Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award No. 5057
Docket No. 5019
98-4-96-4-18

The Fourth Division consisted of the regular members and in addition Referee William E. Fredenberger, Jr. when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
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(Burlington Northern

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11203) that:

Claim of the System Committee of the Brotherhood that Carrier acted in an arbitrary, capricious, and unjust manner when it violated the Agreement between the parties by dismissing Mr. Richard Severin from service on July 7, 1994, as a result of a formal investigation held on June 23, 1994. The Organization asserts that Carrier refused to postpone the hearing, failed to prove the charges, and assessed discipline for rule violations with which Claimant was not charged. Carrier shall now be required to:

(a) Restore Richard Severin (hereafter referred to as Claimant) to service with all seniority, vacation, and other rights unimpaired.

(b) Pay Claimant an additional day's pay for attending the investigation on June 23, 1994. Pay Claimant for all lost time, commencing June 12, 1994, and continuing until Claimant is restored to service, less any amount earned in other employment.

(c) Pay Claimant any amount incurred for medical or surgical expenses for himself or dependents to the extent that such payments could have been paid by Travelers Insurance Company under Group No. GA23000 and in the event of Claimant's death pay his

estate the amount of life insurance provided for under said policy. In addition, reimburse Claimant for premium payments he may have made in the purchase of suitable health, welfare and life insurance.

(d) Pay Claimant amount of incurred dental expenses for himself or dependents to the extent that such payment could have been paid by the Aetna Dental Insurance Company under Group Policy No. GP12000. In addition, reimburse Claimant for premium payments he may have made in the purchase of suitable dental insurance coverage."

FINDINGS:

The Fourth 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.

On June 12, 1994 Claimant reported for his assignment as Ore Handler at the Carrier's Allouez Taconite Facility in Superior, Wisconsin. Claimant was assigned to operate a dump truck. Operators of the truck are required to have a Commercial Driver's License (CDL) and are subject to Federal Highway Administration random drug testing regulations. Shortly after reporting to work Claimant was informed that he would undergo a random drug test that day in connection with which he would be required to submit a urine sample. Claimant repeatedly refused to do so as a result of which the Carrier removed him from service.

By letter of June 12, 1994 the Carrier notified Claimant to appear for formal Investigation on the charges that he had failed to comply with instructions to submit to

drug testing pursuant to Federal Highway Administration random drug testing regulations and had violated Carrier Rule 565 governing employee use of drugs and alcohol. After postponement the Investigation was held on June 23, 1994. By letter of July 7, 1994 the Carrier notified Claimant that as a result of evidence adduced at the Investigation he had been found guilty of the charges and was dismissed from the Carrier's service.

The Organization grieved the discipline. The Carrier denied the grievance. The Organization appealed the denial to the highest officer of the Carrier designated to handle such disputes. However, the dispute remains unresolved, and it is before this Division for final and binding determination.

At the outset the Carrier argues that this case is not properly before this Division. The basis of the argument appears to be that the Claimant is a Clerk which would bring the case within the jurisdiction of the Third Division.

The record does not support the Carrier in this regard. While the record is not absolutely clear on the matter, it contains sufficient information to support the conclusion that little or nothing involved in Claimant's job was clerical in nature. Even the Carrier described his job in the Notice of Investigation as "Taconite Facility Operator." Additionally, on June 12, 1994 Claimant would have functioned as a Dump Truck Operator had he completed his assignment.

The Railway Labor Act defines the jurisdiction of the Third Division as follows:

> "Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, stations, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. . . ."

The jurisdiction of the Fourth Division is defined in pertinent part as encompassing ". . . all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. . . ." 45 U.S.C. §153, First (h). We believe Claimant's job functions place this case within the jurisdiction of the Fourth rather than the Third Division.

Accordingly, we find that the Carrier's argument does not have merit.

The Organization raises a number of arguments against the Carrier's action in this case. One is that the Carrier denied Claimant a fair and impartial Investigation when it refused the Organization's request at the outset of the Investigation for a postponement in order to allow Claimant to confer with the Employee Assistance Counselor (EAC) for purposes of executing a waiver of Investigation and entering the Employee Assistance Program (EPA). We agree.

On June 17, 1994 Claimant had contacted the EAC and had discussed with her the ramifications of waiving Investigation under the circumstances of the case. According to the EAC, Claimant was to decide whether to execute a waiver and again contact the EAC with his decision. Further according to the EAC, on June 27, 1994 she received a message from the taconite facility that Claimant's case had "gone to investigation" and that as a result he had been dismissed from the Carrier's service. Clearly, the Carrier's failure to grant the Organization's request for a postponement cut short the process Claimant had initiated with the EAC.

The Carrier's policy relating to a violation of Rule G, now Rule 565, is to allow first time offenders to execute a waiver of Investigation, which constitutes an admission of a violation of the Rule, and to embark upon a prescribed course of action in the EAP. The instant case is Claimant's first record violation of Rule G or Rule 565. The Carrier violated its own policy by foreclosing the opportunity for Claimant to participate in the EAP.

The Carrier argues that Claimant of his own volition failed to take proper action in order to participate in the EAP. The record does not support the Carrier's contention. As noted Claimant contacted the EAC on June 17, 1994 to discuss a waiver of Investigation and participation in the EAP. Just six days later, contrary to its own policy, the Carrier foreclosed that possibility by refusing to grant the Organization's request for a postponement of the Investigation so that Claimant might take such action.

The Carrier also argues that Claimant has shown no interest in participating in an EAP. Again, the record contradicts the Carrier. It demonstrates that after his dismissal from the Carrier's service Claimant entered a noncarrier substance abuse program and as of August 7, 1994 had progressed to the point where administrators of the program felt he was ready to return to work.

Apparently, the Carrier would justify its action in this case by the fact that Claimant was found guilty of insubordination. The Carrier emphasizes that under its

substance abuse policy a refusal to take a drug test as instructed by Carrier officials constitutes insubordination. The Carrier cites a number of arbitral authorities, including some on this property, in support of its argument that insubordination involving refusal to take a drug test when ordered to do so is a serious offense warranting discharge.

That insubordination is a serious offense warranting discipline is beyond dispute. However, the problem with the Carrier's position is that it fails to acknowledge that the insubordination involved herein was rooted in the violation of Rule G or Rule 565. As noted above, the Carrier failed to comply with its policy applicable to first time Rule G or Rule 565 offenders. To allow the Carrier to do so simply because Claimant's refusal to take the drug test constituted insubordination would seriously impair the Carrier's substance abuse policy.

Our analysis of the arbitral authorities cited by the Carrier reveals that none are on all fours with the facts of this case. Those on this property involved employees with poor disciplinary records. By contrast, Claimant's disciplinary record is not poor. As noted, there is no prior Rule G or Rule 565 offense on Claimant's record. Nor is there any indication of insubordination. Claimant's last offense apparently was almost 13 years prior to the offense in this case. Under these circumstances we have serious questions as to whether the discipline assessed Claimant was progressive.

On the basis of the record before us we believe Claimant should be restored to the Carrier's service.

As noted above Claimant's participation in a noncarrier substance abuse program resulted in a recommendation on August 7, 1994 by administrators of that program that Claimant be returned to service. In our opinion that recommendation effectively establishes that Claimant was able to return to service at that time.

However, it appears that under the regulations of the Carrier's EAP Program Claimant's refusal to take the drug test barred him from reemployment with the Carrier for one year from the date of his dismissal from the Carrier's service. Accordingly, Claimant will be restored to the Carrier's service effective July 7, 1995, with seniority intact and all other rights unimpaired, and pay for time lost will be calculated from that date.

The claim herein is ". . . for all lost time, . . . less any amount earned in other employment." The claim would appear to be in conformity with the requirements of Rule

21 of the applicable schedule Agreement. Accordingly, any pay for time lost calculated under this Award will be reduced by any amount earned by Claimant in other employment.

Arbitral authority on this property makes clear that in the absence of Agreement support for relief such as that sought by Paragraphs (c) and (d) of the claim, such relief will not be granted. See Public Law Board No. 3656, Award 13 and Second Division Award 6383. No Agreement support has been shown for the relief sought in Paragraphs (c) and (d), which is denied.

Claimant's continued employment with the Carrier is conditional upon his successful participation in the Carrier's EAP. Specifically, he must recontact the EAC and follow any program prescribed by that individual, consistent with programs prescribed for similarly situated employees, to a successful conclusion.

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 Fourth Division

Dated at Chicago, Illinois, this 6th day of August 1998.