Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37622
Docket No. MW-37375
05-3-02-3-411

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (former Burlington Northern
(Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Mr. S. R. Stan on January 5, 2001 for alleged violation of Burlington Northern Santa Fe Maintenance of Way Operating Rule 1.5 and Section 7.9 of the Policy on use of Alcohol and Drugs dated September 1, 1999 in connection with a FMCSA Return to Duty test conducted on November 3, 2000 at Pasco, Washington was arbitrary, capricious, without just cause, on the basis of unproven charges and in violation of the Agreement (System File S-P-819-O/11-01-0127 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Mr. S. R. Stan shall now '. . . be immediately reinstated, his record be immediately cleared, without impairment. Restoration of loss is to include, but not limited to, wages loss, overtime opportunities lost, promotional opportunity and all fringe benefits lost such as insurance, railroad retirement contributions, etc.'"

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.

At the time of his dismissal, the Claimant held the position of Track Inspector, and had accumulated a total of four years of seniority in the Track Sub-department. On July 25, 2000, the Claimant failed a drug test by testing positive for amphetamines. The Carrier offered the Claimant the opportunity to return to work after serving a suspension and obtaining treatment through the Employee Assistance Program (EAP) pursuant to Section 8 of the Carrier's Policy on the Use of Alcohol and Drugs. According to Section 8.9, "When the return-to-work test is negative, the employee may return to work . . . subject to the limitations specified in Section 7 of this policy."

According to the record, on November 3, 2000, the Claimant underwent an FMCSA return-to-work drug and alcohol test which yielded a positive result for amphetamines. This was the Claimant's second positive test result, and the Claimant was thus considered to have been in violation of the above policy. On November 17, 2000, the Carrier's Manager of Drug and Alcohol Testing, M. Crespin, notified Division Engineer L. D. Woodley, that the Claimant had failed his return-to-work drug test. By letter dated November 21, 2000, the Carrier informed the Claimant that he was being withheld from service pending a formal Investigation scheduled for November 27, 2000. By mutual agreement of the parties, the Investigation was twice postponed until December 13, 2000, and was conducted on that date.

By letter dated January 5, 2001, the Carrier informed the Claimant that he was dismissed as a result of the formal Investigation, because the Carrier had found him guilty of violating Maintenance of Way Operating Rule 1.5 and Section 7.9 of the Carrier's Drug and Alcohol Policy. On February 6, 2001, the Organization appealed the Carrier's assessment of discipline and the parties discussed the matter in conference on January 22, 2002, the record confirms. Unable to resolve this claim during the parties' on-property handling of this matter, the instant dispute is now properly before the Board for final and binding adjudication.

The Carrier argues that it sustained its evidentiary burden of proof because the evidence adduced on the record clearly shows that the Claimant violated Section 7.9 of the Carrier's Drug and Alcohol Policy which essentially states that employees will be subjected to dismissal if "more than one confirmed positive test either for any controlled substance or alcohol" is obtained "under any circumstance during any 10-year period." The Carrier emphasizes that the Claimant had two confirmed positive tests for controlled substances within a six-month period and the November 3, 2000 positive test result indeed stemmed from a return-to-work drug test.

The Carrier further contends that the record contained substantial evidence of the Claimant's violation of Maintenance of Way Operating Rule 1.5, which essentially prohibits the use of ". . . over-the-counter or prescription drugs . . . while on duty, except medication that is permitted by a medical practitioner and used as prescribed." It stressed that, despite the Organization's hyper-technical argument that the Claimant was "not on duty" at the time of the drug test, the Claimant's positive test result for amphetamines clearly violated Rule 1.5, and that the "substantial evidence" test was properly employed and met.

According to the Carrier, the Claimant's proven use of Adderall, which contained amphetamines, was prohibited under the Carrier's policy, and thus justified his dismissal under Operating Rule 1.5 and Section 7.9, referenced above. The Carrier additionally argues that the Claimant's affirmative defense that the Adderall produced a "false positive" and that the test result cannot be deemed as reliable must be rejected by the Board given the fact that the drug in question did, in fact, produce a positive test result that was confirmed by the Carrier's Medical Review Officer (MRO) R. W. Hamilton, MD. See Award 20 of Public Law Board No. 5515.

Moreover, the Carrier emphasizes that Conducting Officer T. E. Martin heard all the testimony and made credibility determinations as regards both of the witnesses who testified, the Claimant and Roadmaster I. V. Sandoval. The Carrier reminds the Board that its function is not to substitute its judgment for that of the Conducting Officer as regards witness credibility determinations. Thus, the Board should not disturb the Conducting Officer's determination that the Claimant's "story" was "not plausible." See on-property Third Division Awards 33219, 33220 and 33841.

The Carrier also maintains that this case is procedurally sound and that neither the Claimant nor the Organization was "harmed" from an Agreement due process standpoint as regards the timeliness of its mailing of the Investigation transcript and

exhibits. According to the Carrier, such documentation was promptly provided to the Organization after the Claimant's representative raised that issue. The Carrier stresses that the Organization was neither prejudiced nor harmed by the belated receipt of the transcript, and emphasizes that this case remained in on-property handling for nearly two years before being listed with the Board. Indeed, the Carrier states that the on-property precedent has previously established that "late receipt of a transcript or exhibits are not fatal." See Third Division Awards 33918 and 33491.

In addition, the Carrier asserted that a typographical error in the Investigation notice should not invalidate the discipline assessed against the Claimant inasmuch as there has been no showing of any Agreement due process prejudice. According to the Carrier, the Claimant testified that he had taken the return-to-work test on November 3, 2000, and had been informed by the MRO that he had failed it and it would be certified as a positive. Moreover, the record shows that the Claimant knew that the purpose of the Investigation was to determine the facts surrounding his test failure. Citing Third Division Award 32785, involving these parties, the Carrier urges the Board to similarly find that the Claimant was sufficiently notified about the "scope and purpose of the investigation." See also on-property Third Division Award 33217, where the Board in that case found that the charges were "sufficiently clear to put the Claimant on notice. . . ."

The Organization contends that the record shows that the Carrier committed several errors that violated the Claimant's Agreement due process rights. According to the Organization, the errors are serious and fully justify a sustaining award by the Board.

First, the Organization asserts that Rule 40, paragraphs B and C were violated when the Carrier failed to schedule the formal Investigation within ten days after the Claimant was "withheld from returning to service," and issued charges that were "imprecise and timely protested," in clear breach of the above Agreement Rules. See on-property Third Division Awards 6446, 33492, 35607 and Award 7 of Special Board of Adjustment No. 1112.

Second, it states that the Carrier charged the Claimant with an alleged violation on November 17, 2000, but found him guilty of violating the Carrier's Rules on November 3, 2000. This error was significant because the Claimant "cannot validly be charged with one (1) offense . . . on one (1) date and found guilty of another." Thus,

this mistake cannot be dismissed as a mere typographical error, the Organization stresses.

Third, according to the Organization, the Carrier failed to produce a witness who was "competent to answer testing questions," and that the witness who did testify said that the specimen collection and chain-of-custody reports were "illegible." Third Division Awards 12090 and 31872, and others, support the Organization's position that discipline should be overturned in cases where such documentation is unclear or cannot be read, it stresses.

Fourth, as mentioned above, the Organization contends that the Carrier failed to provide a copy of the Investigation transcript within a "reasonable period" after the conclusion of the Investigation. The delay in receiving the documentary evidence contained in the exhibits hampered the Claimant's representatives' ability to "scrutinize the record, analyze the evidence, formulate arguments, research applicable precedent, compose a comprehensive appeal and get it in the mail before the time limits expire," the Organization further asserts. Thus, the claim must be sustained for reason of the Carrier's egregious procedural breach, it argues. See Third Division Awards 32786 and 33491 involving these parties.

Regarding the merits of the case, the Organization stresses that the Carrier failed to present any credible or substantial evidence in support of its disciplinary action against the Claimant. The Organization contends that the Claimant was not on duty, on Company property, or subject to call at the time of the testing. Thus, Operating Rule 1.5 does not apply to this case.

The Organization further states that the Claimant "had a rational and reasonable explanation for his test results which was unrefuted at the Investigation. It argues that the testimony and documentary evidence established that the Claimant's family doctor had prescribed three different medications for narcolepsy and chronic fatigue, beginning in August 2000, and that he and his son had been prescribed similar medications, Adderall, and Methylene (Ritalin) to treat their respective conditions. Moreover, in the Organization's view, the Claimant credibly testified that he had not been informed that taking Adderall or Methylene would have generated a positive drug test result. It adds that, based on the record, if the Claimant had not taken the medication, he would have felt "horribly fatigued." Moreover, the Organization contends that the Claimant tried to inform the specimen collector of the medication he had been taking, but that her reply was that she "didn't want" that information. Under

such circumstances, the Claimant's actions cannot be viewed as "reckless," as the Carrier has suggested, the Organization stressed.

In sum, the Organization charges that the Carrier's assessment of discipline against the Claimant was arbitrary, capricious, unjust, unwarranted and excessive. Based on the above, the Organization requests that the Board sustain the claim and reinstate the Claimant to service, with payment for lost wages and benefits, and with his seniority unimpaired.

The Board reviewed the evidence of record and carefully considered the Organization's arguments with respect to both procedure and substantive merit, and the precedent Awards cited in support of its position. For the following reasons, the Organization's appeal must be denied.

After careful consideration of the Organization's procedural objections, we hold that the instant case stands on sound procedural footing. First, we find that the Investigation notice was issued pursuant to Rule 40. Although the record reflects that the Investigation notice was sent to the Claimant just four days after the Division Engineer received his notice, in arguable violation of Rule 40(C) the record shows that, as noted above, the Investigation was twice postponed, thereby allowing the Organization ample time to construct a vigorous defense on behalf of the Claimant.

Furthermore, we reject the Organization's argument that the Investigation notice should be deemed invalid because the drug test date of November 3, 2000 was incorrectly shown as November 17, 2000. The charges otherwise complied with paragraph (C) from the standpoint of specificity given the fact that, in light of the Claimant's testimony, there was no dispute as to the date on which he had underwent the return-to-work drug test. On these facts, the Awards cited by the Organization are not on point, we find.

Second, we disagree that, given the facts of record, the Claimant was "held out of service" within the meaning of Rule 40(B). The record makes plain that the drug test that the Claimant underwent was a return-to-work test necessitated by the Claimant's earlier removal from service as a result of the positive drug test result ascertained in May 2000. As the Carrier pointed out, the Claimant's return-to-service was conditioned upon a negative result on the November 3, 2000 return-to-work test. Under these circumstances, there is no support for the Organization's position that the Claimant was improperly removed from service, we hold.

Third, having carefully reviewed the Investigation record, we disagree with the Organization's position that the testimony given by the Carrier's witness was lacking in substance, and that the legibility of the copy of the Federal Drug Testing Custody and Control Form was such that it could not be accorded any probative value. Indeed, we find the Organization's characterization of the form as "illegible" was inaccurate, given the testimony of record concerning that document. Specifically, we find from the testimony of record that a "couple of words" at the bottom of the form, were missing. The record reveals that, upon noticing the missing text, Conducting Officer T. E. Martin recessed the proceedings to "secure a form with the same verbiage," which he copied and distributed to the parties. According to Martin's statement in the transcript, it was "agreed by all that the verbiage is the same, less the doctor's remarks and the signatures." The form which the Organization obviously seeks to have removed from the record is that which certified the Claimant's November 3, 2000 drug test as "positive" for amphetamines, we note.

Fourth, upon careful consideration of the Organization's objection, under Rule 40(E) over the mailing date of the transcript, based upon our review of the entire factual record, the Board rules that a fatal error did not occur when the Carrier mailed the transcript on February 27, 2001, after having been notified of the missing document by the Organization in its initial appeal of February 6, 2001. The on-property record of the parties' handling of this particular case establishes that no delay ensued, as the Carrier pointed out above, and there is no evidence that the delay interfered with the Organization's ability to defend the Claimant during the appeal process. Indeed, we find from the correspondence of record that, at the Organization's request, the Carrier afforded it additional time to "supplement and amend the claim as necessary."

Thus, under these facts, we find that Third Division Award 32786 is not governing because, in that case, the transcript was found to have never been produced during the on-property handling of that matter. Likewise, Third Division Award 33491 is not controlling because that case appears to have involved missing photographic exhibits merely viewed by the Claimant and the Organization, but not furnished, at the Investigation.

In the same vein, we find that, with respect to the exhibits which the Organization contends were missing from the transcript, Exhibits A, B and C, the Investigation notice and two postponement letters, were mailed to the Claimant, who testified that he had received them. In addition, Exhibit A was "read into" the record,

verbatim and in its entirety by the Carrier's witness. Exhibit D, the November 17, 2000 letter from Crespin to Division Engineer Woodley, was also reproduced in the body of the record, verbatim. The Claimant acknowledged his receipt of Exhibit E, the Custody and Control Form referenced above, and a copy was provided to the Claimant and his representative during the Investigation. Likewise, Exhibit F, the Drug Test Result form from the testing laboratory, Medtox, was given to both the Claimant and his representative as it was entered into the record. Exhibits G, H, I and J were documents furnished by the Organization from the Claimant's personal physician, we note. Thus, the Board rules that no fatal Agreement due process error occurred as regards the Carrier's tendering of the exhibits, under the particular circumstances before us.

Turning to the merits, as noted above, we find that the Carrier had just cause to dismiss the Claimant given the strength of the evidence of record. We find no merit to the Organization's contention that the positive test result should be deemed invalid because, according to the Claimant, the collector declined to receive any information on the medications he had been taking. The testimony of record established that, in the event of a positive test, the MRO is the individual with whom the Claimant would discuss medication issues, and the Claimant's testimony confirms that such discussion, in fact, occurred. Moreover, the Claimant testified that he had read the Federal Custody and Control Form before signing it, but nevertheless neglected to record the prescriptions he had been taking at the time of the test, as a "memory jogger," for his discussion with the MRO, Dr. Hamilton. The Claimant testified that, during his interview with Dr. Hamilton, he had taken a dose of his son's prescription medicine, Adderall, "for narcolepsy and chronic fatigue," having exhausted his prescribed supply of Methylene, and stated that Dr. Hamilton informed him that <u>because he had taken a medication that had not been prescribed for him, the test result had to be recorded as a positive under the Carrier's regulations</u>.

Furthermore, the Claimant admitted that he did not avail himself of the opportunity to have the reserved portion, or "split sample," of the specimen he had furnished on November 3, 2000 tested at a second certified laboratory. The fact that he declined to pursue that option, after discussing it with Dr. Hamilton, negates any argument that the November 3 test result was a "false positive," we rule.

The Board also notes from the record that the Claimant testified that he had been examined on the Carrier's Maintenance of Way Operating Rules in either April or May 2000, and specifically stated that he had understood Part 7.9, Discipline, for

Drug and Alcohol Violations. The Board finds that the Claimant was, in fact, subject to Part 7.9 of the Carrier's Policy on the Use of Alcohol and Drugs and Operating Rule 1.5 given the fact that a negative result on the return-to-work drug test was a condition for his return to service, following his absence due to the his earlier positive test in May 2000. The Claimant also essentially testified that he had known for approximately two weeks that he would be undergoing a return-to-work drug test prior to his return to duty.

Given the entire record before us, the Board holds that the Carrier's action in this case was reasonable, and the Board has no authority to substitute its judgment for that of the MRO, with regard to his decision to deem the November 3, 2000 test a positive after reviewing the laboratory test results and discussing those results with the Claimant. We find, therefore, that the Claimant's dismissal was justified under the first three items of Section 7.9. Specifically, we find that the Claimant's November 3, 2000 positive test for amphetamines violated that specific Rule because (1) the positive test was the second "confirmed positive test for . . . any controlled substance . . . during any 10-year period"; (2) the test in question was "a single confirmed positive test . . . for any controlled substance . . . within three years of any 'serious offense'. . . .; and (3) the positive test result obtained after the Claimant had been reinstated on a leniency basis following his positive drug test result in May 2000, and after he had presumably satisfied the requirements for reinstatement set by the Carrier's EAP counselor constituted his "failure to abide by the instructions of the Medical & Environmental Department and/or Employee Assistant Program regarding treatment, education and follow-up testing."

Finally, as the Carrier points out, the Board has upheld dismissal actions in cases such as this, notwithstanding the presence of harmless procedural errors, where an employee's repeated failure to abide by the Carrier's Policy on the Use of Alcohol and Drugs has been proven by substantial evidence. In addition, there is no evidence that the Carrier's assessment of discipline was arbitrary, capricious or unfair. For all of the foregoing reasons, the Board finds that dismissal is an appropriate disciplinary penalty. See Award 1 of Public Law Board No. 5860.

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 19th day of October 2005.