

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30895
Docket No. SG-31593
95-3-93-3-596

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Delaware and Hudson Railway Company

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Delaware & Hudson Railroad (D&H):

Claim on behalf of C. Appleby for:

1. Reinstatement to service with seniority unimpaired.
2. Payment for all time and benefits lost in connection with his dismissal from service on February 3, 1993.
3. Removal of discipline from his personal record.

Carrier violated the current Signalmen's Agreement, particularly Article 12.1, when it failed to provide the Claimant with a fair and impartial investigation and then imposed the harsh and excessive discipline of dismissal without meeting the burden of proving its charges against the Claimant."

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 waived right of appearance at hearing thereon.

On March 8, 1991, the Carrier notified all Hours of Service employees of the implementation of a Random Drug Testing Program in compliance with Federal regulations. The program became effective on April 23, 1991.

The Claimant, an Assistant Signal Mechanic, was notified by radio communication on December 14, 1992 of his selection to be randomly tested under the Random Drug Testing Program. At the time, he was working in the Oneonta area on a production job which started at 6:00 A.M. Since he was in the field and not at the Oneonta shop which was set up for the testing, he had to return to the shop. A local company, EMSI was contracted to collect the specimens. The Claimant complied with the directive and provided a urine specimen.

Between December 14 and 29, 1992, the Claimant was notified by the Carrier's Medical Review Officer that he tested positive for cannoboinoids. He was asked whether he had used marijuana and he responded that he had not used the drug for several years. He proffered that he had been using a hair-growth stimulator consisting of vitamins and herbs. He also responded in the negative when asked if he was undergoing chemotherapy treatments for cancer or glaucoma. At that point, he was advised it would be necessary to report to the Carrier that he had tested positive for a controlled substance.

By letter dated December 29, 1992, the Claimant was directed to attend a formal Investigation on January 2, 1993, to determine his responsibility in violating 49 CFR Part 219.101 - 102 and Rule G of the NORAC Operating Rules, which read as follows:

"SUBPART B - PROHIBITIONS

219.101 Alcohol and drug use prohibited.

(a) Prohibitions. Except as provided in 210.103-

- (1) No employee may use or possess alcohol or any controlled substance while assigned by a railroad to perform covered service;
- (2) No employee may report for covered service, or go or remain on duty in covered service while -

duty or off duty, except as permitted by 219.103 of this subpart.

Rule G of the NORAC Operating Rules:

Employees are prohibited from engaging in the following activities while on duty or reporting for duty:

1. Using alcoholic beverages or intoxicants, having them in their possession, or being under their influence.
2. Using or being under the influence of any drug, medication, or other controlled substance--including prescribed medication--that will in any way adversely affect their alertness, coordination, reaction, response or safety. Employees having questions about possible adverse effects of prescribed medication must consult a Company medical officer before reporting for duty.
3. Illegally possessing or selling a drug, narcotic or other controlled substance.

An employee may be required to take a breath test and/or provide a urine sample if the Company reasonably suspects violation of this rule. Refusal to comply with this requirement will be considered a violation of this rule and the employee will be promptly removed from service."

After a postponement at the request of the Organization, the Investigation was held on January 15, 1993. The Carrier reviewed the evidence adduced at the Hearing, including the Claimant's testimony that he had smoked marijuana two weeks prior to his random drug test. On February 3, 1993, the Carrier sent the Claimant a dismissal notice which contained the following:

"You are hereby DISMISSED from the service of the Delaware and Hudson Railway company as a result of the Formal Investigation held January 15th, 1993; for your admission to the use of Marijuana while employed in covered service, a violation of the Code of Federal Regulations Part 49, paragraphs 219.101 and 219.102 and of Rule G. Norac Operating Rules; and as a result of a positive random drug test conducted December 14, 1992."

- (i) Under the influence of or impaired by alcohol;
 - (ii) Having .04 percent or more alcohol in the blood; or
 - (iii) Under the influence of or impaired by any controlled substance.
- (b) **Controlled substance.** "Controlled substance" is defined by 219.5 of this part. Controlled substances are grouped as follows: Marijuana, narcotics (such as heroin and codeine), stimulants (such as cocaine and amphetamines), depressants (such as barbiturates and minor tranquilizers), and hallucinogens (such as the drugs known as PCP and LSD). Controlled substances include illicit drugs (Schedule I), drugs that are required to be distributed only by a medical practitioner's prescription or other authorization (Schedules II through IV, and some drugs on Schedule V), and certain preparations for which distribution is through documented over the counter sales (Schedule V only).
- (c) **Railroad rules.** Nothing in the section restricts a railroad from imposing an absolute prohibition of the presence of alcohol or any drug in the body fluids of persons in its employ, whether in furtherance of the purpose of this part or for other purposes.
- (d) **Construction.** This section shall not be construed to prohibit the presence of an unopened container of an alcoholic beverage in a private motor vehicle that is not subject to use in the business of the railroad; nor shall it be construed to restrict a railroad from prohibiting such presence under its own rules.

210.102 Prohibition on abuse of controlled substances. On and after October 2, 1989, no employee who performs covered service may use a controlled substance at any time, whether on

The Claimant admitted during his uncoerced testimony, that he used a prohibited substance two weeks prior to testing. That admission cannot be erased. Besides the Claimant's veracity is at best questionable. He denied the use of any drug initially and during his initial questioning during the Hearing. Eventually, he admitted to possibly using marijuana once approximately two weeks before the test. However, the Medical Review Officer while responding to the Organization's questions revealed that the metabolites from marijuana would not remain in the system of an occasional user for more than a week, but, in the case of a chronic user the metabolite could remain in the system for weeks. This would be sufficient evidence the Claimant used the drug more frequently than he admitted.

The Organization, as part of its defense of the Claimant, asks this Board to fault the Carrier for failing to educate the Claimant on FRA regulations and the Carrier's policies regarding drug testing. Contrary to the Organization's position, the Claimant was randomly tested for drugs seven months after his employment. It is unrealistic to believe he completed the process and remained ignorant of the Carrier's policies or the FRA regulations. However, it should be noted that if the Organization is intent to offer such an affirmative defense, it must be kept in mind simply saying it does not make it so. When a party raises an affirmative defense, it has the burden of proving its charge. The claim not only lacked proof, but, the fact the employee was subject to at least one random drug test prior to the test at issue, serves to dispel the Organization's claim.

There were no mitigating circumstances under which this Claimant should be considered for reinstatement. He knew the rules relative to drug use and he was employed by the Carrier for less than two years at the time of his discharge.

AWARD

Claim denied.

By letter dated March 12, 1993, the Organization appealed the actions of the Carrier. It contended the drug test was not random and the Claimant did not receive a fair and impartial trial. The appeal was denied by the Carrier, who iterated the sample collection was performed in accordance with FRA instructions as mandated in Part 49. It also asserted that the Claimant was aware of the drug policy since he was tested in October 1991 following his employment in April 1991. It further pointed out the fact the Claimant admitted using a banned substance during his testimony at the Hearing.

On June 25, 1993, the Organization rejected the Carrier's denial and indicated it would appeal the matter to this Board.

On July 12, 1993, the Carrier denied the Organization's appeal of June 25, 1993 on the basis it was not in accordance with Article 12.13 of the current Agreement and was untimely. Therefore, any information contained within the June 25, 1993 letter was improperly submitted.

The Organization argues that the Carrier violated the Agreement, especially Rule 12.1, when it failed to provide the Claimant with a fair and impartial Hearing and when it imposed an excessive penalty for the given infraction. In addition, the Carrier did not follow its established random drug testing procedures. It selected the employees to be tested by craft and location, rather than by computer generated employee identification numbers. The Organization raised this concern at the Investigation, and argued that the selection process was contrary to the FRA regulations. The Organization further argued that errors were made during the collection process and the proper identification of the samples collected was at best questionable. It further denied the Claimant a fair and impartial trial by failing to allow witnesses to testify as to how the tests were conducted.

The Carrier maintains the Claimant was aware of the Random Drug Testing Policy, especially in light of the fact he was tested in October 1991, seven months after his initial hire date. It is the Carrier's position the employees tested were selected according to FRA regulations. It further argues that the drug test itself was properly conducted and the integrity of the samples was preserved. Besides the Claimant himself testified during the Investigation that he had used a banned substance as recently as two weeks prior to the random testing.

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O R D E R

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 10th day of May 1995.