

SPECIAL BOARD OF ADJUSTMENT NO. 235

PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION))	
VS)	NMB CASE NO. 168
)	AWARD NO. 3145
UNION PACIFIC RAILROAD CO.))	
(C&NW DISTRICT))	

STATEMENT OF CLAIM:

Claim of Yard Foreman/Helper Larry Mason for the reinstatement to the services of the Chicago and North Western Railway Company, with vacation and seniority rights unimpaired, in addition to the payment of any and all health and welfare benefits until reinstated, the removal of this discipline from the Claimant's record and that he be compensated for any and all lost time, including time spent attending an investigation held on October 17, 1996 and reconvened on October 22, 1996 when charged with an alleged responsibility that you used an illegal or unauthorized drug or alcohol as evidenced by the alleged positive test result of the FRA Random test administered to you, in accordance with the Union Pacific Railroad's Drug and Alcohol Policy (effective January 1, 1995) at 9:10 AM on August 11, 1996 at Global I Chicago, Illinois while you were on duty and working as a Yard Brakeman on YG177.

FINDINGS AND OPINION

The Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended. This Board has jurisdiction of the dispute here involved.

The parties to this dispute were given due notice of hearing thereon.

Claimant involved in this dispute was instructed to report for formal investigation on a charge as set forth in the Statement of Claim above. Following the investigation Carrier found claimant guilty of violation of Rule 1.5 (formerly Rule G) and when claimant declined the offer to participate in the Employee Assistance Program he was dismissed from service.

In this dispute the Organization has raised procedural issues which it alleges denied claimant the fair and impartial hearing to which he was entitled under the governing rule between the parties.

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The first issue raised by the Organization is that the charging officer, the hearing officer who rendered the guilty verdict, and the officer who received and rejected the Local Chairman's written appeal of claimant's dismissal were one and the same person.

The record before us clearly indicates that Mr. Lynwood M. Mack, Senior Terminal Manager, addressed a letter dated August 23, 1996 to claimant instructing him to report for the investigation on the charge he allegedly used an illegal or unauthorized drug or alcohol. The record is also clear that Mr. Mack, the charging officer, also was the Hearing Officer at the investigation. Following the investigation the same officer (Mr. Mack) rendered the decision in this case when he notified claimant, under date of October 24, 1996, that he was being dismissed from service.

(NOTE: While it has not been made an issue before us, the Board should note for this record that while the decision to dismiss claimant was made on October 24, 1996, the transcript of the investigation was not completed until November 2, 1996.)

It is also a matter of record that when the Local Chairman appealed the decision to dismiss claimant, such appeal was addressed to Mr. Lynwood M. Mack and it was the same Mr. Mack who rendered a decision denying the appeal from his own decision.

The above record of handling is sufficient in and of itself to warrant a finding by this Board that claimant was denied a fair and impartial investigation. It was highly improper for Carrier Officer Mack to act as the charging officer, hearing officer, judge, and first step appeal officer. In fact, the UPGRADE Discipline Policy in effect on this property clearly provides that the officer to make the charge is "Manager A" whereas the officer to conduct the hearing in Level 5 cases is "UPGRADE Coordinator or Authorized Representative." Under the Carrier's Discipline Policy Mr. Mack could not serve as the charging officer and the Hearing Officer.

During the oral presentation of the dispute, Carrier argued that the procedural issue here involved is being presented to this Board for the first time, in that it was not an issue raised during handling of this dispute on the property. It has asked the Board to not consider the issue.

The governing rule in the agreement between the parties is explicit in its provision that "Trainmen shall not be disciplined without a fair and impartial investigation ..." As a party to the agreement, Carrier was fully aware of the provisions of this rule and was also aware of the many prior awards from the National Railroad Adjustment Board and other tribunals which have held that

an employee does not receive a fair and impartial hearing where a single officer acts as the charging party, prosecutor, judge and jury. At this point in time, it should not be necessary to remind Carrier of its responsibilities in this area, particularly in light of the provisions set forth in its Discipline Policy. While the representative for claimant did not specifically mention the utilization of one officer acting as sole prosecutor, judge and jury, in his closing remarks (Tr. page 321) he very clearly stated, "the investigation was not fair and impartial."

Under the circumstances, and in view of the serious nature of the charges against claimant, it is our opinion that the Organization was well within its rights to present this procedural argument to this Board, and Carrier's objection is overruled.

In addition to the above, the record is also clear that in advance of the scheduled investigation, claimant's representative addressed a letter to Mr. Mack, specifically requesting that certain witnesses be present at the investigation (including the Collection Agent who handled claimant's urine specimen) as well as certain documentation. This Board does not intend to rule on each request in that the majority of the witnesses and documents requested were not required to afford claimant a fair hearing; however, the request for the Collection Agent to assure the Chain of Custody was properly maintained, was a legitimate request, particularly in light of the testimony of claimant that the testing facility being used was not properly secured, the collection agent was in a hurry, the custody forms were signed in advance, claimant was not aware of the safety seals being placed on his specimen bottles, and so forth. The testimony of claimant, which is corroborated by the testimony of his fellow employee, who was also tested, leaves extreme doubt about the proper security of the chain of custody involved in the handling of claimant's specimen.

Inasmuch as Carrier elected not to produce the Collection Agent as a witness to secure his testimony concerning the procedures which were followed in collecting the samples and preparing them for shipment, this Board is left with the uncontested testimony of claimant and witness Engineer Harris which, on this record, indicates the test was not properly conducted and that the required forms were not properly handled.

In a dispute such as this the burden of proof rests with the Carrier, and it is the opinion of this Board that by its failure to produce evidence to counter the direct testimony of claimant, Carrier has failed to prove that the proper chain of custody was maintained. The chain of custody begins with the Collection Agent and when that Agent fails to properly perform his functions, it raises many questions regarding the purity of the specimen samples collected. This Board is not in a position to state that the specimen collected from Claimant was somehow contaminated, nor are

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we in a position to state that it was not contaminated. The handling of the urine specimen by the Collection Agent in this instance, based on the uncontested testimony of both claimant and his witness, left a lot to be desired.

When we review the record before us in its entirety, it is the finding of this Board that in addition to its failure to provide claimant with a fair and impartial investigation, Carrier has failed to support its finding of guilty with sufficient evidence to justify its decision to dismiss claimant from service.

AWARD

Claim sustained. Carrier is instructed to comply with this award within 30 days from the date hereof.

F. T. Lynch
F. T. Lynch, Neutral Chairman

D. J. Gonzales, *Consenting*
D. J. Gonzales, Carrier Member

D. R. Haack
D. R. Haack, Employee Member

Award date Oct. 8, 1997