

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36331
Docket No. MW-36437
02-3-00-3-705**

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 Employees
(CSX Transportation, Inc.)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (removed from service on November 16, 1999 and subsequent dismissal) imposed upon Mr. R.E. Shonk in connection with charges of alleged violation of CSX Transportation Operating Rule G and CSX Safe Way Rule 21 was harsh, excessive and in violation of the Agreement [System File CO21706800/12(00-0008) CSX].**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. R.E. Shonk’s record shall now be cleared of the charges leveled against him, he shall be reinstated to service and paid for all time lost.”**

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.

By letter dated November 26 the Claimant was directed to report for a December 9 formal Investigation in connection with his alleged violation of Operating Rule G and CSXT Safe Way Rule 21 account a November 10, 1999 toxicological test was positive for cannabinoids. Thereafter, by letter dated December 28, 1999, the Carrier informed the Claimant that he had been found guilty as charged, and was dismissed from service.

On January 7, 2000, the Organization submitted a claim on behalf of the Claimant in which it was alleged that the December 9 Investigation was not held in accordance within Agreement time limits. The Vice Chairman further alleged that the discipline of dismissal was "harsh and excessive in this case."

On February 11, 2000, the Organization submitted additional correspondence to Manager Employee Relations M. D. Selbert concerning their "... conversation at conference on February 4, 2000." The Vice Chairman included an undated letter from the Claimant in which he acknowledged that he had a "drug problem" and pleaded for leniency premised upon his 22 years of service with the Carrier.

On February 16, 2000, the Vice Chairman again wrote to Selbert concerning their "... conversation at conference on February 4, 2000. ..." The Vice Chairman also included a copy of a letter, dated February 7, 2000, from Cornerstone of Recovery, Inc., concerning the Claimant's admission for "treatment of cannabis dependence . . . ," which advised that the Claimant had successfully completed the program and was discharged on January 14, 2000.

In an April 25, 2000 letter addressed to Senior Director Employee Relations J. H. Wilson, the Vice Chairman asserted that the Carrier had "failed to respond in writing as is required in Rule 24(b) . . ." of the parties' June 1, 1999 Agreement following the February 4, 2000 "discussion" with Selbert. Responding on the same day, Selbert confirmed that while he and the Vice Chairman "... did have a general conversation regarding Mr. Shonk on February 4th ..." it was his recollection that their conversation did not fulfill the parties' obligation to conference the matter, particularly because the issue was scheduled to be conferenced on February 15, 2000.

In March 14, 2000 correspondence to the Organization, Senior Director Employee Relations Wilson noted that this was the Claimant's "... second confirmed positive test in 5 years. . . ." Wilson further noted that the matter was discussed during a February 15 conference, at which time Selbert denied the appeal. The letter went on to state:

"There is no question that Mr. Shonk is guilty of the charge, as he freely admitted during the investigation held on December 9, 1999 that he violated the terms of the Bypass Agreement he signed on March 15, 1996, as well as both rules with which he was charged. (See transcript, p. 15). The only matters to be addressed are the two allegations raised in Mr. Simpson's appeal, that the investigation was allegedly not conducted in accordance with the labor agreement, and that the discipline was harsh and excessive."

With respect to the first matter, the Carrier argues that the Hearing was scheduled for December 9, which was well within the 20-day time limit of Rule 25(d). The Director Employee Relations further stated: "Regarding the second allegation, it

is CSXT's policy that an employee who tests positive twice within five years for drugs or alcohol is subject to dismissal, and the practice is to dismiss these employees."

The matter remained unresolved on the property, and is now before the Board for adjudication.

At the outset, the Organization, relying upon Rule 25, Section 1(d) of the Agreement, asserts that the Carrier violated time limits when it "failed to schedule and hold a timely investigation." Rule 25, Section 1(d) states, in pertinent part:

"An employee who is accused of an offense shall be given reasonable prompt advance notice, in writing, of the exact offense of which he is accused with a copy to the union representative. The hearing shall be scheduled to begin within twenty (20) days from the date management had knowledge of the employee's involvement."

The record evidence reveals that the Claimant was tested on November 10, 1999, the results of which were positive for cannabinoids. However, the Claimant initially stated that the positive test was due to a "hemp diet," and it was not until November 22, 1999 that Supervisor C. S. Bailey was so notified. In this case, it is not disputed that Bailey was the supervisor with the authority to bring charges, and when he received written confirmation from the Carrier's doctor Goldman on November 22, the Hearing was immediately scheduled for December 9, 1999, which was well within the 20-day time limit set forth in Rule 25, Section 1(d).

In that connection, it is not disputed that during a November 11, 1999 meeting, the parties amended Rule 25(d), agreeing to add the following language:

". . . The hearing shall be scheduled to begin within thirty (30) days from the date management had knowledge of the employee's involvement and such hearing shall not begin in less than ten (10) days from the date of the notice. . . ."

Although the Organization cited the original version of Rule 25(d) during the Investigation, there is no doubt that the November 11, 1999 amended Rule was in place prior to the issuing of charges in this case on November 26, 1999.

Turning to the merits of the dispute, while undergoing a return-to-work physical in March 1996, the Claimant tested positive for cannabinoids. Thereafter, the Claimant elected to enter into a Rule G "By Pass" Program, and on March 25, 1996, the Claimant agreed to the following:

"I will contact one of the Carrier's Employment Assistance Program (EAP) Counselors within five (5) days of the date the Charge Notice was

received and will indicate a willingness to immediately enroll and participate in an approved rehabilitation program, with the understanding that:

- (d) Any reported non-compliance with my after-care plan within five (5) years of my return to service will result in a hearing on the Rule G/Safety Rule 21 charge.”

A follow-up test was administered on November 10, 1999, and the Claimant's results came back positive for cannabinoids for a second time and as a result, on December 28, 1999, the Claimant was dismissed.

The Claimant was afforded the opportunity for rehabilitation after his first positive test for marijuana in 1996, and, absent mitigating factors, his failure to do so was cause for dismissal. Therefore, this 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 26th day of December 2002.