

SPECIAL BOARD OF ADJUSTMENT NO. 1016

**AWARD NOS. 134
CASE NO. 134**

PARTIES TO

THE DISPUTE: Brotherhood of Maintenance of Way Employes

vs.

Consolidated Rail Corporation

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained in accordance with the Findings of the Board.

DATE: May 14, 2000

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of employe C. W. Adams in connection with charges of his alleged 'Failure to follow company instructions given in the medical director's letter of August 2, 1996, and reinforced in letters dated August 30, 1996, May 21, 1997, and September 11, 1998, when on December 2, 1998, you were required to provide a urine and/or breath alcohol test as required by Conrail medical policy. And the test results of analysis indicated the presence of cocaine.', was arbitrary, excessive and in violation of the Agreement (System File CRA-MW-99-30).
2. As a consequence of the violation referred to in Part (1) above, Claimant C. W. Adams shall be reinstated to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant tested positive for cocaine in July of 1996. He was returned to work pursuant to a letter dated August 30, 1996 which instructed him to remain free of prohibited drugs during

his next five years of service. If he did not, the letter provided he would subject to dismissal. The letter also established a random testing process during the period. In September of 1998, Claimant voluntarily entered and completed an in-patient treatment program.

Following testing of a urine sample submitted on December 2, 1998, a hearing was scheduled for December 29, 1998 to determine whether Claimant failed to follow the instructions to remain drug free. The Organization requested a postponement by letter dated December 28, 1998 to allow Claimant to submit a resignation. When no resignation was submitted after several months, Carrier rescheduled the hearing for April 27, 1999 at 10:00 a.m.

Claimant had arranged to have his treatment counselor attend the hearing and provide testimony about the effects of drug abuse and the progress of Claimant's rehabilitation. Claimant learned early the morning of the hearing that the counselor would be unable to attend due to an emergency with one of the counselor's others clients. Claimant relayed this to Mr. Burkindine, his Organization representative. Burkindine, in turn, made several calls to the hearing officer to request a postponement but he received no answer. His calls were placed before 8:00 a.m.

Burkindine had to commence his travel to Philadelphia and could wait no longer. Accordingly, he called his Assistant to the General Chairman, Mr. Hudson, and informed him of the circumstances. He asked Hudson to relay the call to the hearing officer and request a postponement. Hudson did make contact with the hearing officer at 9:10 a.m. and relayed the witness unavailability problem. He informed the hearing officer that neither Claimant nor Mr. Burkindine would be present due to the problem. Nonetheless, the hearing officer refused to grant a postponement. Instead, he commenced the hearing approximately 15 minutes late *in absentia*. Despite knowing of the witness unavailability problem, the hearing officer made the following statement on the record of hearing:

And as of today's proceeding, which began at 10 o'clock, we do not have any kind of written document or phone call from either Mr. Adams or Mr. Burkindine advising us that they would not be here or be present for these proceedings.

(underscoring supplied)

By letter of May 10, 1999, Claimant was dismissed. During the handling of the matter

on the property, the Carrier took the position that the information to be provided by the Claimant's witness had no relevance to the charges against the Claimant.

Rule 27(a) of the parties' Agreement provides that an employee "... shall not be suspended nor dismissed from service without a fair and impartial hearing ..." Subsection (d) of Rule 27 provides that a "... hearing may be postponed for a valid reason for a reasonable period of time at the request of the Company, the employee or the employee's union representative."

When disciplinary action is under review in the context of just cause, it is always a two-part analysis. The first step is to determine whether there is substantial evidence of misconduct which justifies some form of disciplinary penalty. This is the "guilt" phase of the inquiry. The second step is to examine the penalty imposed to assure that it is appropriate for the overall circumstances. This is the "penalty" phase of the inquiry. In short and colloquially, there are always two aspects to the review of disciplinary action: Was there a crime?; and does the punishment fit the crime?

The "penalty" phase of the analysis looks into all of the circumstances that are proper considerations bearing on the appropriateness of the disciplinary penalty. Even though they have nothing to do with the "guilt" phase, evidence of past discipline, length of service, work record, and any other exacerbating or mitigating circumstances are always relevant to the reasonableness of the penalty to be assessed. Accordingly, it is a rare situation indeed when evidence of mitigating circumstances would not be relevant to this issue. The Carrier official was simply wrong in his determination that the substance of the counselor's proffered testimony was not relevant. While it may not have been relevant to the "charge," it was clearly relevant to the appropriateness of the penalty to be assessed.

It appears that the hearing officer did not draw the proper distinction between the relevance of the evidence to be offered by the witness and the *weight* to be accorded such evidence. It is an important distinction. Just because evidence may not be entitled to great weight in determining the penalty does not mean that the evidence is not relevant or that Claimant is not entitled to have it heard in a fair and impartial hearing.

Nothing in Rule 27(d) requires that the parties follow a specific protocol to request a postponement. For example, it does not require a certain advance notice. Nor does it require a request to be in writing. Finally, it does not require the agreement of the hearing officer.

Moreover, the record of handling on the property shows that the parties, which has usually been the Carrier, have routinely postponed hearings due to the unavailability of a witness. Their practice shows witness unavailability to be a valid reason for a postponement under Rule 27(d).

On the unique circumstances of this record, we find that the hearing officer's refusal to grant a postponement denied Claimant a fair and impartial hearing as required by Rule 27(a). This is not a case where, for example, a Claimant with notice fails to appear at a scheduled hearing and his representative has no knowledge about his absence. That would not be a valid reason for a postponement. But where, as here, the hearing officer had advance knowledge of a reason that had been accepted as valid in the past, the refusal to grant a reasonable postponement constitutes a denial of a fair and impartial hearing.

Since Claimant's dismissal was not predicated upon a fair and impartial hearing as required by Rule 27(a), his dismissal must be set aside. Claimant must be reinstated to his prior status of medically unqualified for service. He must be returned to service, without any back pay, upon meeting Carrier's physical fitness standards, the recognition of which may not be unreasonably withheld by Carrier. The 5-year period of service during which Claimant must remain free of prohibited substances, originally established by Carrier's March 30, 1996 letter, and all of the conditions upon Claimant's employment contained in that letter are extended by the period of Claimant's time out of service.

AWARD:

Claim sustained in accordance with the Findings of the Board.

Gerald E. Wallin
Gerald E. Wallin, Chairman
and Neutral Member

Mark Schappaugh
Mark Schappaugh,
Organization Member

Lawrence J. Fingegan, Dissenting
Lawrence J. Fingegan,
Carrier Member

6/7/00