

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(The Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Mr. T. Medina for his '... alleged second failure to pass the drug screen test due to the presence of cannabinoids (marijuana) in your system on March 14, 1989 ***' was without just and sufficient cause, arbitrary, on the basis of unproven charges and in violation of the Agreement (System File D-89-11/MW-14-89).

(2) As a consequence of the violation referred to in Part (1) hereof, the Claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him, he shall be paid for all wage loss suffered and he shall be allowed the benefits prescribed in the Agreement."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

Prior to his dismissal, the Claimant established seniority as a section laborer with 12 years of unblemished service for the Carrier. He had been furloughed since May 1987 when this dispute arose.

On May 11, 1987, the Claimant was recalled to service, and he submitted to a return to work physical including a urine drug screen. The Claimant was notified he tested positive for cannabinoids. However, a more senior employee returned to service, so the Claimant returned to furlough status. The Carrier directed the Claimant to contact the Employee Assistance Program, and the Claimant participated in the Program.

The Claimant was recalled on March 14, 1989, and he again submitted to a return to work physical including a urine drug screen. Under letter dated March 27, 1989, the Carrier notified the Claimant that he tested positive for cannabinoids. The Claimant submitted to an independent drug test which tested negative for cannabinoids. Under date of April 14, 1989, the Claimant was notified

"...in connection with your alleged second failure to pass the drug screen test due to the presence of cannabinoids (marijuana) in your system on March 14, 1989, taken as part of your return to work physical after being recalled to service as Section Laborer at Laveta, Colorado, effective April 14, 1989, you are dismissed from the service of The Denver and Rio Grande Western Railroad Company for your responsibility in connection therewith. The first failure was as (sic) result of return to work physical taken on May 11, 1987, when recalled to service as Section Laborer at Alamosa, Colorado."

The Organization contends the Carrier's imposition of the discipline in connection with medical testing was in violation of the Agreement because the Claimant was in a furloughed status, and, therefore, not subject to the Carrier's Rules. The Carrier notes this argument is inconsistent with the holding of the Board. (Third Division Awards 11796, 26203, 25892, 24782, 23410, and 23284).

The Organization alleges the Carrier failed to support the test result documents with critical corroborative testimony or evidence. The Carrier responded that alcohol and drug screens are part of every company physical examination, and the Carrier uses a certified facility. The Carrier noted the time elapsed between the two drug tests in 1989 explain the different results.

The Organization maintains the Claimant was unaware that positive drug test results would be treated as discipline. The Carrier responded that the Claimant was not charged with the failure in 1987 but he was apprised of that fact through his referral to EAP at that time.

In our review of the record in this case, we find no substantial basis to overturn the Carrier's disposition. There is no real dispute that the laboratory report was the result of the Claimant's drug screen taken on March 17, 1989.

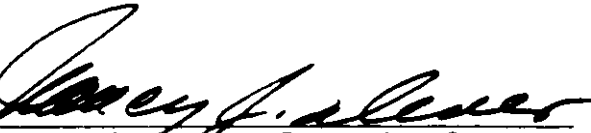
In this matter no evidence was produced by the Organization that would give substance to their conjectures. Therefore, there is no basis for this Board to reverse the Carrier's determination of guilt. Further, discipline as the result of a return to duty physical is not something new in this industry or on this railroad. See Third Division Awards 27004, 27937.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1992.