

(CORRECTED)

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12106
Docket No. 12026
91-2-90-2-207

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

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
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(Southern Railway Company

STATEMENT OF CLAIM:

1. That the Southern Railway Company failed to comply with the procedural requirements of Rule 35 of the Agreement, and accordingly, the claim should be allowed as presented.

2. That the Southern Railway Company violated the controlling Agreement, particularly Rule 34, when they unjustly dismissed Electrician J. Gaines from service on June 15, 1989.

3. That accordingly, the Southern Railway Company be ordered to reinstate Electrician J. Gaines to service with all rights and benefits unimpaired and compensated for all monetary losses sustained account of the unjust dismissal in violation of the Agreement.

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 employees 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, employed as an Electrician at the Carrier's Atlanta Locomotive Shops in Atlanta, Georgia, was dismissed from service as a result of a formal Investigation which was held on June 27 and 28, 1989, for alleged violation of the Carrier's policy on drugs and failure to comply with Rule G of the Safety and General Conduct Rule.

It is the Carrier's position that due to the physical inability of the Claimant to perform his job properly, he was sent to the Howell Clinic on June 12, 1989, for a fitness to remain in service medical examination. Part of this examination was a drug screen urinalysis test, which the Carrier

claimed showed positive for cocaine. As a result, the Claimant was summoned to a preliminary Investigation on June 15, 1989, where he was charged as noted above. At the conclusion of the Investigation, the Claimant was notified that he was dismissed from service. The Claimant requested a formal Hearing which was set for June 27, 1989. The Claimant did not sign for a certified letter which would have notified him of the Hearing, and it was returned to the Carrier unclaimed. The Investigation was recessed on June 27, in order to try to obtain the Claimant's presence and was held without the Claimant being present on June 28, 1989. The Claimant was notified that, as a result of the formal Hearing and the evidence presented, he was guilty of violating the Carrier's policy on drugs and Rule G and, therefore, his dismissal from service was affirmed. It is the Carrier's position that the Claimant was afforded all rights to which he was entitled under Rules 34 and 35 of the Agreement in that the formal Investigation was scheduled on a reasonable basis. The Organization requested and was granted one postponement due to the Claimant's absence from the formal Investigation Hearing on June 27, and since the Claimant did not attend the subsequent Hearing on June 28, the Investigation was properly held. The Carrier noted it made reasonable efforts to notify the Claimant, to afford him the opportunity to hear all the evidence submitted and to interrogate witnesses and present his defense. It was the Claimant's choice to remain absent from the formal Investigation and to waive these procedural requirements. The requirements can be waived by the Claimant in a number of ways by action, inaction or failure to act in good faith. His failure to be present can only be attributed to his own attitude and actions. A number of Awards were provided in support of the Carrier's position. The Carrier did send written notice of the Investigation when it mailed a certified letter of notification to an address that was proven during the Investigation to be the Claimant's correct address. The Claimant did not receive the notice simply because he chose not to claim the certified letter. The Carrier has no responsibility to compel the Claimant to pick up his mail and, therefore, his failure to receive written notice is directly attributable to the Claimant. The Claimant's excuse that he did not attend the proceedings because he was out of town was not based on facts. Even the Local Chairman stated that he had talked with the Claimant previously about the scheduled Hearing and, therefore, the Claimant was aware of the proceedings against him. Moreover, he was in the Carrier's office just a few hours prior to the start of the Investigation on June 27. The Carrier again noted the Investigation was recessed for 24 hours so that the Local Chairman could attempt to contact the Claimant, and this attempt was unsuccessful. The Carrier stated that the Claimant was in town and knew of the Investigation, but chose not to make himself available and chose not to attend. It was the Carrier's position that the timeliness arguments raised by the Organization are also without merit. The Carrier received the Electrical Workers notice of Claim on November 17, 1989. The declination letter was dated January 9, 1990, however, was inadvertently sent to the Brotherhood of Maintenance of Way Employees. In any event, the forwarding was postmarked on January 13, 1990, the 57th day, and, therefore, there was no violation by the Carrier in this case and an Award was provided in support of its position.

With respect to the merits of the case, it is the Carrier's position that the Claimant was proven guilty as charged. The Carrier has the right to require a physical examination to determine employees' ability to perform their assignments. This has been upheld in numerous Awards before this and other Divisions. The Carrier's medical policy specifically states that all Company physical examinations will now include a drug screen urinalysis. It is simply another item which is considered by the Medical Department in determining whether an employee meets the medical standards and is fit to perform duty. The Carrier's testing program offers the highest level of accuracy and reliability, and the samples are sealed to insure the appropriate chain of custody requirements. Samples are subject to two screening tests using the EMIT method and the GC/MS to confirm the results. It is the Carrier's position that when the GC/MS test is used in combination with the EMIT, the results are 100% reliable and cites studies to that effect. Because the Claimant had tested positive for cocaine and since this abrogates the Carrier's responsibility to its employees and to the public to maintain the safest possible conditions, employees who cannot desist from the use of controlled substances threaten the safe operations of the Railroad. A number of cases were cited where, following positive drug screens, dismissals of employees were upheld. The Claimant tested positive for a second time during his probationary period and, therefore, his discipline was justified and the Carrier asked that the Claim be denied in full.

The Organization stated that the Claimant was not afforded a fair and impartial Hearing to which he is entitled under the provisions of the working Agreement. The Investigation was convened on June 27, 1989, and the Claimant was charged as listed above. The Organization noted that the Investigation was held without the Claimant being in attendance. The Carrier's notification to the Claimant was never received, and the Carrier refused to postpone the Investigation until the Claimant could be properly notified and be in attendance. It is the Organization's position that the Claimant was in attendance at the Atlanta Locomotive Shop on the date of the Investigation to sign up for Railroad unemployment, however, there is no mention that anyone informed the Claimant that a formal Investigation was being convened that day or to the charges against him. The Organization objected to the proceedings and stated that the Investigation should be postponed, which was denied by the Carrier. The Carrier was informed as to the reasons for the Claimant's absence and these were appropriate reasons and should have been allowed by the Carrier. The Carrier failed to comply with the pertinent portions of the Investigation Rule of the working Agreement. Therefore, the Claimant was deprived of a fair and impartial Investigation and should be reinstated with pay as a result. Several Awards were cited to bolster the Organization's position. In addition, even if the procedural Claims by the Organization are denied, they state that with respect to the merits of this case, the Carrier has failed to meet its burden of proof to convincingly demonstrate the Claimant is guilty of the

offense upon which this penalty is based. The Carrier failed to produce the proper chain of custody concerning the Claimant's urine test or any testimony from medical personnel to produce credible collaboration as to the accuracy and reliability of test results. Even if the test was accurate, and the Organization stated it was not, this test failed to indicate whether or not the Claimant was under the influence of a controlled substance as stated in the Carrier's charges alleging violation of Carrier's Rule G. Therefore the test was inconclusive as to whether or not the Claimant was under the influence as alleged by the Carrier. The Organization stated the Board should sustain the Employee's Claim in its entirety.

Regarding the Claimant's failure to appear at his Hearing, while the Board would certainly want to encourage carriers to make every effort to have Claimants present at their own Investigations, the Board is satisfied that the Carrier met at least the minimum requirements of the Rule in that it properly notified the Claimant of his Investigation. It did postpone the Hearing at the request of the Organization. The Claimant was present on the property during these times, and the Board can only conclude that the Claimant refrained from attending the Hearing for reasons of his own. The Board, therefore, finds that there are no procedural defects in this case and will proceed to the merits.

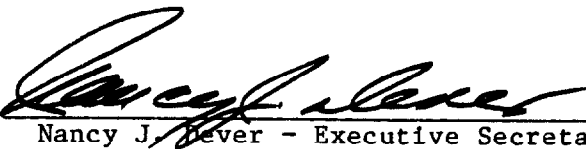
With respect to the merits of the case, the Claimant is charged with a most serious violation of Carrier policy. We do not need to go into any detail regarding the potential safety and other consequences of working while testing positive for cocaine. The Board is satisfied that the Carrier's chain of custody method and testing methods are appropriate under the circumstances, and the Board finds that the Claimant did test positive for cocaine. In light of his previous disciplinary record and the fact that he was on probation under similar charges, the Board finds that the Carrier has proven its case and will deny the Claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of August 1991.