

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35927  
Docket No. MW-35974  
02-3-00-3-22**

**The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.**

**PARTIES TO DISPUTE: (**  
**(Brotherhood of Maintenance of Way Employees**  
**(Union Pacific Railroad Company**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The dismissal of R. W. Lay for the alleged violation of ‘ . . . Rule 1.6(3) - Insubordination of the Union Pacific Rules, effective April 10, 1994. . . ’ as a result of an investigation on August 27, 1998 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File M8-MKT176/1168701-D MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. W. Lay shall have the charges leveled against him cleared from his record and he shall be reinstated with all seniority restored and compensated for all wage loss.”**

**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.**

**After careful analysis of the on-property record the Board finds the following sequence of events. On September 17, 1997, the Claimant failed a drug test after a clinical finding of amphetamines. He was withheld from service and signed a Probation Reinstatement Agreement dated October 2, 1997, which stated "that subsequent denial to Employee Assistance of the fore-mentioned test results will preclude . . . continued participation. . . ." He followed the EAP Agreement contacting Dr. J. K. Adams, a psychologist, and met with her on December 3, 10, and 16, 1997. She concluded on December 24, 1997 that the use of an over-the-counter medication Ephedra, for asthma, resulted in a false positive and that "it would be reasonable to reinstate Mr. Lay to his job without unreasonable administrative delay."**

**Following a Notice of Investigation dated May 21, an Investigation was held on July 29, and concluded on August 27, 1998. The Claimant was charged with insubordination because he failed to comply with the Probation Reinstatement Agreement, which, in particular, required him to not deny drug use. Subsequently, the Claimant was found guilty and dismissed.**

**The Carrier maintains that the Claimant's "alleged evidence" for over-the-counter medication is irrelevant and such "outside opinion" does not negate the requirements of the Probation Reinstatement Agreement. The Claimant tested positive, signed the Probation Reinstatement Agreement and was obligated to comply with the policy. He failed to comply, refused to work with the EAP and forced a Hearing for insubordination. Even further, the psychological evaluation relied upon by the Organization lacks merit when contrasted to the proper toxicological test results. It is the Carrier's position that the Claimant failed to test clean; failed to comply with his Probation Reinstatement Agreement to restrain from denial; and failed to continue contact with EAP from his last meeting on December 16, 1997 until cited for Investigation on May 21, 1998. The Carrier argues that the Claimant was shown to be guilty as charged and should remain dismissed.**

**The Organization points forcefully to the fact that this was not an outside evaluation. The Claimant was referred to the Carrier's own psychologist, Dr. Adams. It was her professional opinion that there was no evidence of the use of illicit or illegal drugs. When she attempted to obtain a further Carrier resolution, she obtained only the**

comment of "hmm, (pause), that's interesting" from the Claimant's EAP Counselor. The Organization points to the straight forward conclusions of Dr. Adams' report that:

**"It was my professional opinion then and remains my professional opinion that there was a valid explanation for these urinalysis results and that the decision to remove Mr. Lay from work had been made prematurely. . . ."**

It is the Organization's position throughout this record and as indicated in its on-property response that the Claimant was never insubordinate. He followed everything the EAP requested him to do. The Claimant was told by his EAP Counselor to go for a psychological evaluation and he did so. He was not "changing his mind" about signing the Probation Reinstatement Agreement, but honestly responding to information requested. It was the Carrier that failed to consider Dr. Adams' recommendation that the Claimant be returned to service, which resulted in this further improper action.

There is no dispute on the fact that the Claimant signed the Probation Reinstatement Agreement leading to his involvement with the Employee Assistance Program and that the EAP referred him to Dr. Adams. Our study of her position is that by reviewing library materials and talking with a local pharmacist, she concluded "that his positive UA resulted from his use of this over-the-counter-medication. . . . " However, she carefully states that "assuming that the medical review officer is able to confirm the information presented above . . ." the Claimant should be reinstated. There is no evidence that the Claimant was informed to stop going to EAP. There is no evidence in the record that Dr. Adams' conclusions ended the Claimant's responsibilities to EAP or the Probation Reinstatement Agreement he signed. Nor is there "evidence" from Dr. Adams that the results were a false positive; only suggestions of her beliefs based on a psychological review. Dr. Adams was not a toxicologist doing a proper toxicological examination.

The Board is persuaded from the evidence that the Claimant failed to follow up with Employee Assistance personnel. There is no evidence in the testimony that Dr. Adams' suggestions were followed up by a Medical Review Officer, although on-property correspondence of April 14, 1999 confirms that they were, and lacked support for Ephedra causing the positive findings. The Board finds no credible explanation for the Claimant's actions after his last meeting with Dr. Adams on December 16, 1997. However, the Probation Reinstatement Agreement is self-executing. Failure to comply

fully with its terms is sufficient cause for dismissal. The evidence in this record is not persuasive for any other conclusion. The Carrier's action cannot be found to be in violation of the Agreement. The Claimant violated the Probation Reinstatement Agreement and the claim must 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 January, 2002.**