Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36064
Docket No. MW-36141
02-3-00-3-320

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 Employes
(Burlington Northern Santa Fe Railway (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Grinder Operator R. A. Newberry for his alleged tampering of a urine sample by adulteration on April 27, 1999 was without just and sufficient cause, arbitrary, excessive and disparate treatment. (System File C-99-D070-4/MWA 10-99-0252 BNR)

(2) Grinder Operator R. A. Newberry shall now be returned to service and made whole for all losses suffered and his record shall be cleared of this 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.

The facts are clear in this record. A randomly administered drug and alcohol test was given to the Claimant on April 27, 1999. On May 7, 1999, there were two notifications forthcoming. The first went to the Carrier's Roadmaster indicating that the results of the random drug screen test "revealed the presence of an adulterant." It indicated that the Claimant should be removed from service. The second letter went to the Claimant to attend a formal Investigation to be held on May 14, 1999.

The Claimant's reaction to the notification of a formal Investigation was to submit a request for a bypass waiver of Rule 1.5 and to agree to any program or rehabilitation requested under the Employee Assistance Program. This was denied and the Investigation was held. The Organization argued on property that the Claimant's Investigation was not timely held, that the Claimant was a 24-year employee with "no prior discipline on his personal record" and that the discipline was "clearly excessive."

The Carrier indicated that the Claimant did not fall under the bypass waiver of Rule 1.5 and its denial was proper. It maintained that there had been no procedural error and noted that the Claimant admitted that he violated Rule 12.0 by tampering with his urine sample. The Carrier argues that tampering results in dismissal which is clearly not excessive discipline.

As a preliminary point, there is, in the Submissions of the parties, material which was not fully joined on property. Most relevant to the Board is material submitted by the Carrier with regards to the Claimant's past record. There is no substantive proof of consideration of these new arguments while the dispute was on the property. Even in the final correspondence, the Organization alleges an "unblemished" record and the Carrier makes no specific denial. As such, the Board turns to procedural issues and the merits.

The Board finds no procedural violation. The Investigation was timely held. The Board similarly finds that the Carrier's determination of guilt is based on absolute proof. The Claimant was asked if he adulterated his urine sample and he testified, "Yes, I did." This is a violation of Rule 12.0 which states:

"12.0 Dismissal

Any one or more of the following conditions will subject employees to dismissal for:

> (c) Refusal to provide a urine specimen or breath sample for testing when instructed under the terms of this policy or federal or state regulations unless the inability to provide a sample is for a verified medical reason. Tampering with a urine sample by substitution, dilution or adulteration will be deemed a refusal." (Emphasis added)

The Claimant was subject to dismissal and the Carrier's dismissal was an action fully contemplated by the policy. The Organization's arguments that the Claimant was due a return to service as a first time offender under Rule 1.5 is not on point with the circumstances herein. Clearly, the Claimant was "subject . . . to dismissal."

The Organization pointed to the on-property record wherein testimony was presented indicating that this is a long term employee of nearly 24 years with a good record. Certainly the Roadmaster testified that:

> "I would characterize his work as safe, the quality of his work is outstanding and his character, he has a high level of moral and ethical character.
>
> [and]
>
> Mr. Newberry has always used the highest standard possible. He's the type of employee that the Burlington Northern should, should solicit for employment and has always done excellent work."

The Organization noted on the property and before this Board, Awards that suggest a return to service under these or similar circumstances (Special Board of Adjustment No. 1112, Award 7; Public Law Board No. 6204, Award 15; Public Law Board No. 6284, Awards 7, 8, 9; and Fourth Division Award 5057, among others).

The Carrier has also argued strongly that this is a Claimant who violated a clear policy which does not permit second chance waivers, but subjects him to dismissal. The Carrier cites numerous others which support the Carrier's actions (Third Division Award 32489; Public Law Board No. 5850, Award 146; Public Law Board Award No. 6213, Award 15; Public Law Board No. 4897, Award 65; Public Law Board No. 4901, Award

124, and others). The Carrier notes the Dissent to Public Law Board No. 6284, Awards 7, 8 and 9, which involved this same Carrier and another Organization and specifically stated that: "dishonesty is a dismissal offense on this Carrier's property and nothing less then zero tolerance will be accepted." Those sustaining cases with the Dissent noted supra, were similar to the one at bar.

We are persuaded that the full record in this case supports a finding that the discipline is excessive. Our review of all of the past Awards (and Dissent) presented, along with the particulars of the Claimant's actions, testimony, and facts, suggest that the dismissal should be modified. This is a long term employee with a strong record, admission of guilt, an attempt for a waiver, who should be given one last chance to prove his worth to the Carrier. We find that the Claimant should be returned to service without backpay, but with seniority unimpaired, and reinstated pursuant to EAP policy.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of May, 2002.

Carrier Members' Dissent
to
Award 36064; Docket MW-36141
Referee Marty E. Zusman

Despite the citation of applicable precedent at the bottom of page 2 of the Award; and the fact that Claimant admitted to the deliberate tampering; and the reference to zero tolerance in the Dissents to Public Law Board No. 6284 Awards 7, 8 and 9, the Majority concluded that the discipline of dismissal "is excessive."

Lest there be any misunderstanding, the Carrier's Policy specifically states:

> **"Tampering with a urine sample by substitution, dilution or adulteration will be deemed a refusal."**

Such subjects an employee to dismissal.

The Organization's contention in argument that the foregoing was not the Carrier's Policy, and referred to the above noted Awards of Public Law Board No. 6284 is clearly wrongheaded. While such may have been the opinion of the particular referee in those matters, it is not the Policy of this Carrier.

We dissent.

Paul V. Varga

Martin W. Fingerhut

Michael C. Lesnik

May 21, 2002