

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36216
Docket No. SG-36856
02-3-01-3-412**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Grand Trunk Western Railroad Company, Inc.**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Grand Trunk Western Railroad (GTW):

Claim on behalf of D.R. Iagulli for reinstatement to service with compensation for all lost time and benefits and for the discipline to be removed from the Claimant's personal record. Account Carrier violated the current Signalmen's Agreement, particularly Rule 42, when it issued the harsh and excessive discipline against the Claimant without the benefit of a fair and impartial investigation and without meeting the burden of proving the charges against him in connection with an investigation held on September 26, 2000. Carrier's File No. 8390-1-128. General Chairman's File No. 00-68-GTW. BRS File Case No. 11719-GTW.”

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 August 30, 2000, the Claimant submitted to follow-up drug testing pursuant to the terms and conditions of a leniency reinstatement agreement dated September 9, 1999 which required that he submit to unscheduled testing for a period of two years from the date of reinstatement. On September 5, 2000, the Carrier was notified by the testing laboratory that the tests had not been performed because the presence of nitrites had been detected in the sample. Under FRA regulations on Drug and Alcohol Testing, and the Carrier's Drug and Alcohol Policy, adulteration of a urine sample is the same as the refusal to give a sample and constitutes a refusal to be tested. Upon notification by the lab, the Carrier removed the Claimant from service.

The Carrier submits that it was not required to provide the Claimant with a Hearing under the agreed-upon terms of the reinstatement agreement. Nevertheless, on September 8, 2000, it notified the Claimant to report for an Investigation to determine whether he violated his leniency reinstatement agreement "for refusing to test by providing an adulterated specimen for a follow-up test performed August 30, 2000."

The Hearing was held on September 26, 2000, after which the Claimant was advised that he had been found guilty of the charges and that he was dismissed from the Carrier's service.

The evidence adduced at the Investigation established that the Claimant and a co-worker, E. Miller, were drug tested on August 30, 2000. Both witnesses testified that the collector in charge of performing the test on that date was a new employee and that the day of the testing was his first day on the job. The Claimant and Miller stated that their specimen containers were not wrapped and sealed when given to them.

The Carrier's sole witness was D. Kellogg, the Supervisor of Signals and Communications. He testified that he removed the Claimant from service after the Carrier was notified of the drug test results. In addition, he submitted into evidence the drug test results from the testing laboratory and the Claimant's leniency reinstatement agreement. The test results merely indicate that the test had been adulterated; there was no information regarding the chain of custody.

Having undertaken to provide the Claimant with an Investigation, the Carrier was required to establish through substantial evidence all elements of its case. The

Board is cognizant of the many Awards that have upheld discharge determinations in cases where employees have been proven guilty of adulterating drug tests. Such misconduct is a very serious violation not only because it is tantamount to insubordination, but also because it reflects on the employee's integrity and honesty. Third Division Awards 36040, 36039, 25269, Public Law Board No. 5395, Award 15; Public Law Board No. 6213, Award 24.

So stating, however, it is equally true that because a claimant may face workplace "capital punishment" for adulterating a urine sample, the accuracy, reliability and diligence of those involved in the chain of custody of the sample must be carefully scrutinized. We have held in a prior case on this same subject that "... if a reputable, certified lab follows the critical steps in handling and analyzing a urine sample, the test result will be extremely reliable. To counter that evidence takes more than a bald assertion of error or speculation that somehow samples were switched." See Third Division Award 36040.

In this case, we are faced with the reverse situation where the Carrier has baldly asserted that the Claimant's test results should be deemed reliable despite the direct testimony of the Claimant and Miller that there were irregularities in the handling of their samples. The Carrier failed to introduce any counter evidence at the Investigation that the testing was accomplished in accordance with lab protocols or federal guidelines. Moreover, the transcript is devoid of any proof whatsoever which would establish that the sample was handled consistent with procedures used for testing adulterated samples. Neither the lab report introduced by the Carrier at the Hearing nor the testimony of the Carrier witness included any of that critical information.

Apparently recognizing the weakness of its own case, the Carrier attacked the credibility of the Organization's witnesses, characterizing their testimony as "self-serving." We find it important to point out, however, that no motivation was ascribed to Miller which would explain why he would fabricate his testimony to corroborate the Claimant's account.

The Carrier also argued that the Claimant should have made his concerns known at the time his sample was taken. His failure to do so, the Carrier asserts, is another factor adversely reflecting upon his credibility. In that regard, the Board carefully reviewed the cases cited by the Carrier on this point and finds them to be

distinguishable from the matter at hand. In several of the cases, the precise issue presently before the Board was not addressed. In First Division Award 25269 and Public Law Board No. 5395, Award 15, for example, there is no indication that the accuracy or reliability of the test procedure was put at issue.

Where the issue has been raised, there were specific findings in the majority of the cases which showed no breach in the normal chain of custody or any other abnormalities in the testing procedures. Third Division Awards 36040; 36039; Public Law Board No. 6003, Awards 59 and 72. In still another case, the Claimant's testimony was discredited by his own prior inconsistent statement.

See Public Law Board No. 5912, Award 184. The claimant in that case certified on the date of testing that his sample had been properly collected. He and the Organization later asserted at the Investigation that there were improprieties in the handling of the sample. The Board rejected that argument, noting that "Claimant cannot now come before this Board and argue against his own certification."

Of course, if such evidence had been introduced in the instant matter, we would have been confronted with a much closer question of credibility. As the record stands, however, we reject the Carrier's contention that the testimony of the Organization's witnesses is inherently unreliable in the absence of any probative evidence refuting their testimony.

The requisite standard of proof in the form of substantial evidence applies just as forcefully in drug testing cases as in other disciplinary matters. Part of the Carrier's burden in such cases is to show the security and integrity of the chain of custody of the sampled material. In that connection, if the lab or test procedures are challenged, the Carrier must provide evidence from a credible source that the tests were conducted in accordance with standard procedure. Bare assertions and unsupported argument are not sufficient for that purpose.

The Carrier is ordered to reinstate the Claimant without compensation for time lost. His return to service is conditioned upon passing a return-to-work physical examination and Operating Rules Exam. Furthermore, he is to be reinstated under the same terms and conditions provided in his September 9, 1999 leniency reinstatement agreement for a period of two years from the date of reinstatement pursuant to this Award.

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 24th day of September 2002.