Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31219
Docket No. MW-31778
95-3-94-3-51

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Railroad Company

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

(1) The dismissal of Group 2 Machine Operator L.A. Hagadorn for alleged violation of Rule G on February 28, 1992 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File T-D-562-B/3MWB 92-07-15L).

(2) The Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

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.

Claimant, as the operator of a machine weighing in excess of 26,000 pounds, that is self-propelled and which can operate on public highways, was selected for a random drug test. Claimant tested positive for cannabinoids, was timely notified that he was being suspended from service pending the results of an Investigation which was timely held. Following the Investigation Claimant was dismissed from service as this was Claimant's second Rule G violation within a ten year span.

The Organization has mounted a vigorous offense to overturn the discipline process.

It contends the notice of discipline was not timely, that copies of the transcript of the Investigation was not timely furnished, that Claimant should not have been the object of a random drug test, that the chain of custody was faulty.

Each of these contentions were adequately and completely neutralized by the Carrier.

Carrier did hand deliver to Claimant the dismissal notice eight days following the Investigation. Claimant signed acknowledgement of receipt and dated that acknowledgement. Claimant was timely notified.

Regarding the "*** local organization's representative ***" contention of not receiving a copy of the transcript in a timely manner, a clear analysis of the Rule leaves the time of the notice to the representative open.

Regarding the distributions of the belated transcripts, Carrier stated (and the Rule supports) that there is no time constraints in furnishing transcript. It should be furnished as promptly as possible, but again, the Rule does not even incorporate such words of art like "promptly" or "within a reasonable period of time."

To be successful in the challenge on this issue, it would be necessary to show that copies of the transcript received 81 days following the dismissal has some how in some way harmed Claimant's case. This has not been shown.

Turning to the merits of the case, the machine Claimant was assigned fit the description of the type subject to random testing. The random selection was pursuant to the FRA specifications. This was not a test administered for cause, but for random selection.

Regarding the chain of custody and the allegation this was faulty has to be rejected also. The Carrier has adequately pointed out it is the bar code number initialed by Claimant that protects the specimen and since there is no evidence that the bar code which he initialed was in anyway tampered with, lost or mishandled this Board finds that the chain of custody was not broken.

Claimant was tested for and found to have in his system a prohibitive drug. This was the second such Rule "G" violation within a ten year span. Claimants dismissal stands.

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 1st day of November 1995.

LABOR MEMBER'S DISSENT
TO
AWARD 31219, DOCKET MW-31778
(Referee Hicks)

The Majority erroneously found that to be successful in overturning the discipline for the Carrier's admitted violation of the Agreement when it did not furnish the local representative a copy of the hearing transcript within the time limit provided, the Organization must "... show that copies of the transcript received 81 days following the dismissal has some how in some way harmed Claimant's case. This has not been shown."

In order to prepare an appeal, the Claimant's representative must be able to refer to the transcript. In this case, the representative was forced to prepare a generic appeal of the discipline, since he had no copy of the transcript to which to refer prior to the expiration of the time limits for appeal. The harm to the Claimant is self-evident. In addition, both the Claimant and the Organization are harmed when the Board fails to provide a remedy for the Carrier's blatant violation of the Agreement.

In addition to the foregoing, this Majority has brought grievous harm to the Claimant in its determination to uphold the his dismissal in this case. In particular, based on the record, including all the first-hand testimony and physical evidence produced at the investigation, there is reason to believe that the Claimant's specimen was mis-identified prior to its being sent to

the testing laboratory. Specifically, the unrebutted testimony of record indicates that the Claimant was not offered the chance to examine the bar code seal placed on the specimen container, was not asked to initial the bar code seal, did not initial the bar code seal and was not afforded an opportunity to compare the bar code number with that on the chain of custody forms to determine if the correct bar code seal was applied to the specimen. Furthermore, it is an uncontested fact of record that the person collecting the specimen left this Carrier's property and proceeded directly to the property of another carrier to collect a specimen from an employe of that carrier. Most importantly, the Majority's finding that "*** there is no evidence that the bar code which he initialed was in anyway tampered with, lost or mishandled this Board finds that the chain of custody was not broken." presupposes the existence of a "bar code which he initialed". However, the Carrier did not produce, has not produced and cannot produce a bar code seal with the Claimant's initials on it. There is no such bar code seal in the record because no such seal ever existed. This fact cannot be overemphasized. The conclusions based on non-existent evidence are totally and palpably erroneous. Therefore, I dissent.

Respectfully submitted,

G. L. Hart
Labor Member