

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, who established seniority on September 10, 1990, had been working as a Signal Maintainer in Fort Worth, Texas, when, on September 11, 2007, he tested positive for cocaine in conjunction with a FMCSA Follow-up Test. The Carrier thereafter issued a Notice of Investigation on September 18, 2007, in connection with the matter. Although the Claimant received due notice of the scheduling of that Hearing, ultimately conducted on October 18, 2007, he failed to appear. Following its review of the evidence adduced at the Investigation, the Carrier issued a notice of dismissal to the Claimant on November 1, 2007. The Organization took exception to that action, processed its appeal on the property in the usual fashion, duly conferenced the matter and then advanced the dispute to the Board for final and binding determination.

The facts surrounding the triggering incident are straightforward. According to the testimony of Manager of Terminal Operations Kurtz, supported by documentary evidence he introduced, the Claimant had been charged with driving under the influence on August 6, 2005. He signed a waiver in that connection and, pursuant to the Carrier's policy allowing a one-time return to service for certain violations of its Drug and Alcohol Policy, resumed his position subject to future testing and upon the express condition that a second violation within a ten-year period would subject him to immediate dismissal.

Kurtz offered testimony and documentary support pertaining to issues including chain of custody specimen handling, certification of results by a competent Medical Review Officer and the express terms of Carrier's Rule 1.5 prohibiting employees from having banned substances in their bodies while on duty.

In response, the Organization raises a number of procedural objections to the Carrier's handling of the matter. Among them, it takes the position that the Carrier violated Rule 68 by serving an untimely Notice of Investigation and decision assessing discipline; improperly introduced the Claimant's past disciplinary record at the Hearing; and deprived the Claimant of procedural process by failing to have the Charging Officer in attendance at Hearing.

The Board carefully considered those contentions and rejects each as unpersuasive. First, without regard to when the Claimant received the Carrier's communication, the record clearly reflects that its charges were sent within 15 days of its first knowledge of the triggering incidents. As affirmed by substantial arbitral precedent on the point, Rule 68 obligates the Carrier to mail such notices within the 15-day deadline imposed by the Agreement. The record reflects that it did so in this instance.

Similarly, the Carrier's charges were provided to the Claimant on September 18, 2007, within the 15-day time limit following the September 11 test forming the basis of the charge.

Thirdly, the Carrier forwarded its "Notice of Discipline Assessed" and transcript on November 1, 2007, within 15 days from the close of the October 18 Investigation as required.

With respect to the Carrier's introduction of the Claimant's past disciplinary record, the Board finds such action in no way inconsistent with the terms of Rule 68. Indeed, in the context of this case, evidence of a prior violation of the Carrier's Drug and Alcohol Policy was not only not prejudicial to the Claimant, but imperative for a proper understanding and knowledgeable defense of the charges.

Lastly, Rule 68 mandates the Carrier to produce at the Hearing those witnesses it believes are required to support its charges. It concluded that under the circumstances presented the absence of its Charging Officer was not critical to supporting its charges. Nor did the Organization make a request for his presence. No violation of Rule 68 is shown by the facts presented.

Form 1
Page 4

Award No. 40305
Docket No. SG-40804
10-3-NRAB-00003-090055

Based upon the foregoing reasons, we conclude that the Carrier sustained its burden of proof and will deny the claim.

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 1st day of March 2010.