD NO. 1261
NMB CASE NO. 1261
UNION CASE NO.E-27403-32-21(g)
COMPANY CASE NO. BLE D94-32.
NMB Subject Code: 119

PARTIES TO THE DISPUTE:

UNION PACIFIC RAILROAD COMPANY
(Western Lines)

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM:

Claim of Los Angeles District Engineer L.K. Thuai for reinstatement to the service of the Company with full seniority and all other employment rights restored, and that he be compensated for all time lost, including supplemental credits, in connection with his dismissal from service on June 27, 1994, until he is returned to service. Further, Claimant's annual vacation rights should be restored, and he should be compensated accordingly. In addition, Claimant's personal record should be completely expunged of any notation or record pertaining to this case.

OPINION OF THE BOARD:

The facts giving rise to this claim are not basically in dispute. Following a positive test for marijuana use in September 1993, Engineer L.K. Thuai ("Claimant") was initially dismissed by letter of September 28, 1993; but subsequently reinstated subject to conditions set forth in a letter of January 26, 1994. In accepting the Carriers' terms, Claimant and Local Chairman D. W. Hannah entered into an agreement stipulating, among other things, Claimant agreed to totally abstain from the use of alcohol and drugs and submit to random unannounced drug/alcohol screening for a period

of two (2) years.

In a subsequent random test , Claimant furnished his urine for toxicological testing on May 25, 1994, just four months after his conditional reinstatement, Claimant tested positive again for metabolites of marijuana. Carrier was notified by SmithKline Beecham Clinical Laboratories on June 3, 1994 that Claimant had tested positive, but, inexplicably, Carrier allowed Claimant to continue to work as an Engineer for six (6) more days until he voluntarily marked off sick on Thursday, June 9, 1994. He was cited for violation of Rule 1.5 by letter and Notice of Investigation dated Monday, June 13, 1994, and the formal investigation was scheduled and held on Friday, June 17, 1994.

It is noted that the certified return receipt on the June 13, 1997 Notice of Investigation, which expressly specified "Deliver to Addressee Only" was returned to Carrier signed by one "Roger Gatson". Claimant did not appear for the hearing on June 17, 1994; but his BLE representative, who did appear, requested an adjournment for time to locate Claimant, ascertain if he was aware of the hearing and seek his input in preparing a defense to the charge. The Carrier Hearing Officer peremptorily denied that request and proceeded with a hearing *in absentia*, over the objections of the BLE representative. Claimant was advised by Superintendent M. L. Wells that he was found guilty for violation of Rule 1.5 and Item No. 3 of his conditional reinstatement letter of January 26, 1994 and he was dismissed from the service of the Southern Pacific Transportation Company, effective June 27, 1995

We find persuasive the Organization's premise that, by proceeding *in absentia* in the face of *prima facie* evidence that Claimant had not received the Notice of Hearing and over the objections of the BLE representative, Carrier's Hearing Officer violated the fundamental right of the accused employee to assist in his defense and confront the charge against him in a fair and impartial hearing.

No good reason was advanced for proceeding to hearing on such short and ineffective notice, there is no explanation why a moderate adjournment would have prejudiced Carrier and the prejudice to Claimant and the Organization representative responsible for defending him was fatal.

Additionally, we note that Claimant's first Rule G (Rule 1.5) violation was prior to Carrier's February 1, 1994 Rule G policy change and Claimant's second violation (the instant case) was soon after that Rule G policy change. Under the previous policy in effect on the occasion of Claimant's first violation and Conditional Reinstatement, an employee who had two Rule G violations could receive consideration for reinstatement after the second violation, provided the Employee remained out of service for at least one year and received a favorable recommendation from the EAP counselor. Under the new policy, effective there was no opportunity to be considered for reinstatement after a second Rule G violation. By letter, dated April 11, 1994, the BLE General Chairman stated in pertinent part as follows:

> "Further, without prejudice to the position set forth in mine of January 28, 1994, if the Carrier intended to implement a new Rule G Policy, every employee should have been considered as being on the same, even basis. In other words, no previous instances of Rule G that occurred prior to the date of the new policy implementation should be held against them."

Carrier responded by letter, dated April 15, 1994 suggesting a conference to discuss the matter but, with the demands of the UP/SP merger, the Parties were unable to get together for that conference and that aspect of this case is still open. However, we do not sail in uncharted waters on that subject because a companion arbitration board between SP and the UTU has issued what we consider to be a reasonable approach to the problem and authoritative precedents which we shall follow. In that connection, in Decision No. 6082, Case No. 1626-T, citing its earlier Decision No. 6061, SBA No. 18 on this property held that individuals already engaged under on the Rule G policy in effect prior to February 1, 1994 but who tested positive again shortly after that date, "contemporary carryover

cases") should have the benefit of that old policy's consideration for last chance reinstatement. The declared rationale for those decisions was that it was unfair to move the finish line after the accused employee had entered onto the disciplinary/rehabilitation track under the old policy. Thus, SBA No. 18 held in pertinent part in Decision 6082, as follows:

> "The end result is that the Board will require the Carrier to apply its old policy to the Grievant as it relates to his second Rule G violation. This requires them to give individual consideration. Thus, the Claimant shall have the opportunity now that one year has passed to be evaluated by the Carrier's EAP. Under a favorable recommendation the Carrier must give serious and reasonable consideration to his request. In the event there is favorable EAP action and yet the Carrier fails to give him another chance, the Board will retain jurisdiction to determine if favorable consideration was unreasonable (sic) withheld."

We find no basis for distinguishing that case from the instant matter and conclude that the same result should follow in this case.

AWARD

1) Claim sustained to the extent indicated in the Opinion.

2) Carrier shall implement this award within thirty (30) days of its execution by a majority of the Board.

3) Jurisdiction is retained in this Board to resolve any disputes which may arise out of the interpretation or implementation of this Award.

Dana Edward Eischen, Chairman

Dated at Spencer, New York on July 22, 1998

Union Member 9-16-98

Company Member