

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33380

Docket No. MS-34106

99-3-97-3-495

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

(R. W. Shawke

PARTIES TO DISPUTE: (

(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“Dismissal case of my failure to comply with the Drug Testing policy as instructed in letter dated April 10, 1995 and subsequent letter dated May 10, 1995 from the Medical Director T. Nowosiwsky, MD, in that I failed to refrain from the use of prohibited drugs as evidenced by the urine sample provided on November 20, 1995, testing positive.”

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 were given due notice of hearing thereon.

Claimant, an employee of the Carrier for approximately 20 years at the date of the Hearing, was dismissed from service following the Hearing for failing to comply with the Carrier’s Drug Testing Policy in that he failed to refrain from the use of prohibited drugs after receiving two letters instructing him to comply.

In April 1995, the Claimant tested positive for cocaine as the result of a return-to-duty medical evaluation. The Claimant was medically disqualified from service and was specifically instructed in the procedures necessary for submitting a urine and breath sample which would test negative. On May 10, 1995, after complying with the instructions, the Claimant was returned to duty and again instructed in the Carrier's policy and informed, consistent with prior written instructions, that he would be required to report for further testing "in order to demonstrate that you are no longer using cocaine or other prohibited drugs." This period of monitoring was to continue for the first five years following his return to work. In November 1995, the Claimant was again tested, and his urine sample yielded a positive result for cocaine, giving rise to the dispute before this Board.

The record in this case shows that initially the appeals were handled by the Claimant's Organization based on procedural arguments and certain contentions that the Carrier failed to prove its case. However, the Claimant chose not to pursue the Organization's arguments and appealed his case to this Board, stating that he would "handle this my own way with the truth." The Claimant's appeal can best be described as an appeal based on leniency in view of the circumstances in his case.

The Claimant admits that he "got lost in the cocaine" after the loss of his father in 1994 and does not dispute the discipline procedures or the basis for the decision to dismiss. The Claimant states that in July 1995 he was informed that his rehabilitation was complete after only three visits. The Claimant admits to receiving a three year Probation Sentence for selling cocaine, four months of which were served at the Eastern Ohio Correction Center (EOCC) on a work release program. Also, the Claimant submitted a very positive letter from his Case Manager at the EOCC. Additionally, the Claimant has stated that he has been to an extensive rehabilitation facility and that he is drug free. He states that such may be documented through the Columbian County, Ohio Adult Probation Department. The Claimant asks "for another chance" to return to employment with Carrier.

The Carrier does not dispute the contentions raised by the Claimant. However, the Carrier argues that "the remission of an appropriate sanction on the basis of leniency is solely a matter of managerial discretion, a discretion this Board may not properly exercise." The Carrier asserts that the foregoing is a "well-established arbitral principle" and cites several Awards in support of its assertion: Special Board of

Adjustment No. 1044, Award 20, and Third Division Award 11651, which specifically cites Third Division Awards 9973 and 8478, and alludes to others.

Special Board of Adjustment No. 1044, Award 20, was a case involving the same Carrier involved in this case and the Carrier's Drug Testing Policy. In that award, the Board specifically noted the Claimants "candor and honesty" but recognized the Carrier's arguments to be more compelling, particularly noting that drug abuse cases have more at stake "than the employment opportunities of a particular employee. The safety and general welfare of entire communities as well as fellow employees are at risk." Third Division Award 11651 more succinctly stated the Third Division's adherence to the principle:

"This being so, this Division has consistently held that while we might not agree with the position of the Carrier on the property, leniency is strictly a matter of management's prerogative."

After a careful review of the entire record, the Board must conclude that the Carrier's argument is compelling.

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 13th day of July 1999.