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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37057
Docket No. SG-37454
04-3-02-3-531**

The Third Division consisted of the regular members and in addition Referee Joshua M. Javits when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Kansas City Southern Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern Railroad (KCS):

Claim on behalf of C. S. Cooper, for reinstatement to service with his seniority unimpaired, payment for all time and benefits lost including overtime, and his personal record cleared of any reference to this matter, account Carrier violated the current Signalmen's Agreement, particularly Rule 47, when it imposed harsh and excessive discipline against him without meeting the burden of proving the charges, in connection with an investigation held on June 7, 2001. Carrier's File No. K06015517. General Chairman's File No. 01-070-KCS-185. BRS File Case No. 12060-KCS.”

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 employed by the Carrier as an Assistant Signalman from August 1999 until June 14, 2001. The Carrier asserts that the Claimant was terminated pursuant to Rule 1.5 of Time Table No. 4, System Special Instructions, effective May 12, 2000, which states, in relevant part:

"The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty, on company property or while occupying facilities paid for or furnished by the company (including any required or instructed medical procedures and examinations). Employees must not possess, sell, use, or have in their bodily fluids any illegal drug or controlled substance while on or off duty, except medication that is permitted by a medical practitioner and used as prescribed."

The record indicates that the Claimant tested positive for drugs on May 18, 2001, which the Organization does not dispute. Rather, the Organization asserts that the Carrier improperly failed to grant leave to the Claimant on May 13, 2001, which, if granted, would have precluded the administration of the drug test five days later. Further, the Organization contends that the penalty for a failed drug test was unduly harsh.

Rule 37(a) states that employees may be given leave "upon request" subject to whether "the requirements of the service permit" and requires "the written consent of the General Chairman." It further states that an employee "absent from duty on account of physical disability will be granted a leave of absence until it is possible for him to return to duty." The record indicates that the Claimant requested a leave of absence on May 13, 2001, which was denied by his Supervisor, Mr. Bruce. Neither this Hearing transcript nor the Hearing transcript of the related matter (Third Division Award 37058) indicates the cause of the requested leave. However, it appears that it was requested because of the Claimant's substance abuse problem

and his responsibilities to his father. Unfortunately, the terms of the Rule require consent from the General Chairman. No evidence of consent was presented. The Claimant also did not demonstrate an inability to appear for work resulting from his substance abuse, because he managed to drive himself to work. Thus, the Board does not find a violation of Rule 37(a).

The Organization further contends that the failure to grant leave for the Claimant to care for his ailing father violated the Family and Medical Leave Act (FMLA). While it is not in the province of the Board to rule on issues under the FMLA, the Organization did not meet its burden as with any affirmative defense to show how the Carrier failed to comply with the FMLA in denying the leave request. Therefore, the Board cannot ignore the Claimant's positive drug test.

The Organization further asserts that inherent in Rule 47 is the principle that discipline must be progressive and neither harsh nor excessive. The Organization directed the Board's attention to Awards supporting this assertion. See: Second Division Awards 8157, 12618; Third Division Awards 19037 and 19537. These Awards stand for the proposition that discipline should be corrective and progressive, not punitive. However, the Organization offered no Awards demonstrating that a positive drug test while on duty does not warrant discharge. The Claimant made no effort to seek treatment available under the Employee Assistance Program and Voluntary Referral Policy. Additionally, the Carrier correctly cited the proposition that positive drug tests are an acceptable basis for termination of employment. See: Third Division Awards 30895, 32706, 33144 and 36181.

The Carrier must prevail on the whole of this record. There is substantial proof of drug use. There is also no evidence that would suggest the Carrier's failure to respect the Claimant's rights or to refuse any request for assistance. The claim must be denied.

AWARD

Claim denied.

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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 22nd day of June 2004.