

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36063
Docket No. SG-36005
02-3-00-3-101

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(Brotherhood of Railroad Signalmen

PARTIES TO DISPUTE: (

(Burlington Northern Santa Fe Railway (former Atchison,
(Topeka & Santa Fe Railway)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Atchison, Topeka & Santa Fe Railway (ATSF):

Claim on behalf of J. S. DeMaio, for reinstatement to service with payment for all lost time, including overtime, plus the 65 cents per hour skill differential, account Carrier violated the current Signalmen's Agreement, particularly Rule 41, when it dismissed the Claimant from service without just and sufficient cause and without a fair and impartial investigation. Carrier File No. 35 99 0002. General Chairman's File No. BRS 9901441. BRS File Case No. 11111-ATSF.”

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 was notified by letter dated February 17, 1999 to attend a formal Investigation following a positive drug test. The Claimant had been ordered to take an FRA mandated random drug test on Tuesday, February 2, 1999, which tested positive. An Investigation was held on February 25, 1999. Subsequently, the Carrier dismissed the Claimant from service for violation of Rule 12.0 in that he had tested positive for drugs for a second time in a ten year period.

The Organization alleges that the Carrier unfairly dismissed the Claimant given the circumstances in this instant case. The Organization points to the fact that the Claimant tested positive to marijuana, which he testified was the result of second hand smoke at a Super Bowl party. The Claimant further testified that given his understanding he submitted for a retest within 72 hours to his personal physician to prove he was clean. However, that test was "botched" and by then it was too late to prove that a retest would be negative. The Claimant testified that a retest would prove his innocence.

The Board has reviewed the full record in the case at bar. There is no doubt that the Claimant tested positive on April 30, 1991. The evidence of record is that the Claimant again tested positive on February 2, 1999. Under Rule 12.0, the Policy on Use of Alcohol and Drugs states in part that: "... employees who have tested positive in the past 10 years will be subject to dismissal." When the Claimant was notified on February 10, 1999 of his positive test he was also notified that: "If you desire a retest on your urine drug screen result, we must receive a written request from you within 72 hours of your conversation with the Medical Review Officer."

The Board finds no evidence that a written request was ever made by the Claimant. Further, there is no evidence that the alleged second test was "botched." The probative evidence that stands before the Board does not support the Organization's position. The evidence supports the fact that the Claimant violated the Carrier's Policy with regard to drug use for a second time within ten years. As a result of the Claimant's actions, the Carrier's dismissal cannot be seen as unjust (First Division Awards 24136, 25193; Second Division Awards 12775, 13493; Third Division Awards 31219, 31937). The Carrier's action constituted a fair and impartial Investigation which met the burden of proof, and which was followed by dismissal. There are no grounds in this record for the Board to disturb the Carrier's judgement. The 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.