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NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37978
Docket No. SG-38433
06-3-04-3-371

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of K. D. Kombrink, for reinstatement to his former position with no loss of seniority rights and benefits, account Carrier violated the current Signalman’s Agreement, particularly Rule 47, and issued the harsh discipline of dismissal against the Claimant as a result of an investigation held on August 1, 2003. Carrier’s File No. K0603-5751, General Chairman’s File No. 03-077 –KCS-185, BRS File Case No. 12932-KCS.

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 the incident at issue, the Claimant was employed as a Signal Maintainer headquartered at Wylie Yard in Dallas, Texas. He had approximately two and one-half years of service with the Carrier.

On July 7, 2003, the Claimant was involved in an auto accident while driving a Carrier vehicle. A probable cause drug and alcohol test was administered, and on July 10, 2003, the Carrier was notified that the Claimant had tested positive for amphetamines and methamphetamines. The positive test was affirmed by a confirmation test performed at the testing facility.

The Claimant was interviewed by the Carrier's Medical Manager to determine if he had taken any prescribed medication that would account for these results. He advised that no prescription medication had been taken. Thereafter, the Claimant was suspended from service pending a formal Investigation.

On July 17, 2003, the Claimant was notified to attend an Investigation in connection with his alleged violation of Rule 1.5 based on the reported results from the drug screen. The Investigation was held as scheduled on August 1, 2003. the Claimant subsequently was advised on August 4, 2003 of his dismissal from service.

Rule 1.5 provides as follows:

"The use or possession of alcoholic beverages while on duty, on company property or while occupying facilities paid for or provided by the company (including any required or instructed medical procedures and examinations) is prohibited. Employees must not have any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property or while occupying facilities paid for or furnished by the company (including any required or instructed medical procedures and examinations).

The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect safe performance is prohibited while on duty, on company property or while occupying facilities paid for or furnished by the company (including any required or instructed medical procedures and examination). Employees must not possess, sell, use or have in their bodily fluids any illegal drug or controlled substance while on or off duty, except medication that is permitted by a medical practitioner and used as prescribed."

At the Investigation, the Carrier's witnesses detailed the collection of the Claimant's testing specimen and provided documentation relative to the chain of custody. The test results showed that the Claimant had 1253 NG/ML of amphetamines and 7507 NG/ML of methamphetamines in his system when tested, far beyond the 1000NG/ML cutoff level. The Claimant acknowledged using the two controlled substances.

The Carrier contends that substantial evidence, including the Claimant's admission, fully supports the finding of wrongdoing in the instant case. The Carrier further argues that there is no basis for interfering with the penalty imposed. The circumstance giving rise to the test – an accident while driving a Carrier vehicle – underscores the fact that there was no abuse of discretion in separating this short-term employee from service.

The Organization does not dispute the reliability or validity of the test results. Instead, it argues that the penalty for the failed drug test was unduly harsh and excessive. Moreover, the Organization asserts that the Claimant's dismissal was inconsistent with the Carrier's policy of granting conditional leniency reinstatement for first time offenders and amounted to disparate treatment when compared to other employees who tested positive on drug tests. It requests that the Claimant be given another opportunity to demonstrate that he can be a productive employee.

The Board examined the record carefully. In light of the Claimant's admission of guilt and the uncontested drug test results, there is no doubt that the Carrier established that the Claimant violated Rule 1.5 as charged.

Turning to the penalty imposed, the Carrier is generally afforded a reasonable range of discretion in imposing discipline. The Board will not substitute its judgment for that of the Carrier in the absence of a finding that the penalty constitutes an abuse of discretion. Here, no such finding is warranted. The Organization asserted that there is a practice of granting leniency reinstatement to employees and it referred on the property to the "Carrier's standard leniency reinstatement conditions." But argument is not evidence, after all, and without a factual predicate to support its assertion that such a practice exists, the Organization's position must be deemed unpersuasive.

Similarly unpersuasive is the Organization's claim of disparate treatment. A claim of disparate treatment rests upon a showing of unfounded, unfair or discriminatory treatment of individuals who are similarly situated. As the party asserting that affirmative defense, the Organization had the burden of establishing that the Claimant was not disciplined in an even-handed fashion.

In its January 7, 2004 letter confirming the parties' conference of this claim, the Organization stated that another short-term employee was granted a leniency reinstatement after having a vehicular accident and testing positive on a drug and alcohol test. Without more information, however, we cannot say whether this other employee was similarly situated to the Claimant. We do not know the circumstances of this other employee's accident, the specific results of the testing, his work record, or whether he sought assistance through the EAP or some other treatment program. In a disparate treatment defense, the Organization must show that both sides of the equation are equal. It did not do so here.

Finally, the Organization's reliance upon Rule 47 is misplaced. True, this Rule provides the fundamental due process protections afforded to disciplined employees in the Investigation and appeal process. But the Claimant was not denied his Agreement due process rights in any manner. And, while we agree as a general matter that discipline should not be punitive, the principle of progressive discipline applies only to those less serious infractions of Carrier Rules or of proper conduct which call for some milder penalty aimed at correction. The Organization offered no Awards demonstrating that a positive drug test while on duty precludes summary discharge. On the contrary, the Board in Third Division Award 37057 upheld a discharge in a circumstance very similar to this one, with the same parties, noting that a positive drug test is an acceptable basis for termination of employment. Also see, Public Law Board No. 6326, Case 6 and Second Division Award 13761.

We are compelled to deny this claim in light of the seriousness of the proven offense. Discharge is severe, but not inappropriate based on the record that has been presented. The Board is not empowered to grant leniency, as that is the sole prerogative of the Carrier.

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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 25th day of October 2006.