

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33955
Docket No. MW-34337
00-3-97-3-856**

The Third Division consisted of the regular members and in addition Referee Stephen B. Rubin when award was rendered.

PARTIES TO DISPUTE: (**(Brotherhood of Maintenance of Way Employees**
(Union Pacific Railroad Company (former Missouri-Kansas-
(Texas Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (suspension from service and subsequent dismissal) imposed upon Machine Operator T. S. Harris in connection with the charges ‘...that you allegedly used an illegal or unauthorized drug or alcohol as evidenced by the positive test result of the Reasonable Cause drug and alcohol test given you, in accordance with Union Pacific Railroad Drug and Alcohol Policy and Procedures effective January 1, 1995, on December 2, 1996’ was arbitrary, capricious and in violation of the Agreement (System File Y97141-Harris/1055270-D MKT).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to 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.”**

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.

Claimant T. S. Harris was employed as a Machine Operator and had over seven years of service.

On December 2, 1996, the Claimant had an accident while driving a vehicle for the Carrier. He was removed from service and subjected to a drug screen test. The test detected controlled substances in his urine. On or about December 16, 1996, the Claimant was instructed to appear for an Investigation on December 20, 1996. That Investigation was held to its conclusion on January 14, 1997. The decision to dismiss the Claimant from service was mailed on or about January 30, 1997.

Article 23 of the Agreement provides in pertinent part:

"Rule 5. Decision will be rendered and the employee notified in writing, sent to last available address, within ten days of completion of the hearing. A copy of notification will be sent to representative."

The Organization, citing prior Awards, argues that the untimely rendering of the decision precludes the imposition of discipline. The Carrier argues that this failure was at most harmless and, in the absence of a showing of intentional violation of the Rule, should be ignored. The Carrier also argues that the discipline was valid on the merits.

The Awards cited by the Organization are distinguishable. In First Division Award 16366 the pertinent Rule provided that the decision must be "rendered in writing within ten days or case will be considered closed." As noted by the Carrier here, the instant Rule does not specifically provide for the consequences of an untimely decision. Similarly, in Second Division Award 2364 the Rule was "If hearing is not held or decision rendered within the time limits herein specified, the charges against the employe shall be considered as having been dismissed." In Third Division Award 2590 no decision was ever rendered and the Board found that the failure was not inadvertent. The job was abolished as a disciplinary measure. In Third Division Award 8160 the Board found that the decision was rendered over a month and a half after the Investigation and constituted harmless error. In Third Division Award 11019 the discussion of the violation of the ten-day Rule appears to be dictum. The Award turned on the failure of the Carrier to specify charges prior to the

Investigation. In Third Division Award 21996 the Rule violated was a 30-day Rule and there was a history of strict enforcement of time lines against employees . The Board held that where there was a history of strict enforcement against one party, similar Rules must be strictly enforced against the other. In Third Division Award 24623 no written decision was ever rendered. The Carrier in that case argued that the discipline was only a verbal reprimand, so the error was harmless. The Board held that the Rule was mandatory. In Third Division Award 19161 there is no discussion of the reasoning by which the claim was sustained. Accordingly, it is impossible to determine if that Award applies to this case. In Third Division Award 29987 the Board attempted to reconcile the two lines of authority with respect to the strict enforcement of such a Rule. It concluded that where there was a serious breach of discipline, such as a violation of drug and alcohol policy, and there was no prejudicial error, the late rendering of the decision could be excused. However, in that case there were no extenuating circumstances for the late rendering of the decision and a showing of prejudice was not required. In Third Division Award 31140 the Rule under examination provided for the allowing of the claim if the reasons for disallowance were not stated by the Carrier as was the case there.

On the other hand, in Fourth Division Award 4662 the Board stated that a requirement of prejudice is not in the Rule and the Board cannot modify the Agreement of the parties. In Fourth Division Award 4745 the conclusion is the same: the Rule is clear and therefore must be strictly enforced. In Fourth Division Award 4990 the Board relied on Award 4662. In Third Division Award 33229 it was held that the ten-day Rule was "clear and unambiguous). The decision was rendered 18 days after the close of the Hearing and four days after removing the employee from service. The Board continued: "There can be no doubt that in these particular circumstances, Carrier violated the specified time limits provided for in [the Rule]." The claim was sustained without an examination of the merits.

The better rule seems to be that where the Rule specifically provides for the consequences of a late decision, that Rule must be enforced according to its terms. Where the Rule does not provide for specific consequences, all of the equities should be considered.

Here the Carrier states as justification that there were difficult pharmacological issues which caused the six-day delay in rendering the decision. The Organization does not state how it or the Claimant was prejudiced by the delay. The charges against the Claimant, involving the illegal use of controlled substances, were serious. That is a factor against strict enforcement. While the better course would have been for the Carrier to seek an extension of time or, in the absence of agreement, clearly state the cause for the delay,

in the circumstances of this case there apparently was no prejudice to the Organization or the Claimant. The equities are in favor of the Carrier.

On the merits, the Carrier has shown that the Claimant tested positive for controlled substances after having been involved in a vehicular accident during work. The accident resulted from the Claimant's alleged failure to yield the right of way. The initial test result was followed by a confirming positive test. This is not disputed. The positive result indicates possible intoxication while on the job, endangering the Claimant and others. The Organization briefly states that there was no reason for the testing, but does not otherwise pursue the matter. The accident appears to have been the reason for the test and by itself may constitute grounds for testing. The Claimant testified at the Hearing that over-the-counter and prescription drugs may have resulted in a false positive result, but there was no supporting evidence to that effect.

The Claimant had tested positive for controlled substances with the previous ten years. The Carrier's rules provide that a second positive test within ten years warrants dismissal. Under the circumstances of this case the removal from service and subsequent dismissal do not violate the Agreement.

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 22nd day of February, 2000.