

The Third Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union  
(National Railroad Passenger Corporation  
(Amtrak)

STATEMENT OF CLAIM: "(Carrier's File No. TCU-D-3125/TCU File No. 393-C9-055-D)

Claim of the System Committee of the Brotherhood (GL-10449) that:

1. The Carrier violated the provisions of Rule 23 when it directed him to submit to physical examination on May 26, 1989 and of Rule 24(a) when on May 27, 1989, it held Red Cap, Mr. Walter Williams, from service pending a disciplinary investigation.

2. The Carrier acted in an arbitrary, capricious and unjust manner and in violation of Rule 24 and other related rules of the Agreement, when by notice of July 10, 1989 it assessed as discipline dismissal from service against Red Cap, Mr. Walter Williams.

3. The Carrier shall now reinstate the Claimant to service with seniority rights unimpaired and compensate him an amount equal to what he could have earned, including but not limited to daily wages, overtime and holiday pay, had he not been held from service and had discipline not been assessed.

4. The Carrier shall now expunge the charges and discipline from the Claimant's record.

5. The Carrier shall now reimburse Claimant for any amounts paid by Claimant for medical, surgical or dental expenses to the extent that such payments would be payable by the current insurance provided by the Carrier."

FINDINGS:

The Third 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.

The Claimant was notified of an Investigation on a charge that he violated Rule L (failure to obey instructions) and Rule G by his alleged failure to report to the Medical Department for quarterly testing on May 26, 1989, as directed at 2:00 PM, or on any subsequent day. In addition, the alleged failure to report was assertedly in violation of a Rule "G" Waiver Agreement signed on November 29, 1988.

Subsequent to the June 29, 1989 Investigation, the Carrier concluded that the "charge has been proven" and the Claimant was terminated from service on July 10, 1989.

Both parties have asserted that the opposing party has relied upon testimony not presented at the Investigation and argument that was not advanced on the property. As a result, we have assured that our evaluation of the evidence of record has been limited to pertinent testimony and documentation presented at the Investigation where the Claimant was present and had the opportunity to dispute the evidence and present contrary information if available and if he so desired.

The only testimony relied upon by the Carrier at the Hearing was given by its Nurse. She testified that she did not know the Claimant, nor had she ever spoken to him. Although she did not have a copy of the Rule "G" Waiver Agreement, a computer listing indicated that he was subject to such an agreement and its quarterly testing requirement. She contacted his Supervisor at about 3:00 PM (not 2:00 PM as stated in the charges) and inquired if the Claimant was at work. When the Supervisor answered in the affirmative, the Nurse requested that he report to the dispensary for a medical evaluation. A later telephone discussion confirmed that the Claimant had been given the message, and he stated to his Supervisor that he was going to the Employee Assistance Program Counselor first and then to the dispensary.

The Nurse conceded that the Claimant had never been tested previously under the Rule "G" Waiver Agreement, and she testified that he failed to report on the day in question.

The Nurse described Carrier's policy which states that a failure to provide a sample or to cooperate is treated the same as testing positive, i.e., the employee is subject to dismissal.

While there was initial confusion at the Hearing concerning the actual existence of a Rule "G" Waiver Agreement, finally a copy was produced. The November 29, 1988 document (signed by the Claimant) required successful completion of the initial treatment plan recommended by the EAP Counselor, and cautioned that the employee would be dismissed from service unless he complied with the following stipulations:

- "1. Maintain periodic contact with the EAP Counselor for a 2 year period after successfully completing the initial treatment program.
2. Adhere to the aftercare plan prescribed by the EAP Counselor.

3. Pass a complete examination upon completion of the initial treatment program.
4. For cases involving the use of drugs or alcohol, submit to and pass a test by urine or breath sample respectfully, each calendar quarter for a period of two years."

There appears to be no question of compliance with the first three conditions, but there is the allegation here of failure to comply with the fourth condition.

At the Investigation there was an effort made to preclude the Claimant from presenting testimony concerning demeanor and his performance of duty on the day he was requested to report to the Nurse, on the grounds that his job performance was not in issue. This effort continued even after his representative pointed out that the evidence had a direct bearing on the allegation of a Rule G violation. In any event, the Carrier has argued that the employee's obvious efforts to avoid testing clearly show that he could not have passed the test, and thus he violated Rule G.

Our discussion below will show that, limited solely to the valid evidence presented at the Hearing, we are not as certain as the Carrier is that there is proof that the Claimant was deliberately attempting to avoid the testing. Moreover, there is no evidence presented whatsoever of any demeanor suggesting an impairment, nor do we find any direct evidence to substantiate the charge of a Rule G violation. The only two witnesses who observed him (to our knowledge) at or about the crucial time, i.e., his Supervisor and the EAP Counselor, were never called to testify at the Hearing. Thus, the Carrier's finding of a Rule G violation is not supported by the evidence and must be set aside.

Does the evidence support the finding that the Claimant violated Rule L by disregarding a directive that he report to the Carrier's Medical Department for quarterly testing, and that he thereby also violated the fourth condition of the Rule "G" Waiver Agreement?

At the Hearing, the Claimant testified that he was told (at about 3:00 PM) by his Supervisor to report to the Nurse, but he was not given any specific appointment time to do so. The EAP Counselor had told him previously that if he had any question to come and visit him. He advised the Supervisor of his intention to do so. There was no stated objection and he did visit the Counselor. After he left the Counselor, he went to the dispensary, arriving about 6:00 PM and found that the Nurse had departed. The next morning, he contacted a Supervisor, and was told that he was being held out of service.

The testimony cited above is the basic information available to us from the transcript of Investigation. There is no evidence of the distances involved, the time of the visit with the EAP Counselor, the time he left to see the Nurse, etc. so that it is virtually impossible for this Board to ascertain if the Claimant's activities were reasonably related to the time frames involved, or if there is an inference that he deliberately wasted time so that he would arrive at the dispensary too late to be tested.

To be sure, the Carrier attempted to provide various missing evidentiary ingredients after the Hearing and the termination. For instance, in its correspondence, and by attachments thereto, it attempted to show that the Nurse's hours were from 6:30 AM to 3:00 PM, but that the Nurse was to remain until 5:00 PM to accommodate the Claimant on the day in question. Even if that assertion is now admissible (in some after the Investigation fashion), there is no evidence that any such information was ever delivered to the Claimant. Moreover, the Carrier has attempted to show that the EAP office is located in the building where the Claimant worked and that the dispensary was only about 1 mile away from that location. Further, it presented certain Health Record notes which tended to show that the EAP Counselor called the Nurse at 3:45 PM to advise that the Claimant was "on his way." On the property, the Organization objected to the receipt and consideration of this post Hearing "information."

Of course, had the information been submitted at the Hearing and it had remained essentially unrebutted by the Claimant, then the basis for certain valid inferences might have been present. But, this Board cannot permit either party to present a minimum of information at a Hearing, and then supplement it some four months later, after the opposing party has given its testimony at the Hearing. Such a procedure would effectively preclude an accused employee from intelligently defending himself because he would have no inkling of what information might be supplied at a later time, long after his opportunity to present contrary evidence and testimony had expired and/or evaporated.

It should also be noted that the Nurse had very little information to supply since she never spoke to the Claimant. The Supervisor gave the directive, and was aware of time frames, yet she was never called as a witness to provide the basic ingredients, nor was the EAP Counselor who could testify as to the time the Claimant left his office.

We have no desire to condone the failure to obey a direct order, nor do we seek to assist an employee who deliberately evades an obligation to undergo testing under a waiver agreement. At the same time, we must insist that the Carrier sustain its burden by direct and admissible evidence at the Hearing, not by ex parte information submitted four months thereafter.


In view of the foregoing, the Claim is sustained to the extent that the Claimant shall be restored to service with seniority and all other rights unimpaired. He shall be compensated for all time lost, less the amount he earned while out of service in accordance with Rule 24(h).

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois this 28th day of October 1991.