AWARD NO. 15
CASE NO. 15

PUBLIC LAW BOARD NO. 5423

PARTIES TO DISPUTE) UNITED TRANSPORTATION UNION
) -
) THE KANSAS CITY SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim of Engine Foreman R. L. Nelond for all wages and benefits lost, including all hospital expenses that were not covered under GA-23000, and all debts incurred, including mortgages, from September 30, 1992, through January 25, 1993, and appropriate monetary redress for pain and suffering, all of which resulted from being erroneously accused of a drug related charge that later proved false. (Carrier File 013.3-3504(46); UTU File 1501-90)

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.

The dispute at issue involves a determination as to whether the Claimant is entitled to compensation and other losses between the date he was removed from service, when a drug screen showed he tested positive for use of an illegal drug substance, and the date he subsequently returned to service, when a requested retest of the same urine sample was unable to reconfirm the test results found by the laboratory in the initial test and he was released for service from a doctor's care.

On September 21, 1992 the Claimant was randomly selected for drug testing under the FRA testing guidelines. The Carrier contract laboratory, Nichols Institute, notified the Carrier some nine days later, on September 30, 1992, that the test results were positive for cocaine metabolites. The Claimant was removed from service that same date, pending a formal hearing for violation of Rule "G".

On October 4, 1992, the Claimant's representative requested a postponement of the company investigation and that the urine specimen be tested by a different laboratory. This pursuant to U.S. Department of Transportation regulation 40.33(e).

There was some confusion as to the proper procedures to be followed in providing for the retest. In any event, on October 9, 1992 the Claimant, as informed by the Carrier Medical Manager,

dispatched a communication to the Medical Review Officer for the Greystone Health Sciences Corporation, together with a $20 money order payable to the Nichols Institute in California, for overnight shipment of the urine sample in question to CompuChem Laboratories in North Carolina.

By letter dated October 12, 1992 the Greystone Health Sciences Corporation requested the Nichols Institute forward "an aliquot of no less than 10 ml" of the Claimant's "confirmed positive sample" to the CompuChem Laboratories, or what it identified as "the donor's designated referee laboratory."

On November 11, 1992 a Laboratory Certifying Scientist for the CompuChem Laboratories dispatched a Forensic Drug Analysis Report to the Medical Review Officer for the Greystone Health Services Corporation in which it was stated that the retest "Failed to reconfirm" the presence of cocaine metabolites in the urine sample.

By letter dated November 18, 1992 the President of the Greystone Health Sciences Corporation advised the Carrier Medical Manager that the "verified positive test for cocaine metabolite reported on September 30, 1992 (for the Claimant) is hereby cancelled." This letter went on to state the following:

> "As you are aware, GREYSTONE HEALTH SCIENCES is the consultant-experts in forensic toxicology for both the Federal Railroad Administration and the United States Army. By my direction, two senior toxicology consultants to GREYSTONE HEALTH SCIENCES have examined both the original raw data from Nichols and CompuChem's retest data. It is the finding of our consultants that there is no evidence that the original positive result found by Nichols is in error or that their determination was in any way incorrect.
>
> It is the further finding of our consultants that the failure to reconfirm the specimen by CompuChem can be attributed to some unknown anomaly in the specimen matrix causing a mass ratio failure, and not because the analyte of interest was not present. There was no apparent problem in the CompuChem procedure or method. This was an unusual finding and not likely to occur very often.
>
> In summary, it is GREYSTONE's professional opinion that the Nichols test should not be considered a false positive. Nonetheless, it is felt that failure to reconfirm should be considered an administrative negative for the purposes of 49 CFR 40.33(e) and therefore the test should be cancelled by the Medical Review Officer."

The Claimant was subsequently advised by the Carrier that he could return to work on November 30, 1992.

The Claimant did not return to work on the aforementioned date. He returned January 25, 1993. In this regard, the Organization offers the following explanation and argument in support of the claim extending to January 25, 1993:

> "Claimant was unable to return to work immediately because he was under a doctor's care. His medical condition was the direct result of the Rule G allegation made by Mr. Sonnier. The allegation caused Claimant to become distraught and humiliated and to experience mental stress, anxiety and depression. He sought medical attention for these conditions and ended up being hospitalized. On November 25, 1992, Claimant committed to following the recommendations of Meadow Wood Hospital Psychiatric Team to help him cope with his condition. He remained under the care of Dr. Kongara until he was released to return to work on January 19, 1993."

On January 20, 1993 the Carrier wrote the Claimant to formally advise that the company investigation initially set for October 6, 1992, and then postponed at the request of the Organization, "has been cancelled."

The Claimant filed the above cited claim with the Superintendent on February 17, 1993. The latter advised the Claimant by letter on March 1, 1993 that the claim was being denied for the following reasons:

> "First of all, the progression of your claim has not been presented to the proper officer. Secondly, certain assertions made in connection with your period of non-service are without merit.
>
> Thirdly, it is ambiguous with respect to time lost. Your claim is for the period of time from September 30, 1992, through January 25, 1993. Crew call recordings indicate you were notified at approximately 1745 hours on November 30, 1992, that you had been released to return to work. Any claim beyond that time is moot. You did not place yourself under a doctor's care until December 3, 1992, and did not notify the Carrier of such until December 8, 1992.
>
> Furthermore, the Carrier and your union have an agreement providing for a 60-day time limit on all grievance claims and any time beyond December 30, 1992, is beyond this time frame. Your claim is denied for each of the reasons stated."

As with the handling of the request for a drug retest, there is a

dispute relative to not only time limits for the filing of the instant claim, but likewise the officers to whom the claim and appeals were to be directed.

In the opinion of the Board, it may not be concluded, as argued by the Carrier, that the November 18, 1992 letter from the President of the Greystone Health Sciences, supra, supports a finding that the initial test should not be considered a false positive. Clearly, the Claimant had the right to have his urine sample be retested by a designated referee laboratory and the fact remains that such laboratory reported on November 11, 1992, supra, that it "failed to reconfirm" the initial test results. That the President of Greystone Health Sciences would offer that it was the finding of two consultant-experts (unnamed) in forensic toxicology testing which it had retained that the initial, or Nichols Institute, test was not in error or in any way incorrect, must be viewed as self-serving and of no force and effect as concerns the right of the Claimant to rely strictly upon the findings of the designated referee laboratory.

Although it may well be as the Organization argues that the Claimant became distraught and experienced mental stress, anxiety and depression as a result of the Rule "G" allegation and charge, no probative evidence is present to support such a contention. The Meadow Wood Hospital document is merely an acknowledgment statement signed by the Claimant that he was evaluated by the Hospital Psychiatric Assessment Team on November 25, 1992 and that he understands recommendations and plans that were explained to him to help him better cope with an unspecified "situation." The statement from Dr. Kongara, dated January 13, 1993, states the Claimant was under his care for the dates of December 3, 1992 through January 19, 1993 and that he is able to return to work. Certainly, neither of these statements show or suggest that any treatment of the Claimant was directly or indirectly related to the random drug test findings.

Under the circumstances, the Board finds no basis to hold that the Claimant is entitled to compensation for the period of time he was reportedly under a doctor's care.

In regard to argument involving contractual time limits for the filing and appeal of the claim. The Board finds reason to believe that the Claimant did not file the claim after being notified he could return to work on November 30, 1992 because he was undergoing treatment by or through the Meadow Wood Hospital and thereafter under the care of a doctor, or circumstances which he would urge were related to his initial removal from service. Therefore, we find the Claimant has demonstrated sufficient reason for any purported delay in the filing of the claim, i.e., that it would be proper to file a claim only after he was physically determined able to return to work.

Further, as concerns the Organization argument that the company

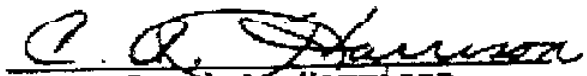
investigation was not cancelled until January 20, 1993, and that a claim could not be made before such time. While there may be some merit in the position the Organization takes under some other circumstances, and it may well be that the Claimant was of a belief he had to await such action before filing a claim, the Board believes such happenstance should be properly recognized as an administrative followup. Certainly, the Claimant knew or should have known when he was told that he could return to work on the basis of the retest findings that there remained no reason for a company hearing.

In the light of the above considerations, the Board finds that the Claimant is entitled to compensation for time lost during the period September 30, 1992, the date he was removed from service, to November 30, 1992, the date he was notified he could return to service. In addition, the Claimant is entitled to reimbursement of the $20.00 which he was required to expend for the laboratory transfer of his urine sample from the Carrier contract laboratory to the designated referee laboratory. This latter determination is made strictly on the basis that the retest findings did not confirm the positive findings of the intial test. The other portions of the claim are denied as being without merit or agreement support.

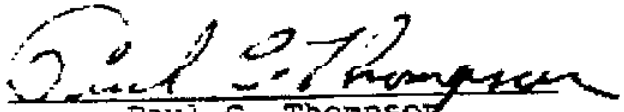
AWARD:

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

Robert E. Peterson, Chairman
and Neutral Member



Cecil R. Harrison
Carrier Member



Paul C. Thompson
Organization Member

Kansas City, MO
October 21, 1994

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March 27, 1995

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Re: PLB No. 5423
Award No. 15

Gentlemen:

This is in response to your joint request that you be provided with answers to two questions concerning Award No. 15 of PLB No. 5423, principally:

> 1. Was the Carrier correct in using Mr. Nelond's payment of vacation pay for the period of October 1, 1992 through October 28, 1992 in computing his lost time compensation during the period of September 30, 1992 to November 30, 1992?
>
> 2. Was the Board's intent to encompass that part of Mr. Nelond's claim, "[All] hospital expenses that were not covered under GA 23000, and all debts incurred, including mortgages, from September 30, 1992, through January 25, 1993, and appropriate monetary redress for pain and suffering ..." as being without merit and agreement support?

In regard to Question No. 1, it was the intent of the Board in directing that the Claimant be compensated for time lost during the period September 10, 1992 to November 30, 1992, inclusive, to provide recovery of any lost earnings sustained as a result of the Carrier failing to meet a necessary burden of proof in withholding Mr. Nelond from service during that period of time. That Mr. Nelond elected to reschedule and take a vacation, and thereby receive vacation pay during a part of the time that he was out of service, must be viewed as a voluntary action outside the scope of the claim and thus not a matter of recovery under Award No. 15. The Carrier was thus correct in using the vacation payment as an offset against any lost earnings due Mr. Nelond under the dictates of Award No. 15.

Turning to the second question. The Board found that the record was devoid of probative evidence to support the claim for special or punitive damages for the ancillary matters which are mentioned in the Statement of Claim. Moreover, it has been held in a long line of past awards that unless it can be shown that the contractual agreement rules provide for the recovery of damages, such as those included in the claim, that Boards such as this do not have the authority to grant a revision of rules in the guise of interpreting an agreement. Here, the applicable agreement language (Article PFY-38) prescribes payment for "earnings lost," i.e.: "When trainmen or yardmen are found to be not guilty they shall be returned to service and paid for all earnings lost." It is for both of the above-mentioned reasons that the last sentence of the Findings in Award No. 15 reads: "The other portions of the claim are denied as being without merit or agreement support."

Sincerely,

Robert E. Peterson

cc: Mr. Robert G. Martin
General Chairman
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