Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37377
Docket No. MW-36850
05-3-01-3-434

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The discipline (removal from service and subsequent dismissal) imposed upon Mr. W. S. Genre for '. . . alleged violation of Section 3.1 of the BNSF RR Policy on the Use of Alcohol and Drugs, dated September 1, 1999, while employed as Group 3 machine operator on TP01.' in connection with a test conducted on April 10, 2000 was arbitrary, capricious, without just cause, on the basis of unproven charges and in violation of the Agreement (System File T-D-2084-W/11-00-0439 BNR).

2. As a consequence of the violation referred to in Part (1) above, Mr. W. S. Genre shall now '. . . be reinstated to his position, with his seniority unimpaired, paid for all lost time beginning with April 20, 2000 and continuing, we also request that Mr. Genre be made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the June 6, 2000 letter from B. P. Chatten, Assistant Division Engineer.'"

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.

Claimant W. S. Genre, a Machine Operator working near Fargo, North Dakota, with 21 years' seniority, underwent a random drug and alcohol urinalysis on April 10, 2000. On April 17, Medtox Laboratories reported: "CHROMIUM IS TOO HIGH." The report also showed that both the pyridine and chromium levels in the Claimant's urine exceeded 50 micrograms (millionths of a gram) per milliliter ("ug/ml") explaining: "Pyridine greater than 100 ug/ml and/or chromium levels in excess of 50 ug/ml are consistent with specimen adulteration." (Id). On April 20, 2000 the Carrier's Medical Review Officer (MRO) Dr. Patty Pepper, contacted and interviewed the Claimant, who denied tampering with his urine specimen.

By letter dated April 20, the Carrier notified the Claimant that an Investigation would be held on April 27, 2000 to determine his responsibility, if any, with respect to his alleged violation of Section 3.1 of the Carrier's Policy on the Use of Alcohol and Drugs dated September 1, 1999. The April 20 letter also advised the Claimant that he would be withheld from service pending the Investigation.

Following the Investigation, which was postponed at the Organization's request until May 11, the Carrier notified the Claimant in a letter dated June 6 that his urinalysis conducted on April 10, 2000 revealed the presence of an adulterant in his urine sample, he was being dismissed from employment for violating the Carrier's Policy on the Use of Alcohol and Drugs, which provides in pertinent part:

> "7.6 Employees refusing to participate in any federal or BNSF drug test will be removed from service immediately and disqualified from service for a period of at least nine (9) months, and subject to dismissal from service with BNSF. Refusal includes:

- Outright rejection or participation in a drug or alcohol test;

* * *

- Tampering with a urine sample by substitution, dilution or adulteration; . . .

* * *

7.9 Dismissal. Any one or more of the following conditions will subject employees to dismissal.

* * *

- Adulteration, substitution or dilution of urine samples."

In a letter dated June 13, 2000 the Organization filed an appeal, challenging the termination. Because the parties were unable to resolve the dispute, it was submitted to the Board for resolution.

At the Hearing, the Claimant testified that during the six-month period before his random drug/alcohol test, he had been taking an over-the-counter chromium metabolism enhancer to help him lose weight. In addition, he testified that his wife, who had had a urinary tract infection, had been using Prodium, also an over-the-counter supplement, which the Claimant said he had used frequently as well. In support of his testimony, the Claimant submitted several exhibits, including a letter dated May 8, 2000 from Dana Larson, MD of Velva Health Center, stating:

> "Mr. Genre has been taking 2 over the counter products, Chromium supplement and medication for dysuria [painful discharge of urine] which contains phenazopyridine chromium. These over the counter dietary supplements are the agents responsible for the chemicals found in his urine drug screen."

Also submitted into evidence was an undated hand-written note from Steven Schoneberg, MD of Trinity Medical Group, stating in pertinent part:

> "Mr. Genre is a patient of mine who recently underwent a urine drug screen which was positive for chromium and pyridinium. Mr. Genre was and is taking a dietary chromium supplement and has been using phenazopyridine at the time of his urine testing. The use of these products would explain the abnormalities noted on his urine screening examination."

The Hearing Officer also admitted into evidence an undated note from a pharmacist, Brent Rondizer:

> "Chromium supplement and phenazopyridine are excreted primarily in the urine either unchanged or as a metabolite."

The Organization asserts that Dr. Pepper, the Carrier's MRO, did not question the Claimant, thereby denying him his Agreement due process rights. The Board disagrees. According to the MRO Review Report, Dr. Pepper contacted and interviewed the Claimant on April 20, 2000 quoting the Claimant as having denied "tampering with the specimen." At the Investigation, the Organization did not *directly question the Claimant about whether Dr. Pepper had asked him any* questions. Rather, the Organization's representative asked the Claimant the following leading question, which the Claimant did not directly answer:

> "Q. Did they ever ask you if you had taken, if you had ever, *anybody ever ask you to explain or anything about when your* test come [sic] back. They just said you adulterated and that was the end of the story or did they ask you if there is any reason these are here or?
>
> A. No, it was, just pulled out of service on adulteration on the urine sample and I had no knowledge of adulterating anything."

Accordingly, the Organization failed to effectively rebut the statement in the MRO Review Report that Dr. Pepper did indeed question the Claimant, who denied having adulterated his urine sample.

Moreover, the applicable provision of the Department of Health and Human Services Memorandum dated September 28, 1998, upon which the Organization relies, does not require the MRO to question an employee believed to have adulterated a sample:

> "Test Not Performed – Specimen Adulterated/Substituted. The MRO checks the 'Test Not Performed' box in Step 8 on Copy 2 or Copy 4 of the CCF and enters 'Adulterated,' or 'Substituted,' and 'Refusal to test' on the 'Remarks' line. The MRO reports to the employer that the specimen was adulterated or substituted, either of which constitutes a 'refusal to test.' The MRO also informs the employer that the right to have the split specimen tested by the donor is withdrawn. Therefore, neither a test of the split specimen, nor a retest of the primary specimen is offered to the donor."

Because this provision does not require that the MRO ask the donor for an explanation for the adulteration or substitution, the Organization's argument must fail for this reason as well.

The Organization also claims that the Claimant was denied his Agreement due process rights because the Hearing Officer admitted into evidence the MRO Review Report with accompanying documentation from the laboratory without a competent witness available to answer questions about how the test results were obtained. Test results from DOT approved laboratories, however, are routinely admitted into evidence because of their inherent reliability. Notably, the Organization did not call its own expert witness to comment on the test results. Moreover, the Organization raised no substantial question regarding the reliability of the test results, so its Agreement due process argument must be rejected.

The Organization's principal argument focuses on the merits of the Carrier's decision to terminate the Claimant's employment based on Dr. Pepper's conclusion that the Claimant's urine specimen was adulterated. According to the

Organization, the test result of a chromium level greater than 50 ug/ml did not prove adulteration of the Claimant's specimen in light of the medical evidence presented by the Claimant. According to the Organization, letters from two doctors explained that the high level of chromium in the Claimant's urine specimen was the result of dietary supplements, thereby disproving the adulteration charge. The Board disagrees. The doctors' letters hardly provide a scientific basis for their conclusory statements that the supplements caused the high levels of chromium in the Claimant's urine sample. For example, the letters did not state that the doctors: (1) knew when or how much chromium had been ingested by the Claimant (2) knew the quantitative results of the urinalysis on April 10 (3) or were competent in the field of toxicology, particularly in connection with chromium in urine. In contrast, the test results by the DOT approved laboratory were inherently reliable and have not been seriously challenged by the Organization. The test results, which were not successfully explained by the Claimant's evidence relating to the over-the-counter supplements, provided the Carrier with substantial evidence to support its conclusion that the Claimant's urine sample was adulterated. In so holding, the Board is not relying on exhibits submitted by the Carrier long after the May 11, 2000 Investigation explaining the scientific bases for Dr. Pepper's conclusion that the Claimant's urine specimen was adulterated. Typically, the Board will not consider evidence proffered after the close of the Hearing/Investigation.

Not inconsistent with this holding are the arbitral cases cited by the Organization. For example, in Burlington Northern Railroad Company and Brotherhood of Maintenance of Way Employes, Special Board of Adjustment No. 925, Case/Award 182 (Kasher, 1994) the Claimant was discharged because his urine specimen had been adulterated with Glutaraldehyde, an agent advertised to cleanse urine samples for drug screening. The Special Board of Adjustment held that the Claimant was denied due process because the Hearing Officer unreasonably had denied the Organization's request that the Investigation be postponed to allow the Organization's expert, a professor of pharmacology at New York University, to testify. The expert was prepared to testify that the laboratory urinalysis results had not shown the presence of Glutaraldehyde. The expert also would have testified about the unreliability of the "smell" test used by the laboratory to conclude that Glutaraldehyde had been used to adulterate the specimen. Because the Hearing Officer in the instant case did not preclude the Organization from submitting expert testimony, Case/Award 182 is inapposite.

Likewise, Brotherhood of Maintenance of Way Employes and National Railroad Passenger Corporation, Public Law Board No. 4979, Award 57 (Marx, 2000) is distinguishable from the instant case. There, Public Law Board No. 4979 sustained a claim that Amtrak had failed to prove that the Claimant's specimen had been adulterated merely because the drug screen showed the nitrate level in the specimen to be greater than 500 ug/ml, suggesting that the Claimant had adulterated the specimen with a nitrate agent such as Clear, A Urine Aide or Whizz Aide. The Board found that the Carrier failed to satisfy its burden of proof primarily because: (1) the test was a voluntary test, not required by the Carrier, making it almost inconceivable that the Claimant would have adulterated the sample (2) a member of the Carrier's own medical staff believed that the high nitrate level might have been caused by a kidney or bladder infection; and (3) the Claimant was being treated by his own doctor for nitrates and blood in his urine. The instant case, however, involves a random test, and for that reason alone is distinguishable. In addition, in Award 57 a member of Amtrak's own medical staff believed that the high nitrate level might have resulted from the Claimant's kidney or bladder condition. In the instant case, on the other hand, two doctors who did not purport to have any toxicological expertise merely stated, without analysis, that the high level of chromium in the Claimant's specimen was caused by his over-the-counter supplements. Accordingly, the Organization's reliance on Award 57 is misplaced.

In summary, there is substantial evidence to support the Carrier's conclusion that the Claimant's urine specimen was adulterated. Furthermore, because submitting an adulterated sample was a dischargeable offense under the Carrier's Policy on the Use of Alcohol and Drugs, termination of his employment was neither harsh nor excessive.

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 24th day of February 2005.