SPECIAL BOARD OF ADJUSTMENT NO. 1049

CASE NO. 173

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier File MW-BHAM-07-03-BB-090)

Statement of Claim:

Claim on behalf of J. E. Mason to rescind the dismissal assessed in connection with the March6, 2007 investigation concerning conduct unbecoming an employee in the substitution of a urine sample during a January 24, 2007 physical to renew his medical card for the Commercial Driver's License.

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This Award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

AWARD

After thoroughly reviewing and considering the transcript and the parties' presentation, the Board finds that the claim should be disposed of as follows:

BACKGROUND

J. E. Mason, the Claimant herein, entered the Carriers' service on September 12, 1988 as a B&B Apprentice. At all relevant times associated with this matter, the Claimant held the position as a B&B Mechanic, a position that requires a Commercial Driver's License ("CDL"). The Federal Motor Carrier Safety Administration regulations require the holder of a CDL to periodically submit to a physical to maintain a current medical card. The Claimant submitted a sample for urinalysis during his January 24, 2007 physical to renew his medical card. Quest Diagnostics, a NIDA, DHHS

certified laboratory performed the drug screen. The test results established that the creatinine levels and specific gravity of the specimen submitted by the Claimant were outside of the acceptable limits and, as a result, concluded that the specimen's chemical composition was inconsistent with that of human urine. Accordingly, the laboratory concluded that the results of the testing established that the urine sample had been substituted. A slit sample testing was performed by ElSohly Laboratories, also a NIDA, DHHS certified laboratory, which concluded that the sample collected from the Claimant on January 24, 2007 was substituted. The results were confirmed by the Medical Director.

By letter dated February 20, 2007, the Claimant was cited to a formal investigation "to determine his responsibility, if any, in connection with conduct unbecoming an employee concerning his tampering by substitution of a sample during a January 24, 2007 drug screen, constituted refusal to test." Following the investigation held on March 6, 2007, the Hearing Officer determined that the Claimant was guilty of the charges, and by letter dated March 22, 2007, the Claimant was dismissed from service. The Organization took exception to the Claimant's dismissal and initiated an appeal on April 16, 2007.

DISCUSSION

Initially, this Board notes that it sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, we must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record.

At the investigation, the Claimant defended the test results by sharing with the Hearing Officer the fact that he was a diabetic. As a result of his diabetic condition, the Claimant maintained that he consumed nearly four times the normal water intake of a non-diabetic, a fact he maintained had an impact on the test results. Neither the Organization nor the Claimant has challenged the propriety of the initial test or the confirmatory test results. Accordingly, and without more, there is sufficient evidence in the record to show that it is more likely than not that the urine sample given by the Claimant on January 28, 2007 was substituted.

However, given the fact that a long-term employee's job is at stake, the Board scoured the record to insure that there was substantial evidence to support the Hearing Officer's finding and conclusion

that the Claimant's termination was an appropriate disciplinary measure. As a result of our review, we took note of the following facts:

First, the Company's Policy on Alcohol and Drugs provides that the first positive test for a prohibited substance does not automatically result in an employee's termination from service. Rather, the employee must participate in the Company's Drug and Alcohol Rehabilitation Service ("DARS") and once successfully completing the DARS program the employee can return to service. Given this one-time forgiveness, it is hard to imagine why the Claimant would take a chance and substitute his January 24, 2007 urine sample. In addition, it is noteworthy that when the Claimant surrendered his sample to the nurse, it was recorded as having a temperature of between 90°and 100° F, the temperature of a normal and unadulterated urine sample.

Next, the record on the property included an excerpt from the United States Department of Transportation, 49 CRF Subtitle A, Section 40.93, which expressly provides the criteria for laboratories to use to establish that a specimen is dilute or substituted, based on the combination of creatinine level and specific gravity. This excerpt was in connection with a copy of the test report from Quest Diagnostics, and accompanied by a March 29, 2007 memo, from Norfolk Southern Director of Medical Services C.R. Prible, M.D., concerning the impact of the specific gravity and creatinine levels in validating a urine sample. A review of the different DOT criteria for determining whether a specimen is dilute versus substituted in comparison with the information, or lack thereof, on the Quest Diagnostics report, regarding the acceptable ranges and detection limits, raises some question in this specific case about the precise meaning of the results. The March 29, 2007, memorandum, which the pertinent part primarily confined its explanation to the implication of a "zero" value for the creatinine level along with a specific gravity of 1.0000, did not sufficiently resolve the ambiguity.

Given the foregoing, a degree of uncertainty exists such that while it is understandable why the Hearing Officer concluded as he did, particularly since the Claimant failed to inform the Medical Officer about his diabetic condition at the first possible opportunity, the Board must conclude, when considering the record as a whole, that substantial evidence does not exist to support the Claimant's termination from service.

SBA 1049
Case 173

In this case, the Organization maintains that given the Claimant's record, dating back to September 1988, the penalty of dismissal represents excessive and undue punishment. The concept of "just cause", which applies to instances of discipline and/or discharge, provides for the use of progressive discipline, except for those situations deemed to be egregious in nature. For actions of the later type, it is well established that the penalty of dismissal, while harsh, is appropriate, even for one instance. However, as noted above, assuming, arguendo, that the Claimant had tested positive, he would not have been terminated.

Given the foregoing unique facts and circumstances in this matter, and without setting a precedent for future cases, the Board finds that a more fitting and appropriate way of dealing with this situation is to reinstate the Claimant, without back pay, and with the presumption that he had his first positive test under the terms of the Carrier's Policy on Alcohol and Drugs. Accordingly, the Claimant maybe required by the Carrier's Medical Department during the 5-year period following the date of his return to service to report to a medical facility for testing to determine if he is free from prohibited drugs. The Claimant is hereby well advised that consistent with this Policy, a positive test or a proven refusal to test during this period will result in his dismissal from service. The Claimant shall therefore be required to remain in compliance with all conditions, restrictions and other terms of the Carrier's DARS program. Finally, the Claimant shall be required to sign necessary releases in order that the Carrier can monitor his compliance with the terms set forth herein.

CONCLUSION

The claim is sustained consistent with the discussion set forth above.

Dennis J. Campagna
Chairman and Neutral Member

D.D. Bartholomay 6-19-07
Organization Member

D.L. Kerby
Carrier Member

Dated May 31, 2007, Buffalo, New York