

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36030
Docket No. MW-35777
02-3-99-3-758**

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former The Denver
(and Rio Grande Western Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Foreman L. C. Facinelli for his alleged use of an illegal or unauthorized drug which is in violation of the Union Pacific Railroad Drug and Alcohol Policy and Procedures was without just and sufficient cause, discriminatory, unwarranted and in violation of the Agreement (System File D-9847D/1161825 DRG).
- (2) As a consequence of the violation referred to in Part (1) above, Foreman L. C. Facinelli shall now be reinstated with seniority and all other rights unimpaired, compensated for all wage loss suffered and have his record cleared of this incident.”

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.

The Claimant commenced his employment with the Carrier on March 20, 1979. Thereafter, the Claimant established seniority as a Section Foreman and was assigned and working as such with Gang 4690 in the North Yard at Denver, Colorado, when this dispute arose.

Pertinent to this dispute, on December 28, 1995, the Claimant submitted a urine sample which tested positive for marijuana.

As a result, on January 9, 1996, the Claimant was dismissed from the Denver and Rio Grande Railroad. On May 7, 1996, the Claimant was reinstated on a leniency basis, subject, in pertinent part, to the following:

- "1. You must totally abstain from alcohol and illegal substances.**
- 2. You must participate in a rehabilitation program as agreed to with the Employee Assistance Manager, and attend AA and/or DA meetings as prescribed and furnish verification of attendance.**
- 3. You will submit to unannounced alcohol and/or drug tests for at least two (2) years.**
- 4. You must receive clearance from Medical Services Department after successfully completing a Company-directed medical examination, demonstrating your ability to meet the physical and emotional demands of the job to which you are returning.**
- 7. You are conditionally returned to service on a probationary basis for a minimum of two (2) years. You must maintain complete abstinence from alcohol and illegal substances. Any violation of the terms of your conditional reinstatement will be considered a violation of your probationary status and you will be removed from service, returned to dismissed status and an investigation may be scheduled per agreement provisions.**

- 8. At the end of the two (2) year period, the Employee Assistance Manager will make a recommendation to continue or terminate your conditional reinstatement."**

The record reveals that the Claimant submitted to drug and alcohol testing on numerous occasions, with negative results on each of those occasions. However, on May 15, 1998, the Claimant was one of several Denver Yard employees to undergo a respirator fit test, which included a drug test. Due to the positive results of that drug test, the Claimant was directed to attend a formal Investigation and was apprised of the following:

"This is in violation of Rules 1.5 and 1.6(3) of the Union Pacific Rules, effective April 10, 1994 and Union Pacific Railroad Drug and Alcohol Policy and Procedures effective March 1, 1997, and the probationary reinstatement agreement of May 7, 1996 which you signed, whereby you were instructed under Item No. 1 you must totally abstain from alcohol and illegal substances."

The Claimant was withheld from service pending Investigation and decision. The Investigation was held on June 15 and was postponed and continued on June 20, 1998. On July 16, 1998, the Claimant was informed that the evidence presented supported the charges and that he was dismissed from the Carrier's service.

The Organization protested the discipline, premised upon the following:

"We cannot dispute that Claimant previously tested positive for marijuana and was dismissed and reinstated on a conditional basis. Nor can we dispute that the Claimant violated the conditions for reinstatement when he did not abstain from alcohol and illegal substances. However, it should be remembered that substance abuse is a disease and as such is treatable. A review of the record reveals that following his reinstatement on May 10, 1996, Claimant was tested seven (7) additional times and the results of each of those tests was negative. Hence, it is apparent that Claimant was diligent in his efforts to rehabilitate himself and comply with the conditions of his reinstatement. In this instance, Claimant was faced with a life and death decision and sought the assistance of Carrier's EAP program, only this time the help he needed so desperately was not available when he

needed it most. In light of the circumstances, the Claimant's actions should be seen for what it appears to be, a one time lapse on the road to recovery. Hence, Carrier's decision to dismiss the Claimant is without just and sufficient cause and unwarranted."

For his part, the Claimant maintained the following:

"I just used it to cope with my father's passing. Mr. Wright told me if I ever felt like using it again to call him and he would talk me down from it. Anytime I felt like using when I was on the SP, I call them up, they get right back to me. This time I needed to talk, but nobody would talk to me, so I hung up."

The Carrier denied the claim maintaining that the Claimant was insubordinate for his failure to comply with instructions after being given a one time opportunity to return to service following a previous drug test. The Carrier further noted that the Organization did not dispute the fact that the Claimant was guilty of the Rule violations and further noted that there were no procedural errors in the handling of this case which would warrant voiding the discipline assessed.

In discipline cases such as this, the Carrier bears the burden of proving that the misconduct for which the employee was disciplined occurred. There is no dispute as to the salient facts of this case, and the testimony of witnesses, in addition to the record evidence introduced, establishes compelling and substantial evidence of the Claimant's guilt.

This is not the Claimant's first offense for drug and alcohol abuse. The Claimant signed the conditional return-to-work Agreement noted supra on May 7, 1996. That Agreement clearly states that the Claimant "must abstain from alcohol and illegal substances." The Claimant signed the form, but did not adhere to the parameters of the Agreement. While we empathize with the Claimant's plight, the Carrier retains the authority to dismiss employees from service for engaging in drug use/abuse. The Claimant was not singled out and his dismissal was not inconsistent with the seriousness of the transgression. Therefore, this claim must be denied.

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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 21st day of May, 2002.