

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37339
Docket No. MW-37323
05-3-02-3-357

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Burlington Northern and Santa Fe Railway Company
((Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Truck Driver M. E. Roberts for his alleged failure to comply with the terms of the Burlington Northern Santa Fe Drug and Alcohol Policy when he tested positive for THC on November 20, 2000 was without just and sufficient cause and in violation of the Agreement (System File B-M-853-F/11-01-0161 BNR).
- (2) As a consequence of the violation referred to in Part (1), Truck Driver M. E. Roberts shall be reinstated to service with seniority and all other rights unimpaired and 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 November 20, 2000, the Claimant was working as a Truck Driver for the Carrier when he was advised that he had been selected for random drug testing pursuant to Federal Railroad Administration (FRA) regulations. The Claimant provided a urine sample which was then sealed in his presence. He affixed his initials on the sample and it was sent to Medtox laboratories for analysis. The Claimant subsequently was notified that he had tested positive for marijuana based on the level of THC metabolites present in the specimen. He was removed from service on November 30 and an Investigation was held on December 7, 2000.

By letter dated January 3, 2001, the Claimant was informed that his employment was terminated due to the Carrier's determination that he failed to comply with the terms of the Carrier's Drug and Alcohol Policy. The Claimant was offered reinstatement if he placed himself into the Carrier's Employee Assistance Program, but he declined to do so. Instead, the Organization filed the instant claim on his behalf. The matter was not resolved on the property and now comes before the Board for resolution.

The Organization protests the discipline on several grounds. First, it is argued that the Claimant was denied a fair and impartial Hearing because the Carrier failed to produce all witnesses who had information pertinent to the Hearing. Specifically, the Organization contends that the Carrier failed to make the Manager of Drug and Alcohol Testing available at the investigative Hearing.

We are not persuaded, after careful review of the record in its entirety, that there is merit to the Organization's argument. Once it became known that the Organization sought information from this individual, the Hearing Officer provided the Organization with the opportunity to contact him by telephone to obtain his testimony. The Organization chose not to do so. Under the circumstances, we believe that the Claimant's rights to due process and a fair Hearing were not compromised.

The Organization's second argument fares no better. The Organization contends that the Claimant did not use marijuana. It is argued that the positive test result standing alone failed to establish the Claimant's guilt. In support of its position,

the Organization points out that the Claimant, as a DOT qualified truck driver, was routinely subjected to random drug tests. He had never before tested positive for alcohol or controlled substances. In the Organization's view, the test result in this particular instance was a false positive caused by the unlabeled bulk tea that the Claimant had consumed. Weighed against the Claimant's denial of wrongdoing and these additional elements of proof, the Carrier cannot rely solely on the lab report to meet its evidentiary burden under these circumstances, the Organization argues.

Equally important to the Organization, the conflicting evidence on this issue required a credibility resolution, yet the decision was rendered by the Division Maintenance Engineer, who was not present for the Investigation.

Notwithstanding the Organization's arguments, we find that substantial evidence exists to support the finding that the Claimant was guilty as charged. The fact that the Claimant had tested negative for the use of alcohol or controlled substances in prior tests is not a basis for a finding that the test here was flawed or suspect. Similarly, the mere assertion that the Claimant's specimen may have been a false positive due to his consumption of tea is pure conjecture, not evidence. At no time did the Organization identify the type of tea or the ingredients contained therein that could have showed up as marijuana in the Claimant's drug test.

Finally, the parties cite conflicting Awards concerning the role of the Hearing Officer when discipline is imposed. Upon a thorough review, the Board is unable to conclude that the Claimant's rights were prejudiced. Based on the record, the Carrier determined guilt, obviously resolving adversely the credibility issue which arose concerning the Claimant's guilt. The official who heard the testimony did not render the decision, however, and the Organization cites Awards for the proposition that this makes the Carrier's action reversible on due process grounds. See, e. g., Third Division Award 31774. We agree with the rationale of that Award to the extent that the Hearing Officer should resolve the credibility issues in cases involving many witnesses, complex evidence, or other similar elements, and we also believe that the better procedure for the Carrier to follow would be one which requires the Hearing Officer to resolve such issues in all instances. However, as that Award recognized, the mere fact that someone other than the Hearing Officer issues the discipline is not a per se basis for vitiating the penalty imposed. In each case, the particular facts and circumstances must be considered to determine whether Claimant's rights were prejudiced. Here, the Board is unconvinced that there has been a showing of prejudice or harm. The Claimant's denial and his counter assertions required some modicum of substantiation before a

significant credibility conflict was created which would have necessitated resolution by the Hearing Officer prior to issuing discipline.

It is plain from the results of the Claimant's drug test that he was in violation of the Carrier's Alcohol and Drug Policy. It must be remembered that the Carrier does not have the burden to prove beyond all conceivable doubt the impossibility of test inaccuracies. To create that burden for a carrier would be tantamount to the rejection of scientific and logical probabilities. Such has rightfully never been held to be a carrier's evidentiary burden, as it was not in this case. The fact that the test was conducted in accordance with required procedures, and there was no probative evidence that the sample was mishandled or that the results were attributable to other factors, adds up to the reasonable conclusion that the Claimant failed to comply with the Carrier's policy.

The Claimant was offered reinstatement upon enrollment in the EAP and he turned the offer down. This suggests that he is unable or unwilling to come to terms with the seriousness of the violation of the Carrier's drug policy. We cannot say under these circumstances that dismissal was an unreasonable or arbitrary assessment of discipline. The claim is denied.

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 19th day of January 2005.