

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 33445  
Docket No. MW-34278  
99-3-97-3-860**

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

**(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Burlington Northern Santa Fe (former Joint Texas Division  
( of Chicago, Rock Island and Pacific Railroad Company -  
( Fort Worth and Denver Railway Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

**(1) The dismissal of Mr. A. P. Mims for alleged violation of Rules 6.2 and 12.0 of the Burlington Northern Santa Fe Policy on Use of Alcohol and Drugs in connection with his allegedly testing positive for drugs on December 9, 1996 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File J-97-01/MWD970508AG BNJ).**

**(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority and all other rights unimpaired and 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 were given due notice of hearing thereon.

Claimant, an employee of the Carrier for approximately 16 years, was dismissed from the Carrier's service after an Investigation on charges that he violated Rules 6.2 and 12.0 of the Carrier's Drug and Alcohol Policy. The rules cited are sections in the Carrier's Drug and Alcohol Policy.

The Sections at issue are:

**"Section 6.2 Follow-Up Testing**

An employee who provides a negative urine specimen and/or breath sample and has been permitted to return to service is subject, for a period of five (5) years, to urine and breath alcohol testing as determined by the Medical Director. The employee will be instructed, in writing, to keep his system free of controlled substances and alcohol. If such further testing for said substance is positive, the employee will be subject to dismissal for failure to comply with BNSF's Medical Department instructions.

**Section 12 Dismissal**

Any one or more of the following conditions will subject employees to dismissal.

- (a) A repeat positive test either for controlled substances or alcohol obtained under any circumstances. Those employees who have tested positive in the past ten (10) years will be subject to dismissal whenever they test positive a second time and shall be eligible for reinstatement under section 5.0.
- (b) Failure to abide by the instructions of the Medical Department/Employee Assistance Program regarding treatment and follow-up testing.
- (c) Refusal to provide a urine specimen or breath sample for testing when instructed under the terms of this policy or federal or state regulations unless the inability to provide a

sample is for a verified medical reason. Tampering with a urine sample by substitution, dilution or adulteration will be deemed a refusal.”

The Claimant and another employee were given a urinalysis test after an accident involving the Jackson Tamper, operated by the Claimant, and a ballast regulator operated by the fellow employee. The Claimant tested positive for the presence of marijuana. The Claimant had previously tested positive for marijuana on November 10, 1988.

The Organization asserts that the employee operating the ballast regulator ran into the back of the machine operated by the Claimant, stating that the “record is devoid of any evidence to suggest that the Claimant acted in a negligent manner or in violation of any of the Carrier’s rules immediately preceding the subject drug test,” that the Carrier had no reasonable cause to test the Claimant, and that “without reasonable cause, test results cannot validly be used as a basis for discipline.” In support of its position, the organization cites Third Division Awards 27802, 30698 and 30819, as well as other awards.

The Carrier asserts that the Claimant violated its Drug and Alcohol Policy when he failed the drug test on December 9, 1996, and was subject to dismissal in that this was the second time the Claimant tested positive for marijuana within a ten year period, citing specifically Section 12.0 of the Carrier’s Policy. While claiming to have probable cause, the Carrier asserts that, even if it did not have probable cause to test the Claimant, the Claimant’s violation of the Carrier’s Policy regarding the second test within a ten year period “would still result in his dismissal.” The Carrier cites a number of Awards in support of its position; none of these Awards involved an instance where it was determined there was no probable cause to test the Claimant.

The Carrier does assert that it properly tested the Claimant in accordance with Section 9.2.1 of the Carrier’s Policy on the Use of Alcohol and Drugs:

**“Section 9.2 Reasonable Cause Testing**

Urine samples for drug testing and/or breath samples for alcohol testing may be collected from any employee under any of the following circumstances:

**9.2.1 Accident, Incident or Near-Miss: When an employee has been involved in an accident, incident or near-miss and a supervisor believes that the employee's act or omissions contributed to either the occurrence or severity of the accident, incident or near-miss."**

The Carrier asserts that the Supervisor believed both the Claimant's and fellow employee's "acts or omissions may have contributed to the occurrence of the accident" and, therefore, the Carrier had reasonable cause to test the Claimant under those circumstances. However, the Carrier's assertions are not reflected in the transcript of the investigation. The Supervisor stated that it was "standard procedure to have an urinalysis test at all collisions, and it's probably standard procedure at an injury, if deemed necessary." When questioned on whether there was probable cause, the Supervisor stated, "The policy of the collision. That's why we deemed it necessary to test him . . . was the collision." Later, the Supervisor was questioned more directly on probable cause:

**"So, what we are saying here is that there's (sic) was really no probable cause concerning the incident that would require a urinalysis no more than policy, am I correct?"**

The Supervisor responded, "Yes."

When again asked what he considered the "probable cause at the time" for the Claimant to have a urinalysis, the Supervisor stated, "the collision between the Ballast Regulator and the Tamper." Later, the Supervisor admitted that it was "routine policy" to test "any and all employees that may have been involved in the incident," and that it was "purely the involvement in the incident that generates the probable cause."

Based on the record, the Carrier has failed to demonstrate that it had probable cause to test the Claimant or reasonable cause under its own policy. In regard as to whether Section 12.0 may stand alone as justifying the discipline assessed, as asserted by the Carrier, the Organization has submitted persuasive awards on the property that hold otherwise.

After a careful review of the entire record, the Board finds that the Carrier failed to meet its burden of proof, and the discipline assessed the Claimant cannot be upheld.

**In regard to the claim for lost wages, the Organization has argued that the principles contained in the Awards it has cited should be applied and that the claim should be sustained in full. The Carrier has offered Public Law Board No. 4768, Award 20, in which it was determined that the circumstances of that case, involving a drug test not based on probable cause, did not warrant payment of back pay. Additionally, the Carrier asserts that once the Claimant tested positive for the presence of an illegal substance, he could not perform service for the Carrier until he was cleared by the medical department, which in this case would mean until he was reinstated pursuant to this Award.**

**Public Law Board No. 4768, Award 20, provides little insight into its rationale and appears to involve circumstances substantially different from this case. Additionally, the Carrier's position on "medical disqualification" is presented without support.**

**Based on the facts present in this case, this Board will be guided by the Awards presented by the Organization.**

**Accordingly, the Claimant shall be reinstated to service with seniority and all other rights unimpaired, and he shall be compensated for all wage loss suffered. However, the Claimant's reinstatement will be subject to his taking and passing a drug screen, and his enrollment and participation in treatment plans, including follow-up testing, that are consistent with the Carrier's policies.**

**AWARD**

**Claim sustained in accordance with the Findings.**

Form 1  
Page 6

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**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of Third Division**

**Dated at Chicago, Illinois, this 23rd day of August 1999.**