

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13859
Docket No. 13742
05-2-04-2-19

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

(Brotherhood Railway Carmen Division
(Transportation Communications International Union

PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

- “1. That the Springfield Terminal Railway Company violated the terms of our current Agreement, in particular Rule 13.1 when they arbitrarily terminated the employment of Carman Kevin Dyer as a result of an investigation held on September 29, 2003.
2. That accordingly, the Springfield Terminal Railway Company be required to return the Claimant to service, compensate him for each day he was withheld from active duty. Further, all benefits, in accordance with the collective Agreement, be afforded to Carman Kevin Dyer. Also, all relevant information in regards to this investigation be expunged from his personal record and file.”

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 were given due notice of hearing thereon.

By letter dated September 5, 2003, the Claimant was notified to attend a hearing to consider his responsibility, if any, for alleged violation of Rule G. The Carrier alleged that the Claimant tested positive on a reasonable cause test administered August 20, 2003. Following a postponement the hearing was held on September 29, 2003. Subsequently, the Claimant was found guilty and dismissed from service.

Initially, the Organization raises a number of procedural issues regarding the knowledge of the Charging Officer; the lack of knowledge of the Claimant regarding the Company Policy; that reasonable cause testing was inaccurate; that the cut off for drugs was above what the Claimant had in his system; and that the transcript became unintelligible at a key point for the Claimant's defense.

The Organization further argues that this Claimant is a very low risk user who was determined by the Employee Assistance Program to neither being an habitual user, nor having a high severity level. The Claimant voluntarily agreed to treatment plans and the EAP "did not foresee any problems with him returning to work immediately."

The Board has carefully reviewed the full facts of this case. The Board takes note that the Carrier rebutted all of the above allegations from the Organization. Moreover, the facts of record indicate that in working on a car, the Claimant cut himself. The Supervisor considered that incident related to

the Claimant's behavior and this led to the drug test. The drug test was positive and at the appropriate level.

There are no procedural issues found in this case. Most importantly, the testimony by the Claimant confirms use. As indicated in the Questions (Q) and Answers (A):

“Q: Okay, have you since been notified that this test has shown a positive?

A: Yes.

Q: Okay. For cannabinoids?

A: Yes.

Q: Okay, do you agree with these findings?

A: Yes.

.....

Q: Mr. Olson had asked you a question earlier about how you tested positive. Would you like to answer that question now?

A: Yes, . . . I was at a party, and that substance was there, and whether it be peer pressure or whatever, I did take a few puffs, . . . ”

The Board takes note that the Claimant admitted use. He is therefore guilty of the charge.

Finding no procedural errors and proven guilt, the only remaining issue is the assessed discipline of dismissal. We have fully reviewed the Organization's arguments with regard to numerous prior negative tests and this “one instance of indiscretion.” We are aware from the record that the Claimant was seeking self help and agreeable to conditions for re-employment. Nevertheless, these are not mitigating factors for this Board's consideration. These factors were considered by the Carrier and rejected. Our consideration is limited to whether the Carrier's discipline was arbitrary, capricious or

excessive. For admitted violation of the Carrier's drug policy, dismissal is proper; it is not arbitrary, capricious or excessive.

What the Organization requests amounts to leniency. Only the Carrier has the right to grant the Claimant another chance and it chose not to do so (see Second Division Award No. 13832). Given the full record before us, this Board must find that the Carrier has acted within its rights and we find no grounds to question its judgment. The claim must 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 27th day of July 2005.