

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

(Bruce Karan

PARTIES TO DISPUTE:

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(Southern Pacific Transportation Company

STATEMENT OF CLAIM:

"Request of Brakeman Bruce Karan, Coast District, Sacramento Division, for reinstatement to service with seniority unimpaired and for replacement of wage loss and productivity credits stemming from my dismissal from service on or about July 8, 1988, because of my alleged violation of Rule 607 of the General Code of Operating Rules, which occurred on June 13, 1988."

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 waived right of appearance at hearing thereon.

On June 13, 1988, Claimant was working as head brakeman on the Santa Clara Turn. At the Logan, California station, Claimant's train was moving in a westerly direction when he lined a spring switch under a locomotive. When the train made a reverse movement one set of trucks derailed. A Trainmaster reported to the derailment site and discussed the derailment with the Conductor and Claimant. Thereafter, the Trainmaster was instructed by the Superintendent by telephone to take Claimant to a local hospital for toxicological testing. Claimant went with the Trainmaster to the hospital but refused to give a urine sample. The Trainmaster then read to Claimant a standardized statement specifically prepared by the Carrier to be read to employees who refuse to submit to toxicological testing when instructed by the Carrier to do so. Claimant again refused to submit a urine sample, and the Trainmaster removed Claimant from service pending investigation.

By letter of June 15, 1988, the Carrier notified Claimant to appear for formal investigation on the charge of insubordination in connection with his refusal to submit a urine sample for toxicological testing on June 13. The investigation was held on July 7, 1988. By letter of July 8, 1988, the Carrier notified Claimant that as a result of the investigation he had been found guilty of insubordination and was dismissed from the Carrier's service.

The Organization grieved the discipline. The Carrier denied the grievance. The Organization appealed the denial.

On January 24, 1989, the Carrier's highest officer designated to handle such disputes offered Claimant reinstatement on a leniency and conditional basis. Claimant's seniority was to be unimpaired, but Claimant was to receive no compensation for wage loss. The offer was made conditional upon Claimant contacting the Carrier's Employee Assistance Counselor (EAC) and receiving a favorable recommendation, submitting to and passing a physical examination (including toxicological testing), passing the required rules examination and reporting to service within thirty days. Claimant did not accept the offer.

By letter of August 28, 1989, the Carrier's highest officer designated to handle such disputes denied the Claim. Thereafter the Carrier listed the dispute to Special Adjustment Board No. 18. Eventually, Claimant withdrew the Organization's authority to handle the Claim, and the Carrier agreed to allow the Organization to withdraw the Claim from Special Adjustment Board No. 18.

By letter of August 3, 1990, Claimant notified the Board that it would bring the Claim before this Board. The Claim is now before us for final and binding determination.

At the outset the Carrier raises a number of procedural objections which we have reviewed. While some of these objections apparently have merit, we believe the interests of the parties are best served by resolving the merits of this dispute.

The decisionally significant factor in this case is whether the Carrier had probable cause to require Claimant to submit to toxicological testing. As the record demonstrates, it is the Carrier's policy that whenever there is an incident or accident and a preliminary investigation fails to exclude human factor as a cause or contributing to the severity of the incident or accident the Carrier will require toxicological testing of employees involved. The same policy applies in cases of unexplained abnormal behavior. As the Carrier points out, this policy has been validated by Special Adjustment Board No. 18, Decision 5749, which is the Board established by the Carrier and the United Transportation Union to handle disciplinary matters involving train service employees of which Claimant in this case is one. Although Claimant withdrew this Claim from Special Adjustment Board No. 18, such action does not change the fact that decisions of that Board are authoritative or at least highly persuasive.

As Special Adjustment Board No. 18 found in Decision 5749 each case must be examined on its particular facts to determine whether the Carrier's policy has been applied correctly. In the instant case when the Trainmaster questioned Claimant after arriving at the scene of the derailment Claimant admitted that he had thrown the spring switch under the locomotive and repeatedly stated that he did not know why he had done so. Despite Claimant's contention that the spring switch was defective, the fact that Claimant threw the switch under the locomotive clearly created a situation where the Trainmaster could not rule out human error as the cause of the derailment. Moreover, Claimant's repeated assertions that he did not know why he had thrown the switch under the locomotive placed his actions in the category of unexplained abnormal behavior. Thus, we conclude that the evidence in this case substantiates the Carrier's compliance with its policy. It follows that the Carrier had reasonable cause to require Claimant to submit to toxicological testing.

We do not believe Claimant's point is well taken that he received no direct order from the Carrier to undergo toxicological testing. Claimant was informed by the Trainmaster that he would be taken to the local hospital for the purpose of obtaining a urine sample for toxicological testing. Claimant stated to the Trainmaster that he would refuse to give a sample. After arriving at the hospital, the Trainmaster read Claimant the standard Carrier statement to be read to an employee who refuses to submit to toxicological testing. The statement clearly sets forth that the employee's refusal to cooperate by voluntarily giving a urine sample for drug screening ". . . may be in violation of the Company's rules and subject you to possible discipline" followed by a question put to the employee as to whether he or she "Will . . . now reconsider your refusal and submit a urine sample for drug screening?" We believe in the context of the facts of this case there can be no question but that the prepared statement read to Claimant constituted a direct order to submit to toxicological testing or face disciplinary measures. Claimant chose not to submit a urine sample. Probable cause for testing having been established, in our view when Claimant continued to refuse to give a urine sample he was insubordinate.

We find no merit to Claimant's contention that the Carrier's policy to return employees to work after submitting samples for toxicological testing and pending receipt of the results of such testing is in any way improper. Special Adjustment Board No. 18, Decision 5734, specifically rejected that contention. We are persuaded to do the same here.

We find the other arguments raised by Claimant equally without merit. Claimant contends that although the Carrier's prepared statement indicates it requires toxicological testing under special circumstances, he never was informed that the incident in this case fell within such circumstances. However, the transcript of Investigation clearly reveals that the Trainmaster explained to Claimant the Carrier's policy which was the basis for requiring Claimant to submit to toxicological testing. Claimant relies on several cited

provisions of the Code of Federal Regulations (CFR) to argue that the Carrier did not have probable cause thereunder for testing and that the Carrier did not follow the requirements of those regulations. The simple answer to that argument is that toxicological testing in this case was ordered not on the basis of the CFR but upon established valid Carrier policy. Claimant's arguments that the minor nature of the derailment did not justify the discipline and that the discipline was in fact motivated by the Carrier's desire to obfuscate what Claimant characterizes as an illegal switch simply do not address the issue of insubordination which is paramount in this case.

It is a proposition too well established to require citation to authority that insubordination is so serious an offense as to justify the ultimate penalty of discharge. While as with any general rule there are exceptions, we do not believe Claimant's insubordinate conduct qualifies for any exception. By refusing to submit a urine sample for toxicological testing, Claimant frustrated what has become well recognized as the Carrier's wholly legitimate right under circumstances like those of the instant case to ascertain whether an employee is under the influence of or has used drugs or alcohol while on duty. To sanction such behavior under the circumstances of this case would render that right ineffectual. Under these circumstances we must conclude that, despite Claimant's fourteen years of service with the Carrier and relatively good disciplinary record, dismissal was not improper.

In this regard we note that Claimant had an opportunity to return to the Carrier's service, but failed to take the steps necessary to do so. Claimant rejected the Carrier's offer of leniency reinstatement upon the conditions applicable to Rule G offenders. As the Carrier points out such reinstatement is routinely offered to employees dismissed for refusing to submit to toxicological testing. Claimant chose to reject the offer on the ground that he should not be subject to such conditions.

Moreover, it is significant that at no time between January 24, 1989 when the Carrier made its offer of reinstatement and March 7, 1991 when this Board heard this case did Claimant contact the Carrier's EAC or apparently make any effort to do so. Special Adjustment Board No. 18 in Decision 5848 ruled that an employee guilty of violating Rule G who made no contact with the Carrier's EAC for fourteen months had not started the process essential to reinstatement within a reasonable period of time. That led the Board to conclude that the Carrier did not act improperly when it dismissed the employee and refused to reinstate him. Here, while Claimant was not found guilty of violating Rule G, the context of his insubordination raise serious questions as to whether Claimant was attempting to evade detection of impermissible drug or alcohol use which would have constituted a violation of Rule G.

As we have found there was reasonable or probable cause to require Claimant to submit to toxicological testing, his failure to do so frustrated the Carrier's legitimate goal in detecting improper drug and alcohol use. As was the situation with the employee in Decision 5848 of Special Adjustment Board No. 18, Claimant could have been reinstated to the Carrier's service by

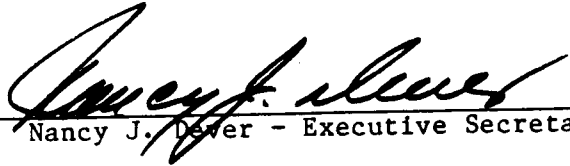
complying with the conditions established by the Carrier. As held in Decision 5848, Claimant's failure to contact the EAC within a reasonable time precludes us from disturbing the discipline in this case.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of June 1992.