

NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISIONAward No. 12932  
Docket No. 12867  
95-2-94-2-42

The Second Division consisted of the regular members and in addition Referee James E. Yost when award was rendered.

PARTIES TO DISPUTE: (International Association of Machinists and  
( Aerospace Workers  
(  
(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

- "1. That the Kansas City Southern Railway Company violated Rule 29, of the Controlling Agreement, effective April 1, 1980, between the Kansas City Southern Railway Company (hereinafter referred to as the 'Carrier') and its employees represented by the International Association of Machinists and Aerospace Workers (hereinafter called the 'Organization') when on February 4, 1990, (sic) the Carrier incorrectly dismissed Machinist R. A. Brooks (hereinafter referred to as the Claimant) from the Shreveport, Louisiana repair facility for alleged violation of Rule 'G'.
2. That, accordingly, the Carrier reinstate the Claimant to service with his seniority rights unimpaired, with the payment for all time lost, all other rights and privileges restored due to his being wrongfully removed from service, and that all records of this matter be removed from his personal record."

FINDINGS:

The Second 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 waived right of appearance at hearing thereon.

Claimant was dismissed from the service of the Carrier for violation of Rule G in September 1990. He was reinstated to service under a Leniency Reinstatement Agreement dated October 24, 1990, and returned to work as a Machinist April 15, 1991.

The leniency reinstatement agreement provided in pertinent part:

- "5. Mr. Brooks must give the Carrier the undisputed right to randomly test him for drug use for a period of five (5) years following the date he is reinstated to service;
6. For a period of two (2) years following the date Mr. Brooks is reinstated to service, he must not lay off except for: scheduled vacation; bereavement; paid personal days; bona fide illness or injury (which must be verified by medical documentation from a physician); or when he has requested and received permission from his General Foreman, Superintendent of Shops or Superintendent of Locomotives;
7. Mr. Brooks must not violate the Carrier's Rule G during the remainder of his employment with the Carrier.

In connection with the aforementioned conditions of reinstatement, it is further understood and agreed that should Mr. Brooks fail to fully comply with any part of such conditions during the periods specified, such failure on his part constitutes a waiver of his right to a formal investigation, as required under Rule 29(1) of the Agreement, with the understanding he will be removed from service and returned to a dismissed status; however, this will not serve to prevent Mr. Brooks and the Organization from progressing a claim as the result of Mr. Brooks' removal from service under the provisions of this return to work agreement."

Claimant was required to take a random drug test on February 1, 1993, which tested positive for Benzodiazepines, a controlled substance. This positive result placed him in violation of Rule G. Claimant was notified on February 4, 1993, that he was being removed from service and returned to dismissed status for violation of Rule G as provided in Paragraph 7 of the Leniency Reinstatement Agreement.

On February 12, 1993, the Organization addressed a letter to Carrier advising that at the time of the test, Claimant was taking a number of over-the-counter medications along with valium which could have possibly caused the positive test results and asked for reconsideration of Claimant's removal from service.

Carrier promptly referred the Organization's advice and request to Greystone Health Sciences Corporation, its Medical Review Officer, for testing conducted under Department of Transportation authority. Two of Greystone's Medical Review Officers reviewed the list of medications submitted and advised Carrier that the medications did not contain benzodiazepine and would not test positive for benzodiazepine either alone or in combination. It also advised that it was not aware of any data affirming that the use of valium would cause a positive test result for benzodiazepine.

Confirmation of Claimant's test results were performed by Gas Chromatography/Mass Spectrometry. The test results were also confirmed by a second laboratory approved by the Department of Transportation.

Carrier relayed Greystone's advice to the Organization, and on the basis thereof, declined to return Claimant to service.

Formal claim was filed by the Organization on Claimant's behalf and handled to a conclusion on the property in accordance with Controlling Agreement provisions. Failing satisfactory resolution, the claim was filed with this Board for adjudication.

On the basis of the record before the Board, we conclude that Rule 29 was not violated when Carrier returned Claimant to dismissed status without benefit of a fair hearing provided in the Rule because Claimant waived his right to a formal Investigation under Rule 29 when he signed the Leniency Reinstatement Agreement of October 24, 1990. He was returned to dismissed status for violation of Paragraph 7 of the Leniency Reinstatement Agreement.

Paragraph 7 of the Leniency Reinstatement Agreement does afford some protection to Claimant as it provides for the progression of a claim by the Organization contesting Claimant's removal from service in that it gives the Organization the right to demand that the return to dismissed status be based on fact. Carrier must come forth with facts to support its actions. See Second Division Award 11998 and Third Division Award 28361.

In the handling on the property, the Organization submitted numerous pieces of technical material to Carrier in support of its argument that it was possible that medications taken by Claimant caused the positive test result and/or it was a "false positive." Carrier referred all such technical material to its Medical Review Officer who advised Carrier that the arguments and technical material submitted were not persuasive and that he could find no scientific reason to reconsider the determination of a positive finding in the case.

This Board has made a study of the record placed before it and we are persuaded that Carrier produced the facts to support its decision returning Claimant to dismissed status. The claim will be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Dated at Chicago, Illinois, this 16th day of August 1995.