Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 23972
Docket No. 43613
90-1-89-1-S-6347

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

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(
(Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM:

"Org. File E-25951-32-21(g); Co. File E&F 7-5-105
Claim of Sparks District Engineer T. J. Carter for reinstatement to the service of the Company with full seniority and all other employment rights restored, and that he be compensated for all time lost from the date he was removed from service on April 20, 1987, until he is returned to duty."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

In April 1987, Claimant was working as an engineer and had attained the age of forty. Pursuant to Carrier policy requiring physical reexamination of engineers who reach their fortieth birthday, Claimant underwent such examination on April 13, 1987, including a urinalysis for drug and alcohol testing. On April 17, Roche Biomedical Laboratories, Inc., which performed the drug and alcohol screen on Claimant's urine reported that the urine tested positive for the presence of marijuana. The Carrier withheld Claimant from service on April 20, pending Investigation. On April 21, the Carrier notified Claimant to appear for formal Investigation on the charge that he had violated Rule G.

The Investigation was held on May 11, 1987. By letter of May 15, the Carrier notified Claimant that as a result of evidence adduced at the Investigation he had been found guilty of the charge and was dismissed from the Carrier's service.

The Organization filed a Claim requesting reinstatement and backpay which was denied by the Carrier. On August 10, 1987, the Carrier offered Claimant reinstatement on terms applicable to first time Rule G offenders. Claimant declined reinstatement on the terms offered by the Carrier and countered with his own proposal for reinstatement on substantially different conditions. The Carrier declined to reinstate Claimant on the terms he proposed.

Eventually, the Organization appealed the discipline to the highest officer of the Carrier designated to handle such disputes. However, the dispute remains unresolved, and it is before the Board for final and binding determination.

The Organization advances a number of procedural and substantive arguments in support of the Claim in this case. One of those arguments is that the Carrier wrongfully failed to grant the Organization's request that a sample of Claimant's urine be submitted for confirmatory testing to a facility other than Roche Biomedical Laboratories, Inc. We believe the Organization's point is well taken.

By letter of April 23, 1987, to the Carrier's Road Foreman of Engines, the Organization's Local Chairman requested in preparation for the scheduled Investigation "[A] sample of the urine taken [from Claimant] at the time of the physical examination on April 13, 1987, to be submitted for an independent testing." By letter of April 24, the Carrier's Trainmaster responded that the request regarding a sample of urine ". . . needs to be addressed to Dr. J. E. Meyers" who at the time was the Carrier's Chief Medical Officer. That letter included Dr. Meyers' address. By letter of April 30, 1987, the Organization responded to the Trainmaster requesting him to inform Dr. Meyers' office ". . . that I would request that a sample (of Claimant's urine), sufficient to perform a confirmation by GC/MS, be sent to . . ." a specified testing facility in another city. The Carrier never responded to the Organization's request.

The Carrier faults the Organization for not directing its request for Claimant's urine sample directly to Dr. Meyers, the only individual who had the authority to obtain such a sample, after the Trainmaster instructed the Organization to do so. However, we believe the Organization reasonably responded to such instruction when it requested the Trainmaster to inform Dr. Meyers that the Organization desired a sample of Claimant's urine to be submitted to a specific testing facility in another city for confirmation. We believe it was incumbent upon the Trainmaster or the Superintendent to convey such a request to Dr. Meyers.

The Carrier's failure to send a sample of Claimant's urine to another facility for confirmatory testing appears to be contrary to the Carrier's practice. By letter of January 6, 1987, to the General Chairman of another Organization, Dr. Meyers advised that the Carrier ". . . is agreeable to, and currently does have, urine samples undergo confirmatory evaluations by other independent laboratories." The letter also states that while no one including the Carrier has a right to obtain a urine sample or a portion thereof from Roche Laboratories, that facility ". . . is willing to and does send a portion of the sample to another laboratory for confirmation."

The Carrier also maintains that Dr. Meyers' January 6, 1987 letter should not be considered by the Board because it is new evidence presented for the first time in this dispute to the Board. A review of the record does not establish that the letter was made a part of the record below. Ordinarily, that fact would bar consideration of the letter. However, in the instant case, the Carrier refused the Organization's request for Dr. Meyers to testify at the Investigation thereby precluding the Organization from exploring the subject matter of the letter with Dr. Meyers directly. While the record does not establish precisely when the Organization obtained the letter or became aware of the Carrier's practice, the Carrier certainly was aware of it at all times material to the dispute in this case. This is a discipline case in which considerations of equity and fairness carry great weight. We do not believe it would be fair or equitable under the circumstances of this case to allow the Carrier to defend its action in this case which appears to have been contrary to its practice on the procedural technicality that the Organization did not raise the issue of the practice with the Carrier prior to bringing the dispute before the Board.

In the final analysis we must agree with the Organization that the Carrier's failure to grant its request for confirmatory testing of Claimant's urine by a facility other than Roche Laboratories, Inc. both denied Claimant a fair and impartial Investigation and raised such questions as to the validity of the positive test results rendered by Roche Laboratories, the only evidence supporting the Carrier's finding of a Rule G violation by Claimant, that the Carrier failed to sustain its burden of proof in this case.

However, we are unable on the record before us to sustain the Claim for pay for all time out of service.

By letter of October 15, 1987, the Carrier offered Claimant reinstatement upon terms applicable to first time Rule G offenders, i.e., 90 days suspension, a return to duty physical examination and two years probation during which Claimant must abstain from alcohol and drug use and submit to random, unannounced alcohol and drug tests or face automatic removal from service and return to dismissed status. At the end of the two-year probationary period, Claimant would have to obtain the favorable recommendation of an Employee Assistance Counselor to continue in the Carrier's service. By letter of October 31, 1987, Claimant rejected the Carrier's offer and proposed six pages of substantially different conditions for reinstatement than proposed by the Carrier. Subsequently, Claimant's counter proposal was rejected by the Carrier.

The Carrier's offer of reinstatement did not specify that it was without prejudice to Claimant's right to pursue his Claim challenging the propriety of his dismissal and seeking pay for all time lost. Accordingly, the offer was conditional, and ordinarily Claimant's rejection of such offer would not bar his pursuit of a claim for all time lost. However, in this case Claimant did not simply reject the Carrier's offer but made a detailed counterproposal for reinstatement upon terms and conditions more to Claimant's liking. Significantly, we think, Claimant's counterproposal did not discuss

reinstatement upon the conditions offered by the Carrier with the right of Claimant to pursue the Claim in this case. Nothing in our reading of Claimant's counterproposal discloses that Claimant would have been willing to agree to such an arrangement. Rather, our reading leads us to the opposite conclusion that Claimant was bent upon rejecting substantially all of the conditions proposed by the Carrier under any circumstances.

On the record before us we must conclude that Claimant failed in his basic obligation to mitigate his damages and for that reason should not recover pay for time out of service after October 31, 1987. Claimant shall receive compensation only for time out of service from April 20, 1987 to October 31, 1987.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of March 1990.

DISSENT
OF THE
LABOR MEMBERS
TO
Docket No. 43613
Award No. 23972

Brotherhood of Locomotive Engineers
v.
Southern Pacific Transportation Company

The Majority has correctly determined on the record of this case that the Carrier failed to either conduct a fair and impartial investigation or to sustain its burden of proof with respect to the Rule G charge Carrier brought against the Claimant.

Despite having found that the Carrier was procedurally barred from imposing a penalty and that Claimant was not proven guilty of wrong doing, the Majority incorrectly allowed (at the time of this writing) a two and one-half year wage loss to stand on the outrageously erroneous and painfully illogical conclusion that Claimant was obligated to mitigate his damages.

A time after Claimant's unwarranted dismissal, Carrier offered Claimant a "standard conditional reinstatement for first-time Rule G offenders" which, critically, did not permit Claimant the right to progress an appeal of his dismissal or to claim recovery of lost wages, and Claimant rejected the offer. The Majority noted that rejection of such a conditional offer would not ordinarily bar a claim for all time lost.

Claimant, in rejecting Carrier's offer, counter proposed alternative conditions. Reading this counter proposal, the Majority states:

> "...leads us to the...conclusion that Claimant was bent upon rejecting substantially all of the conditions proposed by the Carrier under any circumstances...We must conclude that Claimant failed in his basic obligation to mitigate his damages..."

It is utter, contradictory nonsense that in one breath the Majority said, that absent the right to appeal, Claimant had no obligation to accept a conditional reinstatement to mitigate damages, and then, in the next breath, said that once Claimant had rejected that very offer, which was absent the right to appeal, he did have a duty to accept the conditional reinstatement in order to mitigate.

The Majority's conclusion that Claimant "was bent upon rejecting ..all of the conditions proposed...under any circumstances" is also an erroneous conjecture not supported by the record. Claimant said, in concluding his rejection letter:

> "Reasonable men can work out their differences as long as the channels of communication remain open and both parties negotiate in good faith. I, of course, reserve the right to suggest other conditions if these conditions are not accepted in principle." (Emphasis Added)

It was obviously Claimant's intent to make further attempts toward settlement had his counter proposal been unacceptable to the Carrier. This clearly indicates circumstances contemplating consideration of other subsequent conditions, not the rejection of "all conditions...under any circumstances" suggested by the Majority. Thus the Majority's conclusion is wrong on its face.

The Majority also remarked that "Claimant's counter proposal did not discuss reinstatement upon the conditions offered by the Carrier with the right of Claimant to pursue the claim in this case."

Item No. 11 of Claimant's counter proposal reads:

> "The Company will agree that my case will be sent to the Board as if I hadn't been reinstated to duty."

Claimant most certainly requested to pursue his claim.

The vital fact that the Majority does not credit, and that which makes the Majority's discussion of Claimant's proposal irrelevant, is that the Carrier never offered Claimant any conditional reinstatement whatsoever which would have permitted him to pursue his claim. The next action taken by the Carrier after offering the initial first-time offender's conditional reinstatement, and receiving Claimant's rejection and counter proposal, was to specifically deny Claimant's request to progress his claim. This was done in Carrier's November 4, 1987, letter to Claimant (Employees' Exhibit 22) which rejected Claimant's Item No. 11 request in one word, "No."

Whatever Claimant might have been willing to do, it was perfectly clear what Carrier actually did--refuse to allow an appeal of Claimant's discharge or a claim for time lost. Carrier unchangeably contended that Claimant violated Rule G (Carrier's Exhibit K, p. 1). He could be reinstated

only upon accepting conditions which included giving up his claims. Claimant steadfastly maintained his innocence and insisted in preserving his rights to process, including the right to progress his claim for all time lost to this Board.

The Majority found that Carrier failed to substantiate its charge against the Claimant. In the circumstances of this case, absolutely no basis existed to mitigate damages to the Claimant's detriment.

Section 21(g) of Article 32 of the Agreement between the parties to this case reads:

> Section 21. (g) If an engineer is suspended or discharged and later proven to have been innocent of the charges which led to his suspension or discharge, he shall be returned to service with seniority and all other employment rights restored to him as though he had not been suspended or discharged and be paid not less than he would have earned had he not been suspended or discharged, with a minimum per day as specified in Appendix "A" for the time lost on such account in addition to and without deduction from any other earnings during suspension or discharge.

The Majority's erroneous, illogical and unsupported holding for a mitigation of damages flies in the face of the clear intent of Section 21(g) that an engineer found innocent of charges which led to discharge be paid not less than he would have earned but for the discharge, without deduction of outside earnings.

The Majority, by its frightful misapplication of principles of damage mitigation, has done extreme violence to the Agreement. But even worse, it has allowed an innocent employee to continue to endure a devastating loss of wages which, unfortunately, is counted in higher amounts than mere dollars. These things are unconscionable, and, at the very least, compel this Dissent.

Richard K. Radke

George R. DeBolt

Lloyd W. Sweet

CARRIER MEMBERS' CONCURRENCE AND DISSENT
TO
FIRST DIVISION AWARD 23972, DOCKET 43613

(Referee Fredenberger)

The only defect found by the Majority in the Carrier's handling of the dispute is that the Carrier "wrongfully failed to grant the Organization's request that a sample of Claimant's urine be submitted for confirmatory testing to a facility other than Roche Biomedical Laboratories, Inc."

It finds support for its conclusion in a letter dated "January 6, 1987, to the General Chairman of another Organization," written by the Carrier's Chief Medical Officer, in which the CMO stated that Roche is willing and does send a portion of a test specimen to another laboratory for confirmation. The CMO requested the General Chairman to inform him of the names of other laboratories the General Chairman wished to examine the specimen. The January 6, 1987 letter was attached as an exhibit to the Organization's Submission; it was not introduced at the Investigation Hearing of the Claimant which was held on May 11, 1987, nor was it referred to in any of the Organization's correspondence as the Claim progressed through the appeal procedure on the property. Furthermore, on the property, the Organization did not even raise the <u>issue</u> of whether the Carrier had acted improperly in not supplying the specimen for an evaluation by a testing facility other than Roche. The <u>only</u> basis for its claim that the discipline assessed was improper was set forth in its letter of appeal dated

August 10, 1987, in which it stated:

> "In this case, the evidence and testimony at the investigation shows that the chain of custody was not maintained over the specimen furnished by (Claimant); therefore the Committee requests that you allow the claim as presented."

We thus have a situation in which the Majority finds the Carrier to have acted improperly for reasons that even the Organization did not believe warranted setting aside the assessed discipline, and based upon a document that was never presented by the Organization at any stage of the handling of the dispute on the property.

There are three points to be made in connection with the Majority's position:

First, the Majority does not provide the predicate for its assertion:

> "This is a discipline case in which considerations of equity and fairness carry great weight. We do not believe it would be fair or equitable under the circumstances of this case to allow the Carrier to defend its action in this case which appears to have been contrary to its practice on the procedural technicality that the Organization did not raise the issue of the practice with the Carrier prior to bringing the dispute before this Board."

We do not quarrel with the principle that an employee is entitled to due process rights provided by the Agreement. We do disagree with the concept that, beyond the Agreement, there is an area of discretion which allows an arbitrator to impose upon the parties some standard of conduct believed by

the arbitrator to be "fair or equitable." Indeed, such imposition was condemned by the Supreme Court decades ago in warning arbitrators not to impose upon the parties the arbitrator's "own brand of industrial justice." The Majority certainly points to no Agreement provision that was violated by the Carrier.

Second, if the admissibility of evidence not presented on the property is to be approved on the basis of some unidentified doctrine of "equity and fairness" one would expect that the Carrier would be entitled to the same consideration. The Carrier had no opportunity to comment on the January 6, 1987 letter as it did not have any reason to believe that the letter would appear in the Organization's Submission. Furthermore, the Carrier had no basis to believe that the Organization would even raise the issue in its Submission as it did not do so in any of its post Investigation handling on the property. If the Carrier had such precognition, it might have suggested that the January 6, 1987 letter shows the Carrier had no objection to Roche providing a sample for independent testing, that it was the CMO of the Carrier that had responsibility in this area, and, perhaps most importantly, the letter shows that proper handling required communication directly between the Organization and the CMO. It was neither necessary or

appropriate that a Trainmaster serve as the messenger of the Organization in communicating with the CMO. Of course, we will never know what the Carrier might have responded as the Majority apparently finds that the "equity and fairness" doctrine does not require that the Carrier be allowed such response.

There is a third response to the Majority's position. Apart from esoteric and philosophical considerations of what constitutes "fairness and equity," the Majority has carved out an exception to the 55 year old dictates of Circular No. 1 of the Board which provide that "all data submitted in support of employees' position must affirmatively show the same to have been presented to the Carrier and made a part of the particular question in dispute." The issue found determinative by the Majority, as well as the January 6, 1987 letter relied upon by the Majority, were presented to the Board, not the Carrier. The Rules of Procedure set forth in Circular No. 1 do not give the Board authority to expand on the stricture that evidence not presented on the property is inadmissible before the Board. It should be obvious that if Circular No. 1 is to be amended, the amendment must come from the Board itself, not a Majority charged with the responsibility to determine a dispute in accordance with the Rules of the Board.

We concur with the Majority holding on the issue of mitigation of damages. Even here, however, the Majority erred in its factual finding that the offer of the Carrier, contained in its letter of October 15, 1987, was conditional because it:

> "...did not specify that it was without prejudice to claimant's right to pursue his claim challenging the propriety of his dismissal and seeking pay for all time lost."

A reading of the October 15, 1987 letter reveals nothing that would have prevented the Claimant from "challenging the propriety of his dismissal and seeking pay for all time lost." The letter provides that the Carrier was agreeable to reinstating the Claimant "with the following conditions." There are six items specified, not one of which would require the Claimant to waive his right to seek additional redress from the Board.

The Majority believes such waiver would result because the letter did not affirmatively provide that the Claimant could continue to prosecute a Claim. Elementary rules of contract construction, however, provide that mutual rights and obligations are confined to the express terms of the written agreement. It is not necessary that parties detail matters not to be included in the agreement, the omission of such matters is sufficient evidence of the parties' intent.

In the Organizations' Dissent, they argue that the Carrier's refusal to agree to item 11 of Claimant's 12 item, six-page, list of demands contained in his letter of October 31, 1987, shows that the Carrier was conditioning its offer of reinstatement on the Claimant's waiver of any right to continue to prosecute his claim. The Dissent conveniently overlooks the fact that item 11 was not an alternative to the 11 other demands, it was in addition to them. The Majority was correct in finding that the long list of demands clearly shows that Claimant was conditioning his acceptance of reinstatement and right to continue to handle his claim upon the Carrier's acceptance of all his other demands.

Finally, we note that given the facts found by the Majority in connection with the mitigation of damages issue, its decision is entirely consistent with prior Board precedents.

Martin W. Fingerhut
M. W. Fingerhut

Robert L Hicks
R. L. Hicks