Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36305
Docket No. MW-36425
02-3-00-3-696

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe Railway
((former St. Louis-San Francisco Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Mr. G. W. Kizziah for alleged violation of Sections 6.2 and 12.0 of the Burlington Northern Santa Fe Policy on Use of Alcohol and Drugs on January 29, 1999 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File B-1266-2/1299-0177 SLF).

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be '. . . returned at once, paid for all time lost plus benefits, and the charges removed from his service record.'"

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 Claimant was employed by the Carrier as a Welder and was assigned as such to a welding gang working in the vicinity of Quiton, Alabama, when this dispute arose.

In August 1998, the Claimant tested positive for a controlled substance. In accordance with the Carrier's Drug Testing Policy, the Claimant signed a waiver and

agreed to a follow-up testing program. On January 22, 1999, the Carrier administered a follow-up test to the Claimant, which tested positive for cocaine. On January 29, 1999, the Carrier informed the Claimant of the results and due to a second positive drug test within ten years, the Claimant was dismissed from service.

The Claimant requested an Investigation, which was originally scheduled for February 18, 1999. Due to numerous postponements, the Investigation was eventually held on September 9, 1999, after which the Carrier upheld its earlier decision to dismiss the Claimant for violating paragraphs 6.2 and 12.0 of the Burlington Northern Santa Fe Policy on the Use of Alcohol and Drugs.

The Organization protested the discipline, asserting that:

> "On October 19, 1999 we sent Division Superintendent Sarrett another letter further reference to our October 5, 1999 letter that we have not received a copy of the investigation and again requested Claimant be returned to service and paid for all time lost. We finally received a copy of Carrier's decision October 4, 1999 in a letter dated September 27, 1999, and received copy of the investigation October 22, 1999. We still have not received a reply concerning our October 5 and 19, 1999 letters. Carrier's September 27 decision that I received October 4, 1999 is fifteen days outside the time limits, twenty-five days after the investigation."

Regarding the merits of the dispute, the Organization maintained that the Claimant had not been found guilty of any Rule violation and the urinalysis test should be voided. According to the General Chairman, the test site location was not in compliance with the Code of Federal Regulations, and, if the inspector had conducted a pre-test inspection of the site, he would have rendered the location "unacceptable" due to a lack of "adequate security" and the presence of "unqualified people."

The General Chairman further noted that the Claimant "did not agree with the test" and when he requested that the other half of his sample be tested, the Carrier provided the Claimant with an outdated list of other DHH certified laboratories.

Finally, the General Chairman alleged that the Carrier did not provide the Claimant with certain witnesses he requested, each of whom would have "clearly proven" that the Claimant should not be removed from service. As remedy for the aforementioned violations, the Organization requested that the Claimant be immediately returned to service, paid for all time lost, plus benefits, and the charges removed from his service record.

In its denial of the claim, the Carrier asserted the following:

"The transcript of the hearing and all subsequent correspondence have been reviewed, and based on this review it is clear that the Claimant's guilt was proven and the discipline was warranted. In this instance, Claimant was found to have tested positive for a controlled substance twice with the past ten years, a clear violation of Rule 12.0 of the Agreement.

The record clearly indicates that upon notification of the second positive test, the Claimant was given the opportunity to have the split sample retested at a NIDA approved laboratory. The Claimant chose Medlab Clinical Testing from a list supplied by the Carrier. The Claimant received letters from the Carrier's medical department on July 8 and August 11, 1999, informing him that Medlab was no longer sanctioned by the DOT. The Claimant was advised to select another testing laboratory from the list the Carrier supplied, but did not receive a request or instruction from the Claimant for a reconfirmation urine test. After September 1, 1999, the Carrier considered the matter closed and dismissed the Claimant for a second positive test within ten years and in violation of Section 12.0.

You have attempted to wash away the Claimant's two failed drug tests by making procedural arguments. You contend that the Claimant did not receive a copy of the Investigation decision with 15 days from the date of Investigation. But your assertion about the Carrier's alleged procedural error, even if proven, would not invalidate the dismissal of the Claimant. The Organization also alleges that you have not received a copy of the transcript of the Investigation. You have failed to prove this allegation or support it by referring to a rule of the current Agreement. Receipt of your November 19, 1999 letter to Mr. Sarrett, however, quotes testimony in the Investigation. Clearly, in order to write a 12 page letter, which contains mostly testimony during the Investigation, you have received a copy of the transcripts of the Investigation.

Lastly, the Organization alleges that the Carrier did not provide the Claimant with the witnesses he requested at the Investigation. Rule 91(b)(3) gives the Claimant the right to have witnesses present, but the Rule does not require the Carrier to provide the witnesses as you have alleged. It is the Claimant's responsibility to secure witnesses at the Investigation if he so chooses. The Organization's allegations appears to be nothing less that a last-ditch effort to find a procedural argument to reverse the dismissal of a two-time violator of the Carrier's Policy on the use of Alcohol and Drugs reversed."

Fundamentally, this case deals with a second time violation of the Carrier's policy on the use of drugs and alcohol. The voluminous record raises several procedural issues along with the merit issue. Those procedural issues, raised by the Organization, are: (1) The Organization did not receive a copy of the transcript of the investigation; (2) the Carrier failed to provide the Claimant with witnesses he requested at the Investigation, and; (3) the Carrier did not render a decision within ten days after the completion of the September 9, 1999 Investigation.

Rule 91(b)(4) states that:

> "A copy of all the statements taken at a completed investigation will be furnished duly accredited representative of employee. Employees, on request will be given copy of their own statements upon verifying and signing same."

In its defense, the Carrier maintains that it had "trouble" getting its own copy of the transcript and did not intentionally delay getting a copy of the transcript to the General Chairman. In that connection, the Carrier notes that the Claimant was allowed to tape record the proceedings, and contends that the Organization apparently had access to same in light of the General Chairman's ability to quote "extensively" from the proceedings in his letter of November 19, 1999.

The record supports the Carrier's assertion that it had "trouble" getting its own copy of the transcript, and we find no evidence which demonstrates that the Carrier intentionally delayed getting a copy of same to the General Chairman. There is no dispute that the Claimant was permitted to tape record the Investigation, and even a cursory view of the record correspondence makes it clear that the General Chairman had some form of access to that tape recording. Therefore, in the circumstances, we do not believe that the Organization or the Claimant were materially disadvantaged by the problems associated with the transcript of the Investigation.

The Claimant and the Organization make several references to people they allege the Carrier should have called as witnesses, even entering into evidence a list of prepared questions that they would have asked had these witnesses been there. Rule 91(b)(3), which addresses the question of witnesses, states:

> "The employee may be represented by duly accredited representative of the Brotherhood of Maintenance of Way Employees; and shall have the right to have present without cost to the Carrier, such witnesses as he may desire."

There is no evidence on this record that the Organization made an effort to have these witnesses present at the Hearing, and the Rule does not require the Carrier to arrange for attendance of same.

Finally, with regard to the time limit issue, Rule 91(b)(5) states, in pertinent part: "A decision will be rendered by the Carrier within ten (10) days after completion of the investigation." In this case, the Investigation was completed on September 9, 1999, and therefore, the Carrier had until September 19, 1999 to render its decision. However, the Carrier did not render its decision to discipline/dismiss the Claimant until September 27, 1999. The Organization asserts that the Carrier's failure to render a timely decision is fatal, and that the claim should be allowed as presented. For its part, the Carrier notes that Rule 91(b)(5) does not make mention of any remedy for a time limit violation and maintains that the approach to this situation should parallel National Disputes Committee Decision No. 16.

There is no dispute that the Carrier violated Rule 91(b)(5) of the Agreement when it failed to render a decision within the time parameters set forth in Rule 91(b)(5). However, there is no language in the Agreement which supports the Organization's argument that the Carrier's failure to render a decision within the prescribed ten day time period should nullify or void the assessed discipline. The question then arises as to the remedy for the Carrier's violation of the ten-day provision of Rule 91.

We rely then, on the following language set forth in The National Disputes Committee's Decision No. 16, which states, in pertinent part:

> "Claim on behalf of clerk Eklund, dated October 5, 1959, was received by the carrier on October 15, 1959 and denied on December 29, 1959. The Local Chairman received the denial on December 30.
>
> The National Disputes Committee rules that receipt of the Carrier's denial letter dated December 29, 1959 stopped the Carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement."

In these circumstances, the tardiness of the Carrier's letter does not invalidate what is otherwise a sound decision. Therefore, we find the proper measure of damages for the Carrier's violation of Rule 91(b)(5) is that the Carrier is liable only for the period of time that the decision was due, September 19, 1999, until the decision was rendered on September 27, 1999.

Turning to the merits of the dispute, we find no violation of the Agreement. There is no dispute that an inexperienced Hearing Officer did a less than stellar job conducting an Investigation on the Claimant, whom the Carrier had charged with a very serious offense. However, there is sufficient evidence on this record to establish that the Claimant's follow-up test of January 22, 1999 was a confirmed positive test for cocaine. Further, the January 22, 1999 test constituted the Claimant's second failure to pass a drug test, and under the provision of Rule 91, the Carrier was within its rights to discharge the Claimant.

Therefore, we will sustain this claim only to the extent previously set forth as the proper measure of damages for the Carrier's violation of the ten-day time limit set forth in Rule 91(b)(5) of the Agreement.

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 13th day of November 2002.