Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37623
Docket No. MW-37708
05-3-03-3-63

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 discipline (removed from service on September 28, 2001 and subsequent dismissal under date of November 21, 2001) imposed on Mr. J. J. Hanzel for alleged violation of Maintenance of Way Operating Rule 1.5 (Drugs and Alcohol) and 7.9 of the Burlington Northern Santa Fe Policy on the Use of Alcohol and Drugs in connection with a random follow-up test of September 25, 2001 was arbitrary, capricious, unwarranted and in violation of the Agreement [System File C-02-D070-1/10-02-0132(MW) BNR].

(2) As a consequence of the violation referred to in Part (1) above, Mr. J. J. Hanzel shall now be '...returned to service, made whole for all lost time and benefits, and any reference to this incident removed from the personal record of Mr. Hanzel.'"

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 had accumulated 22 years of service with the Carrier and held the position of Bridge and Building Mechanic. According to the Organization, on Sunday, September 23, 2001, the Claimant was "battling a very bad cold" for which he took two of his mother's prescription Tylenol 3 with Codeine tablets. The Organization states that the Claimant took the first tablet on Sunday evening, and the second on the following morning, because he "still felt awful and was unable to go to work." Although the Claimant did not work on Monday, September 24, 2001, he did report for service on Tuesday, September 25, 2001.

The record shows that on May 30, 2000, the Claimant tested positive for drugs and was conditionally reinstated on January 25, 2001. On Tuesday, September 25, 2001, the Claimant was required to undergo a follow-up drug and alcohol test. The Organization states that the Claimant provided a urine specimen and, at that time, informed the specimen collector that he had been taking a prescribed medication containing codeine.

The instant positive test result was the Claimant's second in just under 18 months, the record confirms. According to the record, the Claimant was allowed to retain his employment after the May 30, 2000 positive test, provided he obtain substance abuse counseling through the Employee Assistance Program (EAP) and follow the counselor's instructions and pass a return-to-work drug test. On January 25, 2001, the Claimant signed the standard conditional reinstatement letter, which specified that a condition of dismissal was "More than one confirmed positive test either for any controlled substance or alcohol, obtained under any circumstance during a ten year period."

On September 28, the Carrier's Medical Review Officer, K. Saffo, MD, conducted a telephone interview with the Claimant regarding the September 25, 2001 positive drug test result. The Organization asserts that the Claimant told Dr. Saffo that he had taken two of his mother's Tylenol 3 with Codeine tablets just prior to the follow-up drug test. Documentary evidence in the record shows that from September 28, 2001 to October 10, 2001, the Claimant was placed on a "medical leave" while Dr. Saffo completed his review. On October 10, 2001, Dr. Saffo determined that a legitimate medical explanation did not exist for the test result and certified the result positive for a controlled substance.

By certified letter dated October 12, 2001, the Manager of Drug and Alcohol Testing, M. Crespin, informed the Claimant's supervisor, Manager Structures E. Ferguson, of the Claimant's positive test result. Because the instant positive test result was the Claimant's second, Crespin requested an Investigation and did not authorize a Waiver of Investigation. A certified letter dated October 15 directed the Claimant to attend an Investigation of this matter on October 19. After one postponement at the Organization's request, the Investigation was held on November 7, 2001, the record indicates.

By letter dated November 21, 2001, the Carrier notified the Claimant that he was dismissed as a result of the formal Investigation, because it 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 January 15, 2001, the Organization appealed the Carrier's assessment of discipline and the parties discussed the matter in conference on July 23, 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 contends that the record contains substantial evidence of the Claimant's violation of Maintenance of Way Operating Rule 1.5. It argues that there is no dispute that the Claimant took medication that had not been prescribed for him and, indeed, admitted he had treated his cold with his mother's Tylenol 3 with Codeine. The Claimant's mother testified that, in response to the Claimant's request for something that would help his cold, she, in turn, gave him the Tylenol 3 with Codeine.

The Carrier emphasizes that under its Rules, because the medicine at issue was not prescribed for the Claimant, he could not have possibly used it "as prescribed," pursuant to paragraph three of Rule 1.5. On-property Award 29 of Special Board of Adjustment No. 1112, which upheld the dismissal of an employee found to have taken Dexedrine prescribed to a friend is directly on point with the instant case and supports the Carrier's dismissal action in the instant case, the Carrier asserts.

The Carrier further 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 pursuant to the terms of the original Waiver Agreement and the January 21, 2001 reinstatement letter, the Claimant had a duty to "avoid a second positive test." Indeed, the Carrier maintains that the Claimant, in fact, testified that he was aware of that requirement and, in its view, the undisputed facts reveal that the Claimant tested twice positive within the ten-year period. Thus, on these facts, the Claimant's dismissal was clearly warranted. See Third Division Award 32427, and Award 1 of Public Law Board No. 5341.

Therefore, the Carrier maintains that the Claimant's responsibility for violating Rules 1.5 and 7.9 was proven by substantial evidence, and that his violation of the terms of the January 25, 2001 reinstatement letter signed by him was also proven. With respect to the Claimant's request for leniency, the Carrier asserts that the Claimant was not entitled to lenient treatment in this specific case, given the leniency he previously was afforded at the time of the May 30, 2000 positive drug test, which culminated in his conditional reinstatement on January 25, 2001.

Under these factual circumstances, where the second positive drug test result clearly violated the terms of the original Waiver Agreement and subsequent reinstatement letter, the Carrier was not even required to conduct an Investigation, it argues. See Third Division Award 28361 in which the Board stated, "We find that

Claimant's violation allows Carrier to return him to dismissed status without an Investigation, as the Claimant had already been dismissed."

The Organization contends that the record shows that the Carrier violated procedural Rule 40(B) which provides that an Investigation will be held within ten days from the date an employee is withheld from service. It asserts that in light of the Claimant's removal date of September 28, the Investigation date of October 19, 2001 was clearly beyond the ten-day period provided for in the Rule. Thus, it asserts that the seriousness of the Carrier's breach justifies the Board's overturning of the discipline assessed. See Third Division Awards 32016, 35607, and Award 257 of Public Law Board No. 4244.

According to the Organization, the Claimant's representative was not provided sufficient time to prepare for the Investigation, given the October 15 date of Notice and the October 19, 2001 Investigation date. Thus, it argues that the Claimant was not afforded Agreement due process, as required by Rule 40(C) because such "short notice" arguably had made it difficult for the Claimant to secure his desired witnesses. See Third Division Award 22748.

With respect to the merits, the Organization essentially argues that although the Claimant self-treated his cold with his mother's Tylenol 3 with Codeine, the Claimant did not abuse his mother's prescription medication which, it asserts, "closely resembles" aspirin, Advil or Tylenol. It contends that the Claimant's conduct, although not "entirely proper," was neither tantamount to drug abuse nor concealment of the fact that he took the Tylenol 3 with Codeine. Indeed, the Organization emphasizes that when the Claimant furnished his specimen, he told the collector that he had taken prescription Tylenol, and believed that it was "still in his system."

In sum, the Organization contends that, notwithstanding the procedural errors warranting the Board's overturning of the discipline, as discussed above, the facts show that there was a "good and eminently plausible explanation" for the Claimant's positive test result. Moreover, it argues that the Board should credit the Claimant for his 22 years of seniority and his efforts at confronting his "problems" in an effort to preserve his railroad career. In support of its position that the facts of this case justify a sustaining Award by the Board, the Organization cites on-

property Public Law Board No. 6284, Awards 7, 8 and 9; Public Law Board No. 6204, Award 15; Public Law Board No. 6538, Award 5; and Third Division Awards 36064 and 36198.

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 Board finds that 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(A). According to the record, the Manager Structures was notified of the positive drug test result by letter dated October 12, 2001 from Manager of Drug and Alcohol Testing M. Crespin. Under these circumstances, we find that the Investigation notice dated October 15, 2001 was not untimely. See Third Division Award 32011.

Moreover, given the nature of the offense with which the Claimant was charged, we find that the Claimant's removal on September 28 after having spoken with Dr. Saffo, until October 10, 2001, when Dr. Saffo completed his Investigation, was prejudicial to neither the Claimant nor the Organization. Indeed, under these circumstances, the time limits for issuing the Investigation notice and convening the formal Investigation did not begin until the Manager of Drug and Alcohol Testing notified the Structures Manager on October 12, 2001, we rule. Our finding in this regard is also supported by the Board's decision in Third Division Award 37622, we emphasize.

Furthermore, the Board rejects the Organization's argument that the Claimant's due process right to have witnesses attend on his behalf was compromised because of the Carrier's initial scheduling of the Investigation on October 19, 2001, only four days after the date of the Investigation notice. The record clearly reflects that, at the Organization's request, the Investigation was postponed until November 7, 2001, when it was held without further delay. Thus, on these facts, we find that the Awards cited by the Organization in support of its procedural arguments are not applicable to the instant case.

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 agree that under the factual circumstances, where this was the Claimant's second proven positive drug test result in approximately 18 months, the Claimant was not entitled to leniency treatment by the Carrier. The Claimant acknowledged his duty to comply with the Carrier's Policy on the Use of Alcohol and Drugs, as evidenced by his January 25, 2001 signature on the conditional reinstatement letter following his removal for the May 30, 2000 positive test. Under the factual circumstances, where the Claimant admitted to taking Tylenol 3 with Codeine which had been prescribed not to him, but to his mother, the Board finds that the record supports the MRO's decision to certify the Claimant's drug test result as positive, in violation of the Carrier's Policy. See, again, our decision in Third Division Award 37622, where the claimant's drug test was certified positive after the claimant admitted to having taken his son's prescription medicine, which triggered a positive test result for amphetamines.

Given the entire record before us, therefore, the Board holds that the Carrier's conclusions and disciplinary action in this case were supported by the record. We emphasize that the Board has no authority to substitute its judgment for that of the MRO, with regard to his decision to deem the September 25, 2001 test a positive after reviewing the laboratory test results and discussing those results with the Claimant. In addition, under the totality of the circumstances, the Claimant's 22 years of service and his supposed efforts at improving his conduct by refraining from the use of illicit drugs are not mitigating factors justifying the Board's modification of the Carrier's dismissal action, we rule.

Finally, as the Carrier pointed out, the Board has consistently upheld Carrier dismissal actions in cases such as this, 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. See on-property Award 29 of Special Board of Adjustment No. 1112, cited above. Furthermore, 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 in this case. The Organization's cited Awards are not applicable on these facts, we conclude.

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.