

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 40658  
Docket No. MS-40268  
10-3-NRAB-00003-080066

The Third Division consisted of the regular members and in addition Referee Martin W. Fingerhut when award was rendered.

(Randall Thomas

**PARTIES TO DISPUTE:** (

(Norfolk Southern Railway Company

**STATEMENT OF CLAIM:**

- “1) The dismissal of Mr. R. L. Thomas for alleged violation of Rule G to comply with NS Medical Director C. R. Prible’s letter dated October 12, 2004 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement.
- (2) As a consequence of the violation referred to in part (1) above, the Claimant shall be reinstated to the Carrier’s service with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered beginning Aug. 3, 2005, until he is reinstated to service.”

**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 August 17, 2005, the Carrier sent a letter which, in pertinent part, provided:

“You are hereby notified to report . . . for a formal investigation to determine your responsibility if any, in connection with your failure to comply with Norfolk Southern Medical Director C. R. Prible’s letter dated October 12, 2004, wherein he instructed you to keep your system free of prohibited drugs and your failure to comply with Norfolk Southern policy on drugs, in that your drug screen on July 26, 2005, tested positive for cocaine.”

At the Investigation, the Carrier testimony described a prior case involving the Petitioner in which he had been dismissed following a drug test that had been positive for cocaine. The dismissal was appealed to Special Board of Adjustment No. 1048. In Award 126 of that Board, the Petitioner was returned to service with the following proviso:

“Claimant’s return to service is subject to the DARS [Drug and Alcohol Rehabilitation Services] program’s requirements and conditions, as existed on the date of his dismissal.”

The Petitioner did participate in the DARS Program and upon his successful completion of the Program he was reinstated to service. On October 12, 2004, shortly after Petitioner’s reinstatement, Dr. C. Ray Prible, Carrier’s Director of Medical Services, sent a letter to the Petitioner reminding him that the use of prohibited drugs was contrary to Carrier policy, and that he was instructed to keep his system free of such substances and to participate in any appropriate DARS continuing care recommendations. The letter went on:

“During the first five years following your return to work, you may, from time to time, be required by me to report to a medical facility for further testing in order to demonstrate that you are not using prohibited drugs. Should you fail to comply or should a further test be positive, you will be subject to dismissal.

Any employee who is dismissed for failing to obey instructions pursuant to the Company's policy on drugs is not eligible for reinstatement under the DARS Program."

The DARS Program sets forth guidelines and procedures to be followed by an employee returning to work after a dismissal. It concludes, in pertinent part:

"NOTE: Employees who tested positive . . . who were returned to service following a negative test and instructed to keep their system free of prohibited drugs will be subject to dismissal if any future test is positive."

A Carrier witness placed in evidence the October 12, 2004 letter from Dr. Prible as well as the DARS policy. He likewise testified to the specifics of the random drug test administered to the Petitioner, chain of custody evidence, and the facilities that had performed the tests. The Organization did not challenge any of the Carrier's evidence. The only possible conclusion to be drawn from such evidence is that the Petitioner tested positive for cocaine and that such result showed his noncompliance with the requirement set forth in Dr. Prible's letter and the DARS Program.

At the Investigation, the Organization argued that the Investigation should not have been held because the Petitioner did not appear. In response, the Carrier showed that the Notice of Investigation had been sent certified mail to the Petitioner's residence and had been received at that location. In addition, the Investigation was temporarily recessed to allow the Organization representative to contact the Petitioner. The attempt was unsuccessful. There was no request for a postponement. It is well settled that under such circumstances the Carrier had the right to proceed with the Investigation. The Petitioner's Agreement due process rights were not violated. See, for example, Public Law Board No. 1760, Award 108.

The Organization further contended that the discipline of dismissal was excessive and the Petitioner should have been returned to the DARS Program for further rehabilitation. It made such argument notwithstanding the facts that the Petitioner's reinstatement under Public Law Board No. 1048, Award 126, was specifically conditioned on his complying with the provisions of the DARS Program which, in specific terms, stated that employee "will be subject to dismissal if any future

test is positive.” In addition, the October 12, 2004 letter from Dr. Prible to the Petitioner made it crystal clear that “should a further test be positive, you will be subject to dismissal.” In the face of the above warnings, the Petitioner tested positive for cocaine the year following his reinstatement. The propriety of the Carrier’s decision to dismiss the Petitioner under conditions paralleling this case has been repeatedly upheld on this property. See, for example, Public Law Board No. 1760, Award 108, Public Law Board No. 3445, Award 52 and Public Law Board No. 1760, Award 175, among many others.

The claim will 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 1st day of November 2010.