

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro when award was rendered.

(John E. Sanchez

PARTIES TO DISPUTE: (

(The Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM:

"It is my contention that the D&RGWRR does not have sufficient evidence to permanently dismiss me from their employment. In each of the instances for which I was required to submit to a urine analysis I had not been working for the company nor was I receiving any kind of compensation from them. On the first occasion I was returning to work after being suspended for 30 days. On the second occasion I had injured my back and upon my return to work submitted to the required physical which disclosed the presence of drugs. Since I was not working for the company nor being compensated in each case and therefore did not endanger myself, other employees, or create liability for the company, I should not be permanently dismissed.

Since my dismissal, I came to the realization that I have a disease that affects many within our society, namely that of substance abuse. With this realization came the understanding that I needed help to rehabilitate myself. I entered ARU Bridge House, an addiction recovery unit, in Grand Junction, CO in February, I am currently attending Alcoholics Anonymous meetings, and I am attending drug and alcohol education classes. I am presently drug and alcohol free and have been for the last six months. I feel that I have done all I can to show the D&RGWRR that I can again and will be a valuable employee and they are unwilling to give me my job back. I feel that I am being discriminated against because of my illness and would request review of my case. Your consideration of my case would be greatly appreciated."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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, a welder helper, submitted to a return to duty physical on April 24, 1989 which included a drug screen. The test results showed that Claimant had 540 ng. of a marijuana metabolite in his system. Thereafter, by a letter dated May 4, 1989, Claimant was given Notice to attend an Investigation:

"...in connection with your alleged failure to pass the drug screen test due to the presence of an illegal substance in your system on April 24, 1989, taken as part of your return to work physical."

Claimant was subsequently dismissed by a letter dated May 17, 1989 and the discipline was based, in part, on the fact that this was the second instance of Claimant's failure to pass a return to duty drug test.

Initially, the Organization and subsequently the Claimant has argued that Claimant's dismissal was not supported by the record and that, at the time, Claimant was not under the Carrier's authority because he had not returned to active employment.

In our review of the record in this case, we find no substantial basis to overturn the Carrier's disposition. There is no real dispute that the laboratory report was the result of the Claimant's drug screen taken on April 24, 1989. .

In this matter no evidence was produced by the Claimant that would give substance to its conjectures. Therefore, there is no basis for this Board to reverse the Carrier's determination of guilt. Further, discipline as the result of a return to duty physical is not something new in this industry or on this railroad. See Third Division Awards 27004, 27937.

Subsequent to this matter being filed with this Board, Claimant has advanced parole material to wit, he has completed a rehabilitation program and therefore should not be "permanently dismissed." Besides being material that cannot be considered by this Board, Third Division Award 25553 stated:

"The Organization also contends that because the Claimant enrolled in the Employees Assistance Program, and, according to the Organization completed requirements, she should be given the opportunity to return to work, or 'given second chance.' We have been referred to no Agreement rule so stipulating
...."

In Second Division Award 8636 it was held:

"'Much was said about carrier's employe assistance program in the record of this case. This board has universally supported carriers and organizations who utilize employe assistance programs to salvage employees, but we must leave these decisions to the parties involved.'"

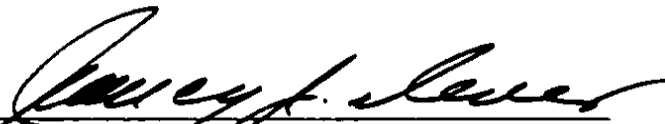
We will follow it here.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1992.