

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37810
Docket No. MW-38661
06-3-05-3-45**

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

**(Brotherhood of Maintenance of Way Employees –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The dismissal of Mr. D. C. Bauer on November 18, 2003 in connection with charges alleging a violation of Maintenance of Way Operating Rule 1.5 and BNSF Policy on the “Use of Alcohol and Drugs,” dated September 1, 2003, was excessive, unfair, improper, unwarranted and in violation of the Agreement [System File B-M-1192-H/11-04-0070 BNR].**
- 2. As a consequence of the violation referred to in Part (1) above, ‘. . . The Carrier must remove any and all mention of the discipline from Mr. Bauer’s record and make Mr. Bauer whole for any and all losses.’”**

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 September 30, 2003, the Claimant was notified to attend a formal Investigation into charges that the Claimant had violated Carrier Rules and policies by allegedly failing a second drug test. After two postponements, the Investigation was conducted on October 29, 2003. By letter dated November 18, 2003, the Claimant 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 an appeal challenging the Carrier's decision to discharge the Claimant. The Carrier denied the appeal.

The Carrier initially contends that the record, including the Claimant's own admission of guilt, supports the Carrier's position that the Claimant violated the Maintenance of Way Operating Rules and received an appropriate punishment. The Carrier insists that the medical test results conclusively establish that the Claimant violated Rule 1.5, and the Claimant never denied the positive test in either of the two drug incidents.

The Carrier asserts that aside from its basic right to discharge under Rule 1.5, it has a special waiver agreement with the Claimant; under this waiver agreement, the Claimant is not entitled to any leniency if he is guilty of a second violation. The Carrier points out that the quid pro quo for the Carrier's leniency in connection with the first violation was the agreement that the Claimant signed. The Carrier maintains that the Board should enforce the signed waiver agreement, and argues that when the Claimant admittedly violated the waiver, he also violated the Carrier's trust. The Carrier points to a number of Awards holding that in these circumstances, the Carrier is left with little choice but to discharge the employee.

The Carrier argues that the Claimant was provided training and treatment to correct his problem, but he failed. The Carrier points to the Claimant's admission that he used drugs, not once but at least twice. The Carrier contends that the Claimant's past employment record does not support continued employment. The Carrier emphasizes that an employee who uses drugs imperils the safety of all workers, and even that of the public. The Carrier maintains that leniency is unjustified for a multiple offender like the Claimant, and leniency in such a situation could produce

tragic results. The Carrier maintains that its employees deserve a drug-free workplace, and the Claimant should not have the right to endanger himself, his co-workers, or the public because of his inability to stay drug-free. The Carrier points out that there is no dispute that the Claimant tested positive for drugs in May 1996 and again in September 2003, so the record supports the Claimant's dismissal.

The Carrier then points out that the Organization has not disputed that the Claimant failed his drug test, but instead offered unproven affirmative defenses in an attempt to create "reasonable doubt." The Carrier emphasizes that it is not charged with proving guilt beyond a reasonable doubt, but there nevertheless is no doubt here because the Claimant admitted his guilt. The Carrier insists that there is no merit to the Organization's argument that the dismissal decision was unfair because the Carrier officer who wrote the letter of dismissal was not the conducting officer. The Carrier maintains that various Awards have ruled that the conducting officer is not required to render the decision.

With regard to the Organization's assertions that the Carrier did not answer any questions on how the Claimant was selected for testing and that the Claimant deserves another chance because he is a long-term employee, the Carrier contends that this is not acceptable for the safety of the Claimant, his co-workers, or the public. The Carrier insists that it cannot tolerate any drug use in a safety-sensitive industry. The Carrier further emphasizes that it responded to the Organization's questions about selection and/or testing methods. The Carrier then points to the Organization's argument that the Investigation was not fair and impartial because medical personnel were not present to explain the Claimant's test results. The Carrier maintains that numerous Awards have held that the Carrier is not required to make such personnel available during an Investigation into the violation of the Carrier's drug policy.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Carrier's dismissal of a 25-year employee for recidivism was excessive. The Organization further asserts that the Carrier did not have the right or reasonable cause to subject the Claimant to random drug testing in September 2003 because the Claimant then held a Machine Operator position, and not a Vehicle Operator position where his commercial driver's license would be reasonably related to his assignment. The Organization insists that the

Claimant was not subject, by federal mandate, to undergo random drug testing, thereby invalidating the subject test.

The Organization emphasizes that the record is devoid of any evidence that establishes reasonable cause to test the Claimant in this case. The Organization points out that a number of Awards consistently have held that without reasonable cause, test results cannot validly be used as a basis for discipline. The Organization therefore asserts that the instant claim should be sustained.

The Organization goes on to assert that the record shows that the Claimant suffered a momentary setback after seven and one-half years of successful participation in the Carrier-sponsored EAP addiction recovery program. The Organization maintains that the record further shows that the Claimant got right back on track. The Organization argues that there is ample precedent for reinstating the Claimant and allowing him to finish his railroad career on a positive note.

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 this Board.

The Board reviewed the evidence and testimony in this case and finds sufficient evidence in the record to support the finding that the Claimant was guilty of violating Carrier Rules when he admittedly tested positive for amphetamines and methamphetamines during a random drug screen on September 22, 2003. The record reveals that the Claimant had tested positive previously and had signed an agreement in 1996 that stated in part:

"I realize and acknowledge a second proven violation of Rule 1.5 which incurs within a ten-year period will result in dismissal with no opportunity for re-employment."

There has been no challenge of the positive drug test results and the Claimant admitted that he came up positive for drugs.

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 was a very long-term employee. However, the fact is that the Claimant agreed that if he came up positive again within the next ten years, he would lose his job permanently. The Board cannot find that the action taken by the Carrier in permanently terminating the Claimant was unreasonable, arbitrary, or capricious. The request of the Organization for leniency is not appropriately before the Board. Any leniency must be granted by the Carrier.

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 21st day of June 2006.