

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36003
Docket No. MW-36285
02-3-00-3-509**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company (Western Lines))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Track Machine Operator P.H. Muhlhausen for use of an:**

‘ . . . illegal or unauthorized drug as evidenced by the positive test result of the Reasonable Cause drug test given you on April 7, 1999, in accordance with Union Pacific Railroad Drug and Alcohol Policy and Procedures effective March 1, 1997, Section XI(E).

This is in violation of Rule 1.5 of the Union Pacific Rules, effective April 10, 1994, and Union Pacific Railroad Drug and Alcohol Policy and Procedures effective March 1, 1997, Section XI(E).’

was arbitrary, disparate, exceedingly harsh and in violation of the Agreement (Carrier’s File 1208382 SPW).

- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall now be reinstated to service with seniority and all other rights unimpaired, compensated for wage and benefit loss suffered and have his record cleared of the incident.”**

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 April 7, 1999, the Claimant was repairing a switch while operating a track machine in the vicinity of Hinkle, Oregon. Although his Foreman had obtained track and time protection to conduct repairs of the switch, the Claimant moved the machine outside the limits of that protection. Such action constituted a Level 3 offense under the Carrier's UPGRADE policy and subjected the Claimant to drug and alcohol testing for cause.

The Claimant's urinalysis testing came back positive for methamphetamine and marijuana metabolites. On April 26, 1999, the Claimant was instructed to report for an Investigation on the charge of illegal or unauthorized drug use in violation of Rule 1.5 of the Union Pacific Rules, effective April 10, 1994, and the Union Pacific Railroad Drug and Alcohol Policy and Procedures, effective March 1, 1997. The subject Rules read in pertinent part:

"Rule 1.5 Drugs and Alcohol

Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on Company property.

Drug and Alcohol Policy

Compliance with the requirements of this policy is a condition of employment at Union Pacific Railroad Company. The illegal use . . . of

any drug or controlled substance is prohibited anytime, either on duty or off duty.”

The Claimant was assessed a Level 5 discipline under the UPGRADE policy and dismissed following the Investigation held on June 18, 1999.

There is no dispute that the Claimant violated the foregoing Carrier Rules by having prohibited substances in his system while on duty. Indeed, the Claimant admitted his guilt at the Investigation. The only issue the Board is called upon to determine is whether the Carrier properly denied the Claimant reinstatement on a leniency basis. The Carrier’s Drug and Alcohol Policy provides as follows:

“E. One Time Return To Service Agreement and Policy

An employee who has been dismissed for a violation of this policy will be permitted a one-time return to service following successful completion of a rehabilitation program approved by EA, provided that the employee has had no previous drug or alcohol violation for 10 years and provided further that no other significant rule violation is involved.”

The record shows that the Claimant was employed by the Southern Pacific Railroad Company prior to the merger of the Southern Pacific and the Union Pacific Railroads in 1997. In May 1989, while subject to the Southern Pacific drug and alcohol policy, the Claimant tested positive for drugs in violation of Rule G. He was afforded a conditional reinstatement in lieu of discharge. A copy of the conditional reinstatement, dated September 5, 1989 was submitted in evidence at the Investigation. It does not contain any agreement that the Claimant’s record would be expunged after completion of the reinstatement conditions.

The Carrier contends that the Claimant’s second positive test result in ten years justified his removal from service under its alcohol and drug policy. Because the Claimant received a leniency reinstatement in 1989, he was ineligible for a second return-to-work agreement under the policy, in the Carrier’s view.

The Organization asserts that the discipline must be overturned: It argues that the Carrier’s reliance on a prior drug violation, under a different policy and administered by a different railroad, is completely misplaced. Moreover, the Organization argues that there is no specific language which allows prior Rule G

discipline under the Southern Pacific to be carried over. Therefore, the Organization asserts the Claimant should have been offered conditional reinstatement as a first-time violator of the Union Pacific drug and alcohol policy.

Based on our review of the record in its entirety, it is clear that the Organization is correct when it argues that there is no express language that addresses whether prior drug violations under the terms of the Southern Pacific's drug and alcohol policy should be counted for purposes of determining whether an employee is eligible for leniency reinstatement under the current policy. However, any "gap" on this subject has been filled by the parties' practice since the merger of the Union Pacific with the Southern Pacific. The testimony of Senior Manager L. Varvel established that former Southern Pacific employees brought with them to the Union Pacific their seniority and their work records, including their drug and alcohol testing records. Absent any credible evidence to the contrary, we must conclude that there was no intent under these circumstances to "wipe the slate clean" at the time of the merger. Accordingly, the Claimant's drug and alcohol testing record carried forward and was properly considered by the Carrier in its determination that the Claimant was ineligible for a leniency reinstatement.

The Awards cited by the Organization do not dictate a different conclusion. In First Division Award 25087, the employee tested positive in July 1987 under the old Burlington Northern Rule bypass program. However, he was not charged with a Rule G violation. He later tested positive in June 1997 under the new policy implemented after the merger of the Burlington Northern and the Santa Fe Railroads. The Carrier concluded that the employee had tested positive twice in ten years and he was dismissed with no chance for reinstatement.

The Board in that case sustained the claim, noting that there was no mention of the employee's positive 1987 drug test in his service record nor was he ever charged in connection with the positive 1987 test. Under those circumstances, the Board concluded that the Carrier should not have counted the 1987 incident in applying the current drug and alcohol policy.

In the instant case, the facts are far different. Not only was the Claimant charged with a drug offense in 1989, but he was found guilty, dismissed and returned to service only after signing a conditional reinstatement agreement. The incident was included in his record and there was no agreement to expunge the incident when he

returned to work. This is precisely the type of first offense contemplated by the ten-year Rule for reinstatement eligibility.

In Third Division Award 30698, the Board sustained the claim because it found that the Carrier did not have the right to test the employee. Here, the Organization has not contended that the Carrier lacked reasonable cause to test nor has it challenged the results of the testing. Additional Awards relied upon by the Organization are similarly distinguishable and inapplicable to the matter at hand.

The Board is cognizant of the fact that the Claimant has 22 years of service as a railroad employee. In addition, his second drug violation occurred nine years and ten months after the first violation. However, neither longevity nor near compliance with the Carrier's drug and alcohol policy are sufficient bases to reinstate the Claimant. He was already offered one chance to return to work. We cannot say that it was arbitrary or unreasonable for the Carrier to require even a long-term employee to have a clean record for at least ten years before offering reinstatement a second time. The Claimant failed to meet that benchmark date, and therefore his 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 16th day of April, 2002.