

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION**

**Award No. 14186  
Docket No. 14062  
17-2-NRAB-00002-150040**

The Second Division consisted of the regular members and in addition Referee Lynette. A. Ross when award was rendered.

**(International Association of Machinists and Aerospace  
Workers)**

**PARTIES TO DISPUTE: (**

**(Norfolk Southern Railway Company**

**STATEMENT OF CLAIM:**

**“(1) Norfolk Southern Corporation dismissed Machinist D. M. Swab following a formal investigation (trial) held on January 21, 2015.**

**(2) Accordingly, the Carrier failed to abide by the controlling agreement. Therefore, Machinist D. M. Swab, should have his record cleared of any reference to the charges, as if the unjust discipline had not been imposed, be credited for any and all fringe benefits that would have accrued and be paid all time lost, including overtime; made whole.”**

**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.**

**The Claimant, who was hired in 2004, held seniority as a machinist at the Carrier's Juniata Locomotive Shop, Altoona, Pennsylvania. By January 14, 2015 letter, the Carrier directed him to attend a formal Investigation in connection with the following alleged offense:**

**“... your failure to comply with the instructions of the Carrier's Medical Director and company policy as stated in his letter to you dated April 29, 2013, in that you failed to keep your system free of prohibited drugs as evidenced by the drug screen given by you on January 7, 2015, which tested positive for marijuana metabolites.”**

**As a result of the findings of the formal investigation conducted on January 21, 2015, the Claimant was found guilty as charged and was dismissed from all service with the Carrier by letter dated January 30, 2015. The Claimant and his duty authorized representative at the Investigation were provided copies of the letter of discipline and transcript of the Investigation via U. S. Certified Mail, return receipt requested. The record contains the proof of mailings and delivery receipts. However, as the Carrier acknowledges, by “inadvertent oversight” a copy of the letter of discipline and transcript of the Investigation were not sent to the General Chairman.**

**On Friday, April 17, 2015, after having been notified by the Claimant on April 14, 2015, concerning the status of his case, the General Chairman contacted the Carrier concerning the matter and inquired whether the documents had been sent to him. On Monday, April 20, 2015, the letter of discipline and transcript of the investigation were e-mailed to the General Chairman. According to the Carrier, on May 8, 2015, the Carrier's Assistant Director of Labor Relations offered the General Chairman additional time to perfect an appeal; however the General Chairman declined the offer. The Organization filed its appeal on April 17, 2015.**

**The Organization contends that the Carrier's failure to provide the General Chairman with the letter of discipline and transcript of the investigation violated**

**Subsection 1 of Section C of Rule 29, Discipline, of the Schedule Agreement, which provides that in dismissal cases the General Chairman also will be furnished a copy of the transcript of the investigation and the decision rendered. The Organization contends that the Carrier's failure to comply with Section C1 of Rule 29 was a procedural error resulting in a violation of the Claimant's contractual rights. Therefore, the Claimant should be immediately reinstated and made whole.**

**The Board has carefully considered the procedural violation alleged by the Organization. Although it is clear that the Carrier failed to provide the General Chairman with the letter of discipline and transcript of the investigation as required by the above-cited provision of the Rule 29, Discipline, the Board holds that such technical error neither invalidates the disciplinary process nor dictates voiding of the disciplinary assessment, especially when the Organization was given additional time to perfect its appeal and there is no showing of prejudice or harm upon the Claimant or Organization. See, among others, the following Awards: Second Division Awards 7505 and 12249; Third Division Awards 20682, 29584, 30679, 31625, and 37622; Award 730 of Special Board of Adjustment 910; Award 38 of Public Law Board 5917; and Award 5 of Public Law Board 7143.**

**From our careful review of the record, the Board concludes there are no procedural defects preventing this tribunal from adjudicating the instant dispute on the merits. As will be discussed below, the Board finds that the testimony and evidence in the transcript amply established the Claimant's guilt of the charge of failing to comply with Carrier policy and instructions to keep his system free of prohibited drugs.**

**According to the record, on April 29, 2013, the Carrier's Medical Director issued a letter to the Claimant following the Claimant's reinstatement pursuant to Award No. 49 of Public Law Board 6421, for mitigating reasons. As regards the facts pertinent to that case, on April 4, 2012, the Claimant submitted for testing a urine sample which was later determined to have been substituted, thereby constituting a refusal to test. In the penultimate paragraph of Award No. 49, the Board stated:**

**“Therefore, given the unique facts and circumstances in this matter, and without setting a precedent for future cases, and noting that the Claimant admitted to having a drug problem for which he requested help, the Board finds that the Claimant is to be reinstated to service without back pay. The Claimant’s seniority and other benefits shall be unimpaired, in accordance with the Carrier’s Policy on Alcohol and Drugs as would have been applied as if the instant test had been a first positive test under the terms of the Carrier’s Policy on Alcohol and Drugs.”**

**Turning to the April 29, 2013 letter from the Carrier’s Medical Director, the Claimant was instructed, as follows:**

**“My records indicate that you were recently reinstated on [sic] by Public Law Board #6421 Award No. 49. I remind you, however, that the use of prohibited drugs is contrary to Company policy. Therefore, you are instructed to keep your system free of such substances and participate in any appropriate DARS continuing care recommendations if applicable.**

**During the first five years following your return to work, you may, from time to time, be required by me to report to a collection site for further testing under direct observation in order to demonstrate that you are not using prohibited drugs. Should you fail to comply or should a future test be positive or any violation of Rule G occur [sic] you will be subject to dismissal.**

**Any employee who is dismissed for failing to obey instructions pursuant to the Company’s policy on drugs is not eligible for reinstatement under the DARS Program.”**

**The record at the foundation of the instant dispute established that the Claimant was instructed to undergo follow-up drug testing on January 7, 2015. The results of the drug screen were positive for marijuana metabolites, as properly**

determined by the testing laboratory and as certified by the Carrier's Medical Director after having discussed the positive test result with the Claimant. The record shows that the "split specimen" analysis performed on a portion of the Claimant's sample reserved for such testing at the Claimant's request also tested positive for marijuana metabolites.

Furthermore, the transcript reflects the Claimant's testimony acknowledging the possibility of a positive result, without conceding he had indeed tested positive. According to his testimony, the Claimant attributed the positive test result to his passive inhalation of marijuana while in the presence of a seriously ill friend who had been using marijuana for pain control. The Claimant testified that he had spent about three days with his friend prior to undergoing substance abuse testing on January 7, 2015, hence, the positive result for marijuana based on passive inhalation.

On careful examination of the record, the Board finds that the Claimant's affirmative defense that his passive inhalation of marijuana was to blame for the positive test result was not supported by any evidence. The Board understands that a positive drug test result as ascertained by the testing laboratory is not actually certified as positive until the Medical Director discusses it with the employee who furnished the specimen. Here, that protocol was followed when the Carrier's Medical Director discussed the positive result with the Claimant before certifying it as positive for the presence of marijuana on January 12, 2015. Consequently, the Carrier was entitled to reject the Claimant's "passive inhalation" defense as proffered during the investigation and to rely on the positive drug test result as substantial evidence in support of the Claimant's violation of the Carrier's Policy on Alcohol and Drugs. For arbitral support concerning the rejection of passive inhalation defenses see, on-property Third Division Award 29451; Award 2 of Public Law Board 5308; and Award 40 of Public Law Board 5928.

Based on the above, it is clear the Claimant was guilty of failing to comply with the instructions of the Carrier's Medical Director and the Carrier's Policy on Alcohol and Drugs by failing to keep his system free of prohibited drugs. The

Claimant tested positive for marijuana on a follow-up drug screen. Therefore, the claim lacks merit and shall be denied in its entirety.

**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 21st day of February 2017.