

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30808
Docket No. MS-31204
95-3-93-3-283

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Alonzo G. Harper
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(Norfolk Southern Railway Company

STATEMENT OF CLAIM:

"Claimant, Alonzo G. Harper, was dismissed from service on June 9, 1993 for alleged positive [test] results for cocaine. Employee requests reinstatement with pay for all lost time with vacation and seniority rights unimpaired."

FINDINGS:

The Third 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 herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant was employed by the Carrier as a Machine Operator. At the time of his dismissal in June 1992, he had approximately three and one-half years of service.

Claimant was on temporary disability leave from November 1991 until March 1992. He returned to service on March 16 and, as part of his routine return-to-work physical examination, was subject to a test for illicit drugs. The test was positive for cocaine; and he was, as a result, taken out of service for violation of the Carrier's 1985 drug and alcohol policy, as amended.

That policy notified employees, in part, that all physical examinations would include a drug test and that it would not actively employ persons who use drugs or are drug dependent.

Claimant was on notice of the policy. One of the conditions of the DARS program was that Claimant provide a negative test for drugs within 45 days.

Claimant denied knowledge of the cause of his positive test, and denied drug use or addiction, but he enrolled in the Carrier's DARS program for the stated reason of saving his job. Claimant was found by DARS to be without addiction, apparently based in part on his denial; and he was denied treatment. As part of the program, he was tested again. On April 20, Claimant's test result was again positive for cocaine. He was scheduled for a third test on May 4.

Claimant stated that he had been regularly, over a two-month period, smoking cigarettes provided free by a neighbor. He stated that on May 4, prior to his scheduled third drug test, his wife told him that the cigarettes "smelled funny." He denied any suspicion prior to that time. Claimant stated that he then learned that the cigarettes had been "laced with cocaine." He filed a report with the police on May 4, alleging that he had discovered that cigarettes he had smoked had been adulterated, without his knowledge. He claimed that he had been "set up." Claimant's neighbor had, according to Claimant's statement, left the area.

Claimant attempted to postpone a drug test scheduled for May 4. The request was denied by the Carrier. The third test result was positive. According to Claimant, he again attempted to obtain treatment through DARS and was denied. On the basis of Claimant's third positive test for cocaine, he was dismissed from service.

Claimant subsequently underwent a treatment program at a center arranged by the Brotherhood of Maintenance of Way Employees, and was released after 14 days because he did not demonstrate drug addiction. Indeed, the program diagnosed Claimant in May 1992 as a "cocaine abuser," rather than suffering from cocaine addiction. Claimant was designated as fit to return to service, subject to unspecified follow-up counselling. The treatment facility to which he was admitted noted that Claimant's "denial is an indication that he is set up for relapse."

The Carrier summoned Claimant to an Investigation held June 9, 1992 to develop facts and determine responsibility in connection with his positive drug tests. At the Hearing the above facts were adduced. Claimant was represented in the Hearing by the Brotherhood of Maintenance of Way Employees. He agreed with the positive test results, although he presented his defense and protested the Carrier's refusal to postpone the third test and its failure to provide him with treatment.

The Carrier determined Claimant guilty of the charges and dismissed him from service. The Organization protested the Carrier's action. The claim was progressed in the usual manner, but without resolution. It was then brought by Claimant to this Board.

The Carrier argues that evidence clearly establishes Claimant's failure to comply with the instructions to produce a negative test result and his violation of the Carrier's drug policy. It points out that Claimant does not protest the validity of the positive test results or deny knowledge of his obligations under the policy. It points out that Claimant's explanation for the introduction of cocaine into his system is implausible and self-serving. The Carrier asserts that continued use of illicit drugs following positive test results has uniformly been held to be a dismissable offense. It points out that the validity of its policy and the propriety of its testing procedures have repeatedly been upheld. The Carrier urges that the Board should not substitute its judgment for that of the Carrier in assessing discipline. It urges that the claim be denied.

Claimant acknowledges that he failed to produce the negative test result, as required, but he argues that he was placed in an impossible situation because he was unaware of the source of his positive test results, but was denied treatment. He asserts that when he learned of the source of the positive test results, he took steps to eliminate both the source and the drug, but the Carrier arbitrarily denied him any postponement of his scheduled test. Claimant points out that he subsequently underwent treatment.

Claimant asserts that his employment record prior to the positive drug tests was clean and that he was not tested as a result of any work-related observations or suspicions. He points out that there is no indication that he ever worked under the influence of drugs and, in addition, that the tests he underwent were not based on probable cause. Claimant points out that he has a stable life. He contends that the Carrier's refusals to allow him to obtain treatment through DARS, refusal to allow him a postponement of the test and refusal to acknowledge the steps he took to obtain treatment through an alternate program are arbitrary and capricious.

Claimant further urges that much of the evidence produced at the Investigation was hearsay and unauthenticated. He protests that the tape was turned off and portions of the Hearing conducted off the record. Claimant was not given opportunity to obtain testimony from his supervisor concerning his work record and his efforts to correct the problem and save his job. He asserts that

the transcript evidences predetermination of his guilt and incompetent representation by the Brotherhood of Maintenance of Way Employees. Claimant contends that he was dismissed without just cause on the merits and as a result of improper procedures. He urges that the claim be sustained.

The use of illicit drugs by railroad industry employees in safety-sensitive positions creates risk to those employees and their co-workers, as well as the public. The Federal Government, through Federal Railroad Administration Regulations, and the Carrier have determined that such risks will not be tolerated. The Board is persuaded that the Carrier's policy is a legitimate manifestation of its rights to manage its operations, direct the work force and ensure a safe working environment.

The Carrier's policy is intended to ensure that drug-using employees are not maintained in active employment and that drug dependent employees are offered opportunity for treatment and rehabilitation. The validity of the policy and its procedures have been upheld in the face of challenges. See, e.g., on-property Awards 98 and 99 of Public Law Board No. 1760, Awards 51 and 52 of Public Law Board No. 3445 and Award 83 of Public Law Board No. 3530.

It is not disputed that Claimant violated that policy by twice testing positive for cocaine after an earlier positive test. Claimant admitted as much in the Hearing and further acknowledges it in his Submission. That is, on its face, a violation of the Carrier's policy; and it authorizes Claimant's dismissal. Indeed, three successive positive tests for cocaine are sufficient to justify Claimant's summary removal under the policy, without resort to use of progressive discipline or consideration of Claimant's record or circumstances. That conclusion is also based on precedent in the cases cited above.

The Board considered Claimant's protests as to the Carrier's application of the policy to dismiss him. They are not persuasive.

Certain of Claimant's arguments are premised on the assertion that he was the victim of a "set-up," where he was given cocaine-laced cigarettes for two months by a neighbor, without knowing that they contained the drug. Claimant's assertions in this regard are unsupported, self-serving and implausible. They would require the Board to believe that Claimant could smoke the cigarettes for two months without feeling any response to the drug and no unusual craving for the cigarettes and without even noticing that - as he admitted his wife noticed - they smelled strange. It would require the Board to believe that a mere acquaintance had determined to

give Claimant these cigarettes, without cost, for an extended period, without telling him about it and without Claimant suspecting until after his second positive drug test, and then conveniently disappear.

The Carrier's policy does not provide for the postponement of drug tests. There are a number of sound reasons for adhering to scheduled tests. However, even assuming that postponements might be permissible under compelling circumstances, Claimant's implausible tale constituted no basis upon which to hold the Carrier's refusal to postpone the third drug test a violation of his rights, by any standard.

Of Claimant's complaint that the Carrier improperly refused to allow him to undergo drug treatment under the DARS program the Board is similarly unpersuaded. Treatment is appropriate and efficacious for employees who have a drug addiction and who are able to acknowledge and deal with the problem. The record indicates that, in Claimant's dealings with the DARS program, he denied drug use or addiction and denied any knowledge as to the source of the positive tests. DARS was unable to confirm Claimant's addiction and did not deem him an appropriate candidate for treatment, on that basis. Indeed, the in-patient drug treatment program which Claimant voluntarily underwent following his third positive test confirmed that he was a "cocaine abuser," rather than suffering from cocaine addiction; and it discharged him. The Board is persuaded that both the nature of the diagnosis and Claimant's response of denial made denial of treatment a reasonable response.

The Board notes that length of service is not ordinarily a relevant factor in reviewing the penalty imposed for multiple positive tests for illicit drugs; dismissal without resort to progressive discipline or consideration of mitigating factors is the usual result. However, even if such factors were to be considered, we would not find Claimant's case compelling. He had only about three years of actual service, deducting his time off work on injury.

Of Claimant's further arguments that the Brotherhood of Maintenance of Way Employees failed to provide him with adequate representation, the Board is not convinced. Evidence was allowed at the Hearing concerning Claimant's attempts to correct his drug problem - a problem he basically denied - and save his job; and the Organization argued on his behalf. There was substantial evidence in support of Claimant's guilt; and the Carrier did not accept either Claimant's testimony or the Organization's arguments by way of rebuttal, explanation or mitigation. Moreover, Claimant

pointed to no argument which would have saved his job, if made. The way for Claimant to have saved his job was not to use cocaine. Given Claimant's admitted three positive tests for cocaine and his implausible explanations for how they resulted, the Board is not persuaded that the Organization could have done more than it did. Claimant may not reasonably hold the Organization responsible for the loss of his job.

Of the arguments that the Carrier predetermined Claimant's guilt or improperly conducted the Hearing the Board concludes there is no support. Claimant admitted the crucial facts - he tested positive for cocaine three straight times. There is no indication that the Carrier improperly prejudged Claimant's guilt, improperly treated evidence or utilized the untaped parts of the Hearing for more than administrative details not a necessary part of the record. Indeed, Claimant, who was present, does not assert to the contrary.

The Board concludes that the Carrier's assessment of the penalty of dismissal was not arbitrary or excessive. We decline to disturb its decision.

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 Third Division

Dated at Chicago, Illinois, this 6th day of April 1995.