

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33920
Docket No. MW-34367
00-3-97-3-988**

The Third Division consisted of the regular members and in addition Referee Sandra Gilbert Pike when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (removal from service and subsequent dismissal) imposed upon Welder Helper T. R. Green for alleged'...FAILURE TO FOLLOW INSTRUCTIONS GIVEN IN LETTER OF AUGUST 20, 1987, AND SUBSEQUENTLY REINFORCED IN LETTERS OF SEPTEMBER 4, 1987, AND FEBRUARY 1, 1991, AS EVIDENCED BY BREATH ALCOHOL TEST ADMINISTERED ON OCTOBER 25, 1996, RESULTING IN BREATH ALCOHOL LEVELS OF 0.033 PERCENT AT 13:59 AND CONFIRMATION TESTING CONDUCTED ON OCTOBER 25, 1996, OF 0.027 PERCENT AT 14:25 AT ELKHART YARD, ELKHART, IN., WHILE PERFORMING YOUR DUTIES AS A WELDER HELPER' was arbitrary, capricious, without just and sufficient cause and on the basis of unproven charges (System Docket MW-4549-D).**
- (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, his record cleared of the test results and 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 were given due notice of hearing thereon.

On October 25, 1996, Claimant submitted to a random breath and urine test for drugs and alcohol, while working as a welder helper. The alcohol breath test indicated a .033% blood alcohol level. By letter dated October 30, 1996, Claimant was instructed to appear for a Hearing on the charges as stated. Following the Investigation, which was eventually held on November 21, 1996. Claimant was notified on December 9, 1996 that he had been found guilty and that he was dismissed because this was considered a second offense.

The first drug offense occurred on August 12, 1987 when Claimant tested positive for cannabinoids. Claimant received a letter dated August 20, 1987 from the Carrier's Medical Director, O. Hawryluk, M.D., who disqualified him from service because his medical evaluation test results were positive for cannabinoids. The Claimant was instructed to provide a negative urine sample not later than October 4, 1987 and to contact the Carrier's Employee Assistance Program Counselor, Ms. C. Nigut, for instruction. By letter dated September 4, 1987, Claimant was instructed to return to service and advised that he would be required to undergo further testing for the first three years following his return. By letter dated February 1, 1991, Claimant received further instructions regarding the removal of his "Close Supervision Recommended" restriction and continued required urine specimens for a ten year period which began on August 27, 1987.

There is no dispute between the parties that Claimant has not tested positive for drugs in urinalysis since 1987.

The Organization argues that (1) the Claimant did not receive a fair and impartial Hearing; (2) that the Carrier did not present substantial evidence to prove its charges leveled against the Claimant; and (3) that the Claimant's dismissal was arbitrary and capricious, unreasonable, unwarranted and excessive.

The Organization further contends that letters dated August 20, 1987, September 4, 1987 and February 1, 1991 make no mention of alcohol testing or of breath tests. Until January 1, 1995, the policy of including alcohol breath testing was not in effect.

The Carrier contends that a letter dated December 19, 1994 notifying employees that effective January 1, 1995, changes in the alcohol and drug testing program would take effect including alcohol testing combined with the letters of August 20, 1987, September 4, 1987 and February 1, 1991 thereby including alcohol as a prohibited drug. The key issue is whether the evidence of Claimant's positive breath test for alcohol violate the specific charges of "FAILURE TO FOLLOW INSTRUCTION GIVEN IN LETTER OF AUGUST 20, 1987 AND SUBSEQUENTLY REINFORMED IN LETTERS DATED SEPTEMBER 4, 1987 AND FEBRUARY 1, 1991."

The letter dated August 10, 1987 stated that Claimant was disqualified from service because his medical evaluation on August 12, 1987 was positive for cannabinoids. The Claimant was instructed to provide a negative urine sample not later than October 4, 1987.

The letter dated September 4, 1987 congratulates Claimant and states, in pertinent part:

"I remind you, however, that the use of prohibited drugs is contrary to Company policy. You are, therefore, instructed to keep your system free of such substances.

During the first three years following your return to work, you will, from time to time, be required by me to report to a medical facility for further testing in order to demonstrate that you are no longer using Cannabinoids or other prohibited drugs. Should a further test be positive, you may be subject to dismissal by your department for failure to follow proper instructions."

The letter dated February 1, 1991 from Carrier's Medical Director informed Claimant that the restriction of Close Supervision was removed and states in pertinent part:

"You will continue to be required to provide urine specimens for drug testing during medical examinations, and if applicable, in those instances required or authorized by the Federal Railroad Administration (FRA) regulation.

You are directed to remain drug free and provide negative urine drug screens. If you have a positive drug test before the end of the ten (10) year period which began on 08/27/87 and ends on 08/27/98, you will be subject to discipline."

The Organization argues that to combine the letter of December 19, 1994 notifying employees that changes would occur in the drug and alcohol testing effective January 1, 1995, with the previous letters of August 20, 1987, September 4, 1987, and February 1, 1991 constitutes an improper retroactive application of the January 1, 1995 plan and that Claimant was charged with violating instructions of the 1987 letters. The Organization contends that the January 1, 1995 policy was not in effect at the time of the letters.

The Carrier contends that the letters in 1987 warned against the use of prohibited drugs and that alcohol was added to the list of substances tested for as of January 1, 1995.

In a similar case (Special Board of Adjustment No. 910, Award 788) this same issue was addressed. That Board held:

"Appellant had previously tested positive for illegal drugs and had been instructed to remain free of drugs. (Alcohol was added to the list of substances to be tested for in January 1995.) The evidence is convincing that Appellant was positive for alcohol. That positive test mandated a different result than what would be appropriate for a first positive test. In accordance with the Policy, it made Appellant subject to dismissal . . . In this industry, there is no place for employees working under the influence. The Carrier's decision to dismiss cannot be regarded as arbitrary or excessive. . . ."

Based upon this precedent and the evidence presented, the Board finds that the Hearing was fair and impartial, that the Carrier did present substantial evidence to prove the charges leveled against the Claimant; and that the Claimant's dismissal was not arbitrary and capricious, unreasonable, unwarranted and excessive.

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 24th day of January, 2000.