Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36198
Docket No. MW-35788
02-3-99-3-781

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 Employes
(Burlington Northern Santa Fe Railway (former Fort
( Worth and Denver Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Foreman E. R. Roach for his alleged '. . . violation of Rule 1.5 of Maintenance of Way Operating Rules, effective August 1, 1996, as amended and supplemented, and Rule 6.2 and 12.0 of the Burlington Northern Santa Fe Policy on the use of Alcohol and Drugs concerning your alleged second time positive on a FHA Random CDL test, at Amarillo, Texas, at approximately 0845 hours, December 10, 1997, when reporting for duty as patrol gang foreman on duty 0730 hours December 10, 1997' was without just and sufficient cause, arbitrary, capricious and in violation of the Agreement (System File F-98-04/MWD 98-06-04AA FWD).

(2) As a consequence of the violation referred to in Part (1) above, Foreman E.R. Roach shall now be allowed the remedy prescribed in Rule 26(c)."

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.

Prior to his dismissal, Claimant E. R. Roach was employed by the Carrier for approximately 18 years. At the time this dispute arose, the Claimant was working as a Patrol Gang Foreman (Track Inspector) under the supervision of Roadmaster D. F. Befort, at Amarillo, Texas.

Pertinent to this dispute, in 1988 the Claimant allegedly tested positive for marijuana use and was "medically disqualified" for a two week period. During those two weeks, the Claimant was required to submit daily urine samples, all of which were negative. Therefore, at the end of the two week "medical disqualification" period, the Claimant was returned to service. There is no dispute that the Claimant had no disciplinary charges or discipline leveled against him in 1988 as a result of his alleged positive drug test.

Thereafter, on December 10, 1997 the Claimant was randomly selected to participate in the Carrier's federally mandated random drug and alcohol testing program, the results of which tested positive for the presence of cannabinoids. On December 19, 1997, as a result of his "second-time violation," the Claimant was removed from service and directed to attend a December 26, 1997 Investigation for allegedly violating Rule 1.5 of Maintenance of Way Operating Rules, effective August 1, 1996, as well as Rules 6.2 and 12.0 of the Burlington Northern Santa Fe Policy on the Use of Drugs and Alcohol.

The Organization requested a postponement of the Investigation, which was rescheduled for January 12, 1998. However, due to the unavailability of a Carrier witness, the Investigation was postponed for a second time and rescheduled for January 22, 1998. On February 18, 1998, by Certified Mail, Return Receipt Requested, the Carrier informed the Claimant that:

> "This Letter will confirm you are dismissed from employment for second violation within ten years of Rule 1.5 of Maintenance of Way Operating Rules, effective August 1, 1996, as amended and supplemented; and Rules 6.2 and 12.0 of the Burlington Northern Santa Fe Policy on the Use of Alcohol and Drugs.
>
> Please arrange to return all Company property in your possession. A check will be issued for nay monies due."

The Organization submitted a claim on behalf of the Claimant maintaining that:

> "The Carrier has committed and allowed various procedural errors in the progression of this matter, most notably the direct violation of Rule 26a; 'Decision will be rendered within thirty (30) working days after completion of the investigation, except where an employee is held out of service, in which case decision will be rendered within twenty (20) days.'

Claimant has been held out of service, pending investigation and decision of such investigation, since December 19, 1997. Said investigation was held on Thursday, January 22, 1998. A decision should have been rendered on this matter by February 11, 1998. Carriers' letter of dismissal to claimant was not written until February 18, 1998, twenty-seven (27) days after said investigation, seven (7) days outside of the time limits set by Rule 26a."

The General Chairman asserted a second procedural error premised upon the Carrier's "abrupt postponement" of the January 12, 1998 Investigation account Roadmaster Befort was unavailable.

Regarding the merits of the issue, the General Chairman noted that the Carrier did not charge the Claimant with any Rule violation as a result of the November 22, 1988 "incident," or was the Claimant notified that he had tested positive for marijuana on November 22, 1988. Finally, the General Chairman noted that ". . . Claimant cannot be charged with violation of a rule or rules that did not exist on November 22, 1988. Carrier rule 1.5 of the M of W Operating Rules states effective date as of August 1, 1996; the date of the BNSF Policy on the Use of Alcohol and Drugs is dated October 15, 1996."

The Carrier denied the claim maintaining that the results of the Claimant's failed drug test became available on December 18, 1997, and that the original Hearing was set for December 26, 1997, well within the time constraints set forth in Rule 26. The Carrier noted that the December 18 Hearing was postponed at the Organization's request.

Regarding the merits of the issue, the Carrier stated that it had met its burden of proof regarding the Claimant's guilt account Roach "clearly tested positive for drugs twice in the last ten (10) years, and therefore, was in violation of the Carrier Policy on the Use of Alcohol and Drugs."

At the outset, the Organization asserted that the Claimant was denied a fair and impartial Investigation due to certain procedural defects. However, we find no evidence on this record which convinces us that the Claimant was denied his contractual rights, nor do we find any evidence which causes us to conclude that the Carrier failed to render its decision in a timely manner, i.e., within the time limit stipulated by the parties in Rule 26(a).

Turning to the merits of this issue, the Organization asserts that the Carrier's reliance upon the 1988 incident of the Claimant's alleged use of a prohibited substance is improper account no charge was leveled against him in connection with the incident. The Carrier maintains that the Claimant is a "two-time loser" and that his guilt in the November 22, 1988 incident is "indisputable."

For his part, the Claimant testified that:

> "Q. Now, back in 1988, after you were held out, medically held out, I believe that was what the letter showed, medical disqualification, did you have to give another urine test, provide a clean test, in order to get back to work.
>
> A. Yes. I talked to a Eric Wisman, at the time. He informed me to go to a rehab evaluation lady, who evaluated me for three or four hours that day, and then also, he held me out of service for two more weeks testing me every other day to see if I was clean. And then he put me back to work."

Clearly, the evidence of two positive tests for a controlled substance in the workplace cannot be erased. In these circumstances, however, the Claimant's November 22, 1988 "medical disqualification" did not result in disciplinary charges, nor was discipline leveled against the Claimant in connection with the November 1988 incident.

Therefore, we cannot concur with the Carrier's decision to terminate the Claimant in the peculiar facts and circumstances presented on this record. On the other hand, the Claimant is not without responsibility in this matter and the Board does not hold that the Carrier must condone his behavior. In the final analysis, we conclude that the Claimant should be reinstated to employment, conditioned upon successful fulfillment of EAP requirements. However, his conditional reinstatement will be with seniority unimpaired, but without backpay.

## AWARD

Claim sustained in accordance with the Findings.

## 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 24th day of September 2002.

Carrier Members'
Concurrence and Dissent
to Award 36198 (Docket MW-35788)
Referee N. F. Eischen

The Majority statement at page 4 of the Award:

> "Clearly, the evidence of two positive tests for a controlled substance in the workplace cannot be erased"

recognized that claimant had been found in 1988 and in 1997 to be under the control or influence of a controlled substance while at work. To that conclusion we concur.

However, to conclude that because Claimant was simply "medically disqualified" and such did not result in discipline being issued ignores the facts of record that this Majority has acknowledged Claimant had two "incidents" within a ten year period.

To those of us who were around in the mid 1980's many employees, instead of being dismissed on being found under the influence at work, were, under several separate railroad policies, accorded a second chance by being medically disqualified until they could substantiate via a subsequent drug test that they were clean.

Obviously, such action did not change the character of the incident to something that didn't exist. The individual was put on notice concerning his/her infraction but was given a second chance. To conclude, as this Award does, that this Claimant did not have a "second" incident is to ignore the facts.

We Dissent.

P. V. Varga

M. W. Fingerhut

M. C. Lesnik