

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37582
Docket No. MW-38501
05-3-04-3-442

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(BNSF Railway Company
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline (withheld from service beginning May 28, 2003 and subsequent dismissal on July 29, 2003) imposed upon Mr. R. Rodriguez in connection with charges of violating Rule 1.5 of the Burlington Northern Santa Fe Railway Maintenance of Way Operating Rules concerning a positive test conducted on May 20, 2003 was harsh, excessive and in violation of the Agreement [System File C-03-D070-9/10-03-0495(MW) BNR].
2. As a consequence of the violation referred to in Part (1) above, it is requested ‘. . . that the harsh discipline of dismissal of a 25 year employee with an excellent work history be set aside, and that Mr. Rodriguez be returned to the service of the Carrier and he be made whole for all lost earnings and benefits. . . .’”

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.

By letter dated May 30, 2003, the Claimant was notified to attend a formal Investigation to determine "your responsibility, if any, in connection with your alleged violation of the BNSF Policy on the Use of Alcohol and Drugs, effective September 1, 1999, and your alleged violation of Rule 1.5 of the BNSF Maintenance of Way Operating Rules, effective January 31, 1991, as the result of your Follow-up Test conducted on May 20, 2003." After a postponement, the Investigation was conducted on July 1, 2003. By letter dated July 29, 2003, Claimant Rodriguez was informed that as a result of the Investigation, he had been found guilty as charged, and he was being dismissed from the Carrier's service. The Organization thereafter filed a claim challenging the Carrier's decision to discharge the Claimant. The Carrier denied the claim.

The Carrier initially contends that the record supports its position that the Claimant's dismissal was warranted. In December 2001, the Claimant signed a waiver after he tested positive for drugs and/or alcohol the first time. The Carrier points out that this waiver was conditional, in that failure to comply with any one or more of the conditions would result in the Claimant's dismissal. The Carrier emphasizes that the Claimant tested positive for cocaine 17 months after his first positive test, and this clearly violated "any one or more" of the conditions of the December 2001 waiver. The waiver plainly states that "more than one confirmed positive test either for any controlled substance or alcohol, obtained under any circumstances during any 10-year period" would subject the Claimant to dismissal.

The Carrier then addresses the Organization's assertion that the Claimant's statement at the end of the transcript was "heartfelt" and "100% sincere." The Carrier insists that the Claimant's sincerity is questionable in that he failed to comply with one of the conditions required for his continued employment with the

Carrier. If the Claimant truly desired to retain his employment relationship with the Carrier, he simply needed to not test positive for drugs and/or alcohol; the Claimant, however, failed to meet this requirement. Contrary to the Organization's argument, this is not a characteristic of a "valuable" employee, but instead it is a characteristic of an employee who would jeopardize his own well-being, as well as that of his co-workers and the general public.

The Carrier then maintains that the Claimant admitted his guilt during his testimony, and he now is trying to "throw himself at the mercy of the court." The Carrier insists that the Claimant already was given a second chance, but he voluntarily chose to throw away that opportunity. The Carrier asserts that there is no dispute that the Claimant violated Rule 1.5 of the Maintenance of Way Operating Rules. Instead of disputing the Claimant's guilt or the validity of the December 2001 waiver, the Organization simply argues that the punishment was too harsh. The Carrier points out, however, that prior Awards have found to the contrary. The Carrier asserts that numerous Awards acknowledge that under these particular fact circumstances, the Carrier has no choice but to dismiss the Claimant.

The Carrier then points to the issue of workplace safety, and it urges that an employee who uses drugs imperils the safety of all workers and the public at large. The Carrier argues that leniency for a repeat offender, such as the Claimant, simply is unjustified and could produce tragic results. The Carrier maintains that the Board consistently has recognized the Carrier's obligation to provide a safe workplace. The Carrier asserts that its employees deserve a drug-free workplace, and the Claimant does not have the right to endanger himself and others with his inability to refrain from using drugs.

The Carrier points out that the penalty for testing positive for drugs and/or alcohol is dismissal, regardless of an employee's length of service. The Carrier argues that it is the severity of the offense, not the employee's tenure, that determines the punishment. In the instant case, dismissal was warranted for the Claimant's second positive drug test. The Claimant signed a waiver after his first positive test, accepting the condition that any positive test within the next ten years would result in his dismissal. The Carrier maintains that the Claimant was obligated to abstain from drug use, and the Board should enforce the plain language of the December 2001 waiver, just as it would any provision of the parties'

Agreement. Contrary to the Organization's argument, the Claimant's length of service is irrelevant. The railroad industry is hazardous, and the Carrier is obligated to provide its employees with a safe workplace, which includes dismissing any employee for violating Rule 1.5. The Carrier asks that the Board not consider reinstating any employee, whether short or long-term, who willfully and repeatedly violated Rule 1.5, and without consideration for the safety of fellow co-workers and the general public.

The Carrier argues that it may enforce its Rules and policies to the fullest possible extent under the Agreement. The Claimant did not comply with the Rules and policies in effect regarding drugs and alcohol, but the Carrier granted the Claimant a second chance when it offered him a conditional reinstatement waiver. The Claimant accepted that offer, knowing up front that his failure to comply with any one or more of the conditions would result in his dismissal. The Carrier insists that the Claimant is not deserving of any more chances.

The Carrier then argues that if the Board should overturn the discipline at issue, the Carrier automatically is entitled to offset for any outside income that the Claimant earned during the period that he was out of service. The Carrier ultimately contends, however, that the instant claim should be denied in its entirety.

The Organization initially acknowledges that there is no dispute as to the Claimant's guilt, but this concession should not be mistaken for a plea for leniency. The Organization contends that the Carrier failed to give any serious consideration to the Claimant's honest and candid testimony about his actions, and the Carrier's imposition of the extreme penalty of dismissal was arbitrary, unnecessarily excessive, and an abuse of its discretion.

The Organization argues that the Claimant did not attempt to make any excuses or blame anyone but himself for his admitted lapse in judgment. The Claimant's closing statement at the Hearing is a testament to his honest and heartfelt remorse. The Organization maintains that despite the Claimant's honest responses, humble attitude, and sincere remorse, the Carrier callously and uncaringly chose to impose the ultimate penalty of dismissal upon a 25-year career employee with an otherwise unblemished service record.

The Organization recognizes that alcohol and drug abuse are serious offenses, but it asserts that the record demonstrates that the Claimant never was accused, suspected, or charged with being impaired while on duty. The Organization points out that the record further reveals that a citation was noted in the Claimant's personal record for reporting an unsafe work condition. Moreover, the Claimant had no discipline during the course of his 25 years in the railroad industry, except for the two issues with drugs.

The Organization emphasizes that substance abuse is a disease, and it is treatable. The Organization further points out that all divisions of the Board consistently have held that the purpose of discipline is to rehabilitate, correct, and guide. In this case, however, the Carrier simply chose to schedule an Investigation and permanently dismiss the Claimant, rather than utilize any of the other numerous options available to it. The Claimant freely admitted that he made a terribly foolish mistake, and he expressed genuine remorse for this mistake. The Organization asserts that under the circumstances, there can be no doubt that the Carrier's decision to dismiss a 25-year veteran employee with an otherwise unblemished discipline record is unjust, unwarranted, and excessive.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board reviewed the record and testimony and we conclude that there is sufficient evidence in the record to support the finding that the Claimant was guilty of a second Rule 1.5 violation when he tested positive for alcohol and/or drugs on May 20, 2003.

The record reveals that the Claimant had previously been found guilty of violating the Carrier's Rules relating to controlled substances and alcohol in December 2001. At that time, the Claimant admitted his guilt and accepted a waiver in which he stated that he would be tested over the next ten years and that if he had a confirmed positive test, he would be terminated.

The record reveals that the Claimant was given a mandatory follow-up test on May 20, 2003, and again tested positive.

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Board recognizes that the Claimant has worked for the Carrier for 25 years and has been a good employee. He has a disciplinary record that only has these two drug offenses in it. However, leniency is not within the province of the Board. If the Roadmaster and other supervisory employees of the Carrier believe that the Claimant would be an excellent person to reinstate to service, then the Carrier can do that. However, the Board has no authority to exercise that leniency. The record reveals that the Claimant was given a second chance, and he failed to keep himself drug and/or alcohol free. He was already given one chance to save his job, and the Board really does not have the ability to give him another.

For all of the above reasons, the claim must be 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 24th day of August 2005.