

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13288

Docket No. 13009

98-2-95-2-28

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

(International Brotherhood of Electrical Workers,
(System Council No. 14

PARTIES TO DISPUTE: (

(Southern Pacific Lines (Denver & Rio Grande Western
(Railroad Company)

STATEMENT OF CLAIM:

- "1. That the Southern Pacific Transportation Company (former Denver and Rio Grande Western Railroad Company) violated the controlling agreement, in particular, Rule 32, but not limited thereto, when they unreasonably, unjustly and arbitrarily dismissed from service Electrician A. G. Parker, effective February 9th, 1994, following an investigation held on February 1st, 1994.
2. Accordingly, the Southern Pacific Transportation Company (former Denver and Rio Grande Western Railroad Company) should be ordered to compensate Electrician Parker as follows:
 - (a) Compensate him for all lost wages, eight (8) hours each day at the prevailing rate of pay of electrician, commencing February 1st, 1994 -- until returned to service, and all applicable overtime;
 - (b) Make him whole for all vacation rights;
 - (c) Make him whole for all health and welfare, and insurance benefits;
 - (d) Make him whole for all pension benefits including Railroad Retirement and Unemployment Insurance;

- (e) Make him whole for any and all other benefits that he would have earned during the time withheld from service, and;
- (f) Any record of this arbitrarily and unjust disciplinary action be expunged from his personal record."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

While working on his assigned task of "troubleshooting" a locomotive, the Claimant, a Journeyman Electrician, became seriously ill, left his work station, sought assistance at the Planner Office, and was taken by ambulance to a hospital for treatment. As far as can be determined from the record, the cause of his distress was the use of a special cleaning fluid; while there may be some possible doubt as to the certainty of this cause, such does not require determination by the Board.

Because the cause of the Claimant's condition was undetermined at the time, the Supervisor accompanying the Claimant to the hospital was instructed to have the Claimant subject to a toxicological test by urinalysis. It is the Carrier's contention that the Claimant refused to undergo the test. On this basis, the Claimant was subject to an investigative Hearing under the following charge:

"... to develop facts and place responsibility, if any, in connection with your alleged refusal to take a toxicological test on January 23, 1994, after being directed to do so by a company official."

The Claimant was further charged with possible violation of Safety and General Rule 1007, which reads in part:

"Employees will not be retained in the service who are . . . insubordinate. . . ."

Following the Hearing, the Claimant was dismissed from service.

The Carrier states in its Submission as follows:

"Every time there is an accident or injury in which proximate cause cannot be established to rule out an employee's impaired judgement, Carrier will exercise its right to rule out drug or alcohol use with a urinalysis. Every time an employee refuses to submit to a drug test when said probable cause has been established, he must be sure that he will always be pulled out of service for insubordination." (Emphasis in original)

In support of this contention, the Carrier did not provide any specific reference to a written "policy", much less the policy itself, either at the investigative Hearing or for the Board's review. The Board, nevertheless, need not question that in the circumstances here under review, because a "probable cause" urinalysis initially may have appeared to be warranted. At the time of the incident, Carrier supervision had no clear explanation for the Claimant's condition, and the decision to require a drug/alcohol test was arguably justified.

The Board further has no difficulty following a long line of Awards in which an employee's refusal to take such a test may be determined to be insubordination.

The investigative Hearing was held nine days after the incident. Its purpose was not simply to confirm the Claimant's refusal, thus supporting a charge of insubordination and his consequent dismissal from service. Rather, the purpose of the Investigation, as stated by the Carrier itself, was to "develop facts and responsibility."

Following the Hearing, the Director, Mechanical Operations concluded the Claimant was in violation of Rule 1007, and the Claimant was dismissed from service.

The Board finds this conclusion with little or no support from the Hearing record. Among the reasons the Board so determines are the following:

1. There was considerable discussion concerning a "form" and whether it required the Claimant's signature. The "form" in question was merely a request and authorization by the Carrier to the hospital to perform a drug/alcohol test. This clearly misses the point. Any standard toxicological test by urinalysis must involve the employee's participation, including witnessing of the handling of the urine, a signature verifying the sealing of the sample, etc. There is no evidence that the Claimant was advised of this procedure or even given the opportunity to participate.

2. Whatever the cause of the Claimant's temporary impairment, the record makes it obvious that he may not have sufficiently recovered to understand the procedure.

3. The record leaves considerable uncertainty as to whether the Claimant was flatly refusing to take a urinalysis or simply, in his possible confusion, asking to read and sign a consent form.

3. On the following day, the Claimant, now sufficiently or fully recovered, spoke with the Director, Mechanical Operations and offered to take a drug/alcohol test immediately. This opportunity was refused. The Board is fully aware of the purpose of testing at the time directed, since with any delay positive showing of drug or alcohol use may no longer be found. Nevertheless, given the Claimant's serious condition while being treated in the hospital, the Carrier's refusal to test the Claimant within 16 hours of the incident must be considered inappropriate.

4. Was there "probable cause" to believe the Claimant was under the influence of alcohol or drugs? Perhaps there was, at the time of the incident. Testimony of the Carrier's own witness, however, offers convincing evidence to the contrary. There follows an interchange between the Hearing Officer and the Diesel House Foreman who accompanied the Claimant to the hospital and who was trained in drug identification:

"Q Now in this case here, this would have been a reasonable cause, wouldn't it?

A It was an unusual case. Something we've never seen on him [the Claimant] before.

Q Well, a reasonable cause versus you had personal knowledge that he had taken some drugs or heard he had taken drugs.

A No, no, nothing like that.

Q I mean the two choices are he had to take the test, I believe you had personal knowledge or he had been accused or that you had reasonable cause to suspect and this would have been the latter—the reasonable cause? Is that correct?

A Yes.

Q Were the symptoms that [Claimant] demonstrated compatible to your drug identification training?

A No.

Q He was having a hard time breathing?

A Yes.

Q Would that be a symptom of a drug overdose?

A Not to my recall. . . .

Q Redness of the eyes a symptom of drug --

A I didn't notice redness of the eyes. His eyes were swollen.

Q Were swollen?

A Yes. Actually his whole face was swollen.

Q Isn't that an indication of a drug overdose?

A No, not the training that I've had. (Emphasis added)

Further, as argued by the Organization, the Board finds the Hearing was not conducted in a fair and unbiased manner. The Board recognizes that Hearing Officers are not experts in legal niceties, given that their principal occupation, as here, is entirely unrelated to conducting hearings. However, in this instance, the preconception of the Claimant's guilt is obvious. The portion quoted above is an example. Others are the unnecessary defense of Carrier officials' actions at the time of the incident (Record, pp. 38-9); his unwarranted attempt to read, erroneously, a "positive" finding in the drug/alcohol test taken by the Claimant on his own initiative (Record, pp. 46-7); and the following exchange which appears to be seeking a stronger response from a subordinate official:

"Q By [the Claimant's] failure to take the test, was he in violation of Rule 1007, Conduct, 'employees will not be retained in service who are insubordinate'?"

A I guess so.

Q Would you repeat that.

A Yes." (Record, p. 18).

The Board specifically does not intend to suggest any general limitation on the Carrier's right to require testing for "probable cause" or the general principle that refusal to be tested is insubordination. The Hearing testimony in this case, however, suggests, or demands, that the Carrier should have realized that exceptional, possibly unique, circumstances required a different conclusion.

While the Award sustains the claim, the Board notes that the Claimant was reinstated by Carrier action after nine months. For the nine-month period, the remedy is properly limited to that provided in Rule 32(f).

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 15th day of June 1998.