

SPECIAL BOARD OF ADJUSTMENT NO. 910

PARTIES) UNITED TRANSPORTATION UNION
TO)
DISPUTE) CONSOLIDATED RAIL CORPORATION

STATEMENT OF CLAIM:

"Appeal of Trainman C. L. Randall from discipline assessed of 'Dismissal in all capacities' following an investigation commenced on September 15, 1988, in connection with the following:

Outline of Offense: 'Your failure to comply with Conrail Drug Testing Policy as you were instructed by letter dated December 8, 1987 and subsequent letter dated January 11, 1988 from Medical Director, O. Hawryluk, M.D. and that you failed to refrain from the use of prohibited drugs as evidenced by the urine sample provided on August 30, 1988 testing positive.'" (System Docket No. CR-T-5820-D; UTU File No. 1620-630(D))

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

Several threshold issues have been entered by both the Employees and the Carrier.

The Employees maintain that: 1) the Claimant was improperly removed from service in violation of Rule 93(a); and, 2) the notice of investigation was improper because no applicable charge had been cited and it was not timely given to the Claimant in accordance with Rule 93(d)(1).

In regard to the first procedural issue, the Employees argue that the Claimant was "removed from service for an alleged miniscule residue of a controlled substance in his body (17 ng/ml) . . . [with] no evidence of any impairment, hence no evidence of any Rule G Violation . . . [and] no basis for removal from service prior to the conducting of a fair and impartial investigation."

Rules 93(a) and 93(b)(1) of the applicable Schedule of Agreement read as follows:

"(a) Except as provided in paragraph (c), no trainman

will be disciplined, suspended or dismissed from the service until a fair and impartial formal investigation has been conducted by an authorized Corporation officer.

(b)(1) Except when a serious act or occurrence is involved, a trainman will not be held out of service in disciplinary matters before a formal investigation is conducted. A serious act or occurrence is defined as: Rule 'G', Insubordination, Extreme Negligence, Dishonesty."

In the opinion of the Board, the Carrier had the right to invoke Rule 93(b)(1) and to thereby hold the Claimant out of service pending a formal investigation. The Claimant was charged with a failure to comply with the Carrier's Drug Testing Policy, or "a serious act or occurrence" for which an employee may be withheld from service pending a formal hearing. Furthermore, since the record shows that the Claimant was not in fact administered discipline until after he had been accorded opportunity of a formal investigation, there was no violation of Rule 93(a).

In regard to the other questions raised by the Employees, it is evident that the Notice of Investigation provided the Claimant had specifically and fully informed him of the nature of the formal investigation. The notice of hearing read:

"Your failure to comply with Conrail Drug Testing Policy as you were instructed in letter dated December 8, 1987 and subsequent letter dated January 11, 1988 from Medical Director, O. Hawryluk, M.D. and that you failed to refrain from the use of prohibited drugs as evidenced by the urine sample provided on August 30, 1988 testing positive."

And, as concerns whether timely notice was provided the Claimant, the Employees argue that the Carrier Notice of Investigation, dated September 10, 1988, was not received by the Claimant until September 12, 1988, and that this exceeded the 10-day time limit as prescribed by Rule 93(d)(1). The Employees do not dispute the fact, however, that the Division Superintendent was first made aware of the results of test conducted on August 30, 1988 at 2:08 p.m. on September 1, 1988.

Rule 93(d)(1), in part here pertinent, reads as follows:

"A trainman directed to attend a formal investigation to determine his responsibility, if any, in connection with an act or occurrence will be notified in writing within 10 days from the date of the act or occurrence or in cases involving dishonesty, criminal or moral offenses, or letters of complaint within 10 days from the date the Division Superintendent becomes aware of such act or occurrence."

The Board does not find the applicable rule to require that an employee be in receipt of a Notice of Investigation within the prescribed 10-day time limit. Nor does the Board find sufficient reason to hold, as further claimed by the Employees, that the time limit for dispatch of the notice began to toll as the date that the Claimant submitted to the urinalysis test, i.e., August 30, 1988. Rather, we believe that Rule 93(d)(1) requires that the Carrier appropriately demonstrate that it had in fact dispatched a notice involving, such as here, a criminal or moral offense, within 10 days of the date the Division Superintendent becomes aware of such act or occurrence. And, in this respect, there is no question that the Division Superintendent sent the notice by certified mail, return receipt requested, on September 10, 1988, or a date within the prescribed 10-day time limit from the date he first became aware of the results of the drug test.

In this same regard, the Board does not find, as also urged by the Employees, that Award No. 311 of this SBA No. 910 (Referee Fred Blackwell) is supportive of their contentions relative to the above time limit issue. In the dispute there before the Board, the grievant was charged with a failure to comply with instructions to provide a negative urine sample by a specific date, i.e., December 13, 1987. A notice of investigation was not sent until January 14, 1988. Therefore, since the date of occurrence was held to be December 13, 1987, the hearing notice was clearly outside the 10-day time period allowed by the applicable rule.

In the instant case we do not have a situation where an employee failed to provide a urine sample by a specified date. Rather, we are faced with a circumstance where an employee, who agreed to undergo random drug testing as a part of his conditional return to service, provided a urine sample on a random date (August 30, 1988), and the Division Superintendent was not made aware of the test results on such sample until September 1, 1988. This latter date thus became the date of occurrence pursuant to a literal interpretation of Rule 93(d)(1), and in that respect a Notice of Investigation was properly provided within 10-days of such date of occurrence.

For the above reasons, the aforementioned procedural objections of the Employees are found to lack merit or agreement support, and they will, therefore, be denied.

Now, as concerns the Carrier's threshold argument. It contends that appeal of the claim was not taken in a timely manner as is prescribed by Rule 93(i). This rule, in part here pertinent, reads as follows:

"(i) Further appeal will be subject to the procedural provisions of paragraphs (g), (h), (i), (j) and (k) of Rule 91, except that in appealing cases involving the discipline of dismissal, the General Chairman must,

within 60 days after the date the decision is rendered by the Labor Relations Officer, make an appeal in writing to the highest appeals officer of the Corporation requesting either, that he be given a written response or that the case be held in abeyance pending discussion in conference with the highest appeals officer of the Corporation. . . . "

The Carrier's contentions in regard to the Employees alleged violation of the above rule were described in a letter dated April 20, 1989, which the Carrier had written to the General Chairman in response to the latter's letter of appeal. In this letter the Carrier said:

"Rule 93(i) of the Schedule Agreement provides that in the progression of appeals involving discipline of dismissal, it is incumbent upon the Local Chairman to forward the appeal to the General Chairman for handling with the highest appeals officer of the Corporation, within 60 days from the date the decision is rendered by the Labor Relations Officer.

Records reflect that the appeal hearing in connection with the foregoing subject was conducted on October 20, 1988, and the Manager-Labor Relations denied the appeal by letter dated October 27, 1988. In lieu of progressing the appeal in accordance with Rule 93 of the Schedule Agreement, the Local Chairman, by letter dated December 20, 1988, requested a joint submission pursuant to Rule 91.

Due to the Local Chairman's failure to properly appeal the foregoing subject, any further appeal cannot be considered timely pursuant to Rule 93 of the Schedule Agreement. Therefore, the decision rendered by the Manager-Labor Relations on October 27, 1988 must be considered final as set forth in Rule 93(k)(2)."

In giving consideration to the above Carrier argument, the Board believes it must be recognized that the Carrier Manager-Labor Relations had not taken any exception whatsoever to the Local Chairman seeking to and then handling the claim through the preparation and exchange of a Joint Submission. This, notwithstanding that such action is not mandated for appeals of disciplinary grievances under Rule 93, but is, rather, a part of the prescribed procedures under Rule 91 as concerns claims for compensation.

Actually, the Manager-Labor Relations joined with the Local Chairman in seeking to reach agreement on the preparation of a Joint Submission. It was only after there had been an inability to agree on certain matters that it was decided each party would prepare an ex parte submission. In this connection, it is espe-

cially worthy of note that the Manager-Labor Relations, for some unknown reason, appeared to be in substantial agreement with the Local Chairman that appeal of this particular dispute was subject to both Rule 91 and Rule 93. This is evidenced by a letter dated January 24, 1989 to the Local Chairman whereby the Manager-Labor Relations stated:

"I am not in accord with your Proposed Joint Statement of Facts. Therefore, pursuant to paragraph (i)(2) of Rule 91 and paragraph (i) of Rule 93 of the October 1, 1981 agreement between Conrail and the UTU-T, the following revised Proposed Joint Statement of Agreed-Upon Facts is submitted for your consideration: . . ."

In the circumstances, the Board believes it must be concluded that by its actions in the initial handling of the claim on the property that the Carrier had effectively waived its right to subsequently seek to impose a strict and literal application of Rule 93 to the dispute at issue. Accordingly, the Carrier's procedural objection will be denied.

Turning now, to the merits of the dispute. At a return to duty physical examination on November 24, 1987, the Claimant was required to submit to a drug screen urinalysis. He tested positive for cannabinoids, i.e., marijuana, a narcotic controlled substance.

Pursuant to the Carrier's recognized policies and procedures related to substance abuse, the Claimant was advised by letter dated December 8, 1987 that he was disqualified from service and that he had 45 days from such date of notification, or, to January 22, 1988, to clear his system of the prohibited drug, and that a failure to do so would subject him to dismissal from all service.

The Claimant did subsequently provide a negative drug sample and he was, accordingly, advised by letter dated January 11, 1988 that he was qualified for return to service as of that same date. This letter also notified the Claimant that he would be subject to random testing. In this regard the letter from the Medical Director stated:

"During the first three years following your return to work you will, from time to time, be required by me to report to a medical facility for further testing in order to demonstrate that you are not longer using cannabinoids or other prohibited drugs. Should a further test be positive, you may be subject to dismissal by your department for failure to follow proper instructions."

Thereafter the Claimant was advised by letter dated August 29, 1988, which was hand-delivered to the Claimant at 2:45 P.M., to

report to the Elkhart Convenience Clinic for a random test at 7:30 A.M. on August 30, 1988. The Claimant reportedly tested positive for the presence of cannabinoids.

The Claimant was therefore directed by notice dated September 10, 1988 to report for a formal hearing.

The hearing commenced on September 15, 1988, but was thereafter recessed and then reconvened on September 23, 1988. The Claimant was present and duly represented on both hearing dates, and a transcript was made of the hearing.

Following the company hearing, by notice dated October 5, 1988, the Claimant was advised that he was dismissed from all service of the Carrier.

The Employees have offered various argument in support of the contention that the Claimant was not guilty as charged and that the hearing accorded the Claimant was procedurally defective.

The Employees especially argue that at the company hearing the Claimant's representative was denied benefit of an opportunity to examine or, more importantly, cross examine a witness familiar with such matters as the chain of custody procedures, the process used by the Carrier-designated laboratory to make its determinations on drug screen tests, the screening tests utilized, the extent to which a specific cut-off number of nanograms per milliliter has been determined appropriate, the extent to which there was a possibility of a false positive secondary to other over-the-counter medication or drugs taken by the Claimant, and, to explain the various findings and notations on documents accepted in evidence. The Employees also submit that it is evident that the testing laboratory had not been provided copy of the form on which the Claimant had listed over-the-counter medication which he had reportedly taken prior to the latest test.

The Claimant's representative had requested both before and at the hearing that witnesses be present to explain the various documents, testing procedures, and test results. His request was denied. The hearing officer remained adamant that there was no need to provide any substantiation for the laboratory findings. This, despite the continuing requests of the Claimant's representative for an expert witness and it being most evident at the company hearing that the Carrier's only witness, a Trainmaster, was not able to answer some rather penetrating and technical questions pertaining to the test procedures, methodology, and test results, including some questions based upon excerpts from a medical dictionary which suggested there may have been reason to impeach the test findings.

The Board would also here note that the hearing officer and the Carrier had benefit of a 9-day recess or continuance of the hearing to secure either the presence of an expert witness or someone

knowledgeable of the testing procedures and test results, but, again, elected not to do so.

The transcript of hearing reveals that the Trainmaster had admittedly only been provided a photo copy of the exhibits just prior to the hearing. Both the Trainmaster and the hearing officer concurred that some of the documents were not originals, some copies contained notes not found on the original documents, and that some copies were illegible. The Trainmaster also essentially offered that he was not qualified to explain the basis for the report findings or to answer any questions related to test procedures or what the laboratory findings purported to indicate with respect to its findings of substance abuse. The Trainmaster said he was present to merely introduce the documents into the record.

There is no question that under some circumstances expert witnesses or those persons who had prepared a specific report are not necessary to a determination of facts, and there may be occasions when a witness cannot be produced. However, that is not the situation in the instant case. Here, there was an effective challenge to the authenticity of certain components of the testing procedure and the test results. The Carrier had opportunity to obtain and produce witnesses with first-hand knowledge of such matters. Instead of securing such witnesses, the Carrier elected to present its case against the Claimant on what must be considered as hearsay profferings in the absence of any sound reason as to why a witness or someone knowledgeable of the basis for which the Claimant was charged could not be produced to testify and respond to the various questions raised by the Claimant's representative.

Basically, it appears that the Carrier sought to have the hearing conducted as a mere formality. It says that had any additional witnesses been present, they simply would have introduced the same result of the Claimant's drug screens that were presented by the Trainmaster. This Carrier view of its burden of responsibility is contrary to the principal upheld in numerous past awards that even where evidence against an employee appears overwhelming a hearing officer need take care to ensure that an investigation is conducted in strict fairness and in such a manner so as have those facts favorable as well as unfavorable to the charges against an employee be brought out at the investigation. This burden is not satisfied where, as here, the record suggests that the Carrier was so intent on establishing a prima facie case on what it considered to be incontrovertible evidence of the positive results of the Claimant's drug test that it found no reason to produce credible corroboration when it was met with a challenge as to the scientific accuracy or reliability of the particular test results and questions as to whether all documents in connection with such test were handled in accordance with appropriate procedures.

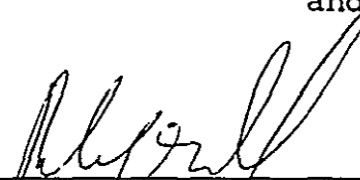
As indicated above, this Board is in general agreement with the principal expressed in many past awards, or, as cited to this Board, Case No. 88 of PLB No. 2720 (IBF&O v. Conrail) (Referee John J. Mikrut, Jr.) and Award No. 316 of this SBA No. 910 (Referee Harold M. Weston), as concerns it not being fatal error in certain circumstances for an official to testify regarding identification of formal documents and procedural matters related to drug testing. However, we think the record as developed in this case at the company hearing leaves no doubt that more was required of a witness than the introduction of documents. The Board believes, as indicated above, and as brought out in Award No. 316 of this Board, that some more appropriate witness should have been made available and that although the calling of a doctor may not have been necessary, a registered nurse or a responsible technician or other competent witness familiar with the case should have been called to present evidence and to be subject to cross examination.

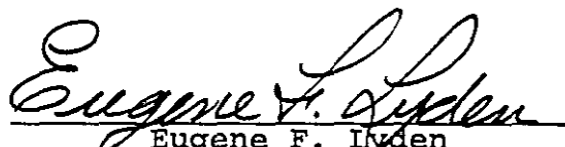
Accordingly, the Board will hold that the Claimant be returned to service with seniority and other benefits unimpaired, with pay for time lost. The Claimant will continue to be subject to random drug testing as set forth in the Carrier's letter of January 11, 1988, or to the termination of the three-year period which ends January 10, 1991.

AWARD:

Claim sustained to the extent set forth in the above Findings.


Robert E. Peterson, Chairman
and Neutral Member


Robert O'Neill
Carrier Member


Eugene F. Lyden
Organization Member

Philadelphia, PA
August 18, 1989