

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30893
Docket No. SG-31547
95-3-93-3-565

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Atchison, Topeka & Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim on behalf of General Committee of the Brotherhood of Railroad Signalmen on the Atchison, Topeka & Santa Fe Railway:

Claim on behalf of B. L. Brown for reinstatement to service with payment for all lost time and benefits and discipline removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 41, when it failed to provide the Claimant with a fair and impartial hearing and imposed the harsh and excessive discipline of dismissal as a result of the investigation held on September 29, 1992, without meeting its burden of proving the charges against the Claimant. Carrier's File No. 92-14-36. General Chairman's File No. 41-1099. BRS File Case No. 9185-ATSF."

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 involved herein.

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

The Claimant's tenure with the Carrier began on October 1, 1984. On July 26, 1990, he was subject to a Department of Transportation physical, including a drug test. He tested positive

for amphetamines and methamphetamines. He was advised that if he was taking a doctor's prescription, he should supply evidence of such, otherwise he had to provide another urine sample for a second test. The Claimant did not present evidence of a doctor's prescription, but did provide a second sample which tested negative.

At the time, an employee was not removed from service if the second sample tested negative. However, the second negative test did not remove the positive test result from his record. Only evidence of a prescription drug could negate the results of the first positive test.

Because he tested positive the first time, the Claimant was subject to periodic random drug tests. He had been advised of this requirement following his first positive test. By letter dated July 15, 1992, the employee was notified to submit to a random drug test. He complied. The urine specimen he provided proved positive for the illegal substance methamphetamine.

By letter dated August 13, 1992, the Claimant was notified to attend a formal Investigation to determine the facts surrounding his positive drug test results on July 15, 1992. The hearing was to be held on August 21, 1992 at the Santa Fe Office Building, Winslow, Arizona. The charge letter cited possible violations of Rule 9.0(A), Santa Fe Policy on use of Alcohol and Drugs, in effect March, 1991; and Rules C and G of Safety and General rules for all Employees, effective October 29, 1989, those portions reading:

"Rule 9.0(A): DISMISSAL. Any one or more of the following conditions will subject employees to dismissal for failure to obey instructions: (a) A repeat positive urine test for controlled substances obtained under any circumstances. Those employees who have tested positive in the past ten (10) years would be subject to dismissal whenever they test positive a second time."

"Rule C: Examinations: Employees must pass the required examinations."

"Rule G: Drugs and Alcohol: The use of alcoholic beverages, intoxicants, drugs, narcotics, marijuana or controlled substances by employees subject to duty, when on duty or on company property is prohibited. Employees must not report for duty, or be on company property under the influence of or use while on duty or have in their possession while on company property, any drug, alcoholic beverage, intoxicant, narcotic, marijuana, medication, or other substance, including those prescribed by a doctor,

that will in any way adversely affect their alertness, coordination, reaction, response or safety."

The Carrier concluded that there was substantial evidence to support a determination of guilt. Therefore by letter dated September 29, 1992, it notified Claimant of his dismissal. The Claimant's removal from service was in keeping with Rule 9.0(A), which was implemented in March, 1991, two years after the Claimant's employment and nearly a year after the Claimant first tested positive for illegal substances. The rule was cited in the charge letter.

The Organization appealed the Carrier's decision to remove the Claimant. In part it objected to the utilization of the Claimant's first positive drug test. It contends he was never disciplined for the first positive test since it was negated by a second negative test. Furthermore, the first positive test occurred before the implementation of Rule 9.0(A). The rule should not be enforced retroactively.

The Organization also argued that the Claimant was denied a fair and impartial Hearing when the Regional Manager issued an immediate determination of guilt the same day as the Hearing without affording the Claimant the consideration of a full review of the transcript.

The Organization also claims that the discipline issued the Claimant was punitive, in that discipline is supposed to be corrective in nature. In the instant case, the Carrier's penalty was harsh and excessive.

The Carrier believes the instant claim should be denied in its entirety. The Claimant admitted at the Hearing he had tested positive for drugs once before, and he knew from that point on that he would be tested randomly for the presence of illegal substances. The follow-up tests were no surprise. The evidence clearly shows the Claimant violated Rule 9.0(A) and Rule C and G, as cited.

The Carrier further asserts that the Rules are clear and the Claimant was knowledgeable concerning these Rules, in that he was guilty of the illegal use of drugs twice in ten years and accordingly should be dismissed. Numerous Third Division Awards have supported its rights and obligations in this area:

Third Division Award 19928

"With its responsibility to the public, Railroads have generally quire properly considered the use of intoxicants to be an extremely serious offense.

Dismissal is appropriate under the Rules for this infraction. . . ."

Third Division Award 11440

"It is also evident from even a cursory examination of the Awards of the Board involving Rule G violations, that the offense charged, if proven, results more often than not in dismissal from service. . . ."

(See also Public Law Board 5388, Award No. 5 and Public Law Board 5388, Award No. 6)

The Organization's contention that Rule 9.0(A) does not apply to incidents of drug screening which occurred prior to its effective date is incorrect. If it were to be accepted, this section of the policy would not be applicable until the year 2001.

The Claimant was given a fair hearing and was properly found guilty. The penalty was appropriate for the offense. The claim should be denied.

This Board has reviewed the evidence submitted in this case, as well as, the history of the applicable rules and policies. It is clear the Carrier prohibited the illegal use of drugs prior to the Claimant's employment. It did change the rules after the Claimant first tested positive for the use of illegal substances. However, the Claimant was not disadvantaged by these changes and the effect of these changes was not in essence retroactive as the Organization would argue. There was no evidence the Carrier immediately discharged anyone who had two positive drug tests within the previous ten year period, as a result of the rule change. Rather it merely put employees on notice that if they had a previous incident of drug use, they would be subject to the new rule, wherein two incidents of positive drug tests within any ten year period would result in dismissal.

Once the rule went into effect in March, 1991, employees were put on notice that a second positive test within ten years would be automatic dismissal provided the tests were valid and did not involve legally prescribed drugs. The Claimant's first positive drug test occurred July 26, 1990. His second positive test was June 17, 1992. The Claimant knew he was subject to random drug tests after his first incident in any case. It is unrealistic to believe he thought the Carrier would give him a third chance even if it had not effectuated the March, 1991 policy. Regardless, the Claimant was not surprised by the new policy. His second positive drug test occurred over a year after the policy went into effect.

The Claimant must be held accountable for his failure to comply with the rules.

The Board does not believe the Claimant's Agreement due process rights were violated when the decision to suspend him was made immediately after the hearing. Once the charges were sustained and the employee admitted it had been the second time he tested positive for drugs, the Carrier was within its rights to discharge the Claimant, particularly since the Claimant could not present a defense for his drug use.

The Board can find no mitigating factors which would cause us to overturn the Carrier's decision to dismiss the Claimant. The penalty issued by the Carrier will not be disturbed.

AWARD

Claim denied.

O R D E R

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 10th day of May 1995.