

**NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION**

**Award No. 13678**

**Docket No. 13582**

**02-2-00-2-64**

**The Second Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.**

**(International Brotherhood of Electrical Workers  
( (System Council #16)**  
**PARTIES TO DISPUTE: (**  
**(Burlington Northern Santa Fe Railroad  
( (former Burlington Northern Railroad)**

**STATEMENT OF CLAIM:**

- “1. That in violation of the controlling Agreement, Rule 35 in particular, Mechanical Department Electrician Kurt E. Miller was unjustly dismissed from Carrier service following an investigation conducted on January 4, 1999.**
- 2. That Mechanical Department Electrician Kurt E. Miller’s dismissal was arbitrary and unjust.**
- 3. That accordingly, the Burlington Northern/Santa Fe Railroad Company should be directed to reinstate Mechanical Department Electrician Miller in accordance with the terms of the controlling 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 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 was first employed by the Carrier in September 1978. In May 1998, he tested positive for a controlled substance. The Claimant waived his right to a formal Investigation. He was issued a conditional suspension for his first-time violation of the Carrier's Alcohol and Drug Policy. Under the terms of the conditional suspension, the Claimant agreed to enroll in the Employee Assistance Program and to comply with its requirements.

A Breathalyzer and drug test was performed while the Claimant was on duty on December 16, 1998. Because the Claimant's Breathalyzer test showed a positive reading, a formal Investigation was scheduled for the purpose of ascertaining the facts in connection with an alleged violation of Rule S-28.5. The Rule states: "Employees must not have any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property." The Rule also references the Carrier's alcohol and drug policy, which provides for dismissal for second time violators of the drug and alcohol Rules. Following an Investigation on January 4, 1999, the Claimant was dismissed.

The record shows that a Breathalyzer test was administered at 8:33 A.M. followed by a second test at 8:50 A.M. on the morning of December 16. Both the initial and the confirmatory test showed positive results of .038 and .035, respectively. Test results over .02 violate the Carrier's policy.

The Board finds that there was substantial evidence to support the Claimant's discharge. There is no basis for a finding that the Hearing Officer erred in rejecting the Claimant's testimony attributing the positive readings to cough medicine. Moreover, we find unconvincing the Organization's attempt to cast doubt on the reliability or accuracy of the test results. Although the Claimant voluntarily had a blood alcohol test taken later that morning which tested negative, the record shows that there was an hour and a half delay in administering that test. In light of the rate at which alcohol metabolizes in the body, a negative test result does not serve to negate the prior positive test results. (See Second Division Award 11530.) Finally, the Organization's contention that the Breathalyzer technician should have been called as a witness at the formal Investigation is one that has been rejected in many prior Awards. See, Public Law Board No. 5614, Award 7; Special Board of Adjustment No. 884, Award 206; Third Division Award 35507. The general rationale is that there is no justification for calling medical witnesses if the evidence indicates that testing

procedures followed proper protocol to ensure the accuracy of the results. That is the case here.

The Organization also seeks leniency from the Board, arguing that the Claimant's long years of service warrant another chance at re-employment. However, leniency is not the prerogative of the Board. Third Division Awards 34206, 31937. Equally important, the Claimant was already given a second chance by the Carrier. Unfortunately for the Claimant, he was unable to comply with the Carrier's Drug and Alcohol Policy despite that additional opportunity. We have no alternative but to deny the claim.

**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 11th day of February, 2002.**

