

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 36990  
Docket No. MS-37895  
04-3-03-3-263

The Third Division consisted of the regular members and in addition Referee James E. Nash when award was rendered.

(Mario E. Arredondo

**PARTIES TO DISPUTE:** (

(Union Pacific Railroad Company

**STATEMENT OF CLAIM:**

"This is to serve notice, as required by the Uniform Rules of Procedure of the National Railroad Adjustment Board effective May 16, 1994, of my intention to file an Exparte Submission within 75 days covering an unadjusted dispute between [me] and [the] Union Pacific Railroad involving the following:

I was picked up for a DUI in Del Rio, Texas which was later dismissed, in court. UPRR then suspended [me] for the incident, because I had already had an offense for dirty drug screen from a return to work after being laid-off. After all this was came [sic] about the railroad then, (Southern Pacific Trans. Co) charged for Rule 1005, which states that use of alcohol or intoxicants subject for duty or while on company property(sic).

For one I was never on duty or on company property, because I was laid-off and was coming back to work. After agreeing to go to rehab in order to get back to work, after I had completed everything that I was supposed to do I was never told that I would be on probation for 10 years not by union or by the company EAC (Herman Hiessie). I never signed anything stating such. So I feel that I was actually railroaded by my union and the railroad for not informing me of all of all [sic] the information I am coming to find out on my own. I have tried to get legal help from every where but everybody wants so much money for there [sic] services in order to get my job back so I

come to you asking that you please help me in any way that you can, because I have worked too many years out on the road and away from my family to lose my job over misrepresentation by my union and by a company that no longer exists. So I leave this matter in your hands and may God help you make the right decision.”

**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.

After an evaluation of a random drug test in December 1993, the Claimant was charged with using marijuana in violation of Rule 1005 – Drugs and Alcohol. On January 11, 1994, he acknowledged responsibility for the Rule violation, as charged. He was subsequently reinstated contingent upon participation in the Carrier’s Employee Assistance Program and his remaining drug and alcohol free for ten years.

On January 4, 1999, the Claimant was charged with violating Rule 1.5 – Drugs and Alcohol, Rule 1.6(1) – Conduct (Careless of the safety of themselves and others), Rule 1.6(2) – Conduct (Negligent), and the Carrier’s policy regarding the use of drugs and alcohol. Charges arose from allegations that the Claimant – while driving a company vehicle under the influence of alcohol – was involved in an accident and, thereafter, left the scene and fled from Del Rio, Texas, police officers.

The Claimant protests his termination because the charges involving the January 4, 1999 incident were dismissed in court. In any event, he emphasizes, he

was not on company property when the incident occurred. And, his termination is made even more unfair, he asserts, because he was never advised, either by the Carrier or the Organization – at the time that he acknowledged responsibility for using marijuana in December 1993 – that he would be on probation and required to remain drug and alcohol free for ten years, and he signed no documents making such acknowledgment or agreement.

The Carrier contends that the Board lacks authority to consider this case. That is so, it believes, because the incident that occurred in December 1993 was resolved with the Claimant's acknowledgement of responsibility and acceptance of a leniency reinstatement. Furthermore, his termination following the most recent occurrence of January 4, 1999, was upheld by Public Law Board No. 6402, Award 12 on January 21, 2002. Referee Martin H. Malin wrote:

“On January 11, 1999, Carrier notified Claimant to report for an investigation on January 18, 1999, in connection with his allegedly having been arrested on January 4, 1999, following an accident in which he struck another vehicle while operating a Carrier tractor trailer. The hearing was held as scheduled. On January 26, 1999, Carrier informed Claimant that he had been found guilty of the charges and dismissed from service.

The record leaves absolutely no question that Carrier proved Claimant's guilt by substantial evidence. On January 4, 1999, while off duty, Claimant was driving a Carrier tractor-trailer when he struck a pickup truck, causing approximately \$1,000 in damage to the pickup. Claimant did not stop at the accident scene but was chased and apprehended by local police. Claimant's blood alcohol level was approximately twice the legal limit for operation of a motor vehicle in the State of Texas, five times the FHWA limit and ten times Carrier's limit. Claimant was in clear violation of Rules 1.5, 1.6(1) and 1.6(2) and Carrier's Drug and Alcohol Policy.

The record further reveals that Claimant tested positive for marijuana in 1993. He was allowed a leniency reinstatement when he agreed to enter the Employee Assistance Program. Under

Carrier's policy, an employee is not eligible for a second leniency reinstatement – EAP placement for a second offense within ten years. Under the circumstances, we cannot say that the penalty of dismissal was arbitrary, capricious or excessive.”

The random drug testing incident that occurred in December 1993 was resolved by the Claimant's acknowledgment of responsibility and his return to service on a leniency basis. The events of January 4, 1999 were by Public Law Board No. 6402, Award 12. Because the Claimant's termination was upheld, there is nothing for the Board to consider. Stated differently, because the Board lacks authority to overturn the final and binding decision rendered by Public Law Board No. 6402, the claim now before the Board must be dismissed.

**AWARD**

Claim dismissed.

**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 12th day of May 2004.