

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38995
Docket No. SG-39287
08-3-NRAB-00003-060140
(06-3-140)

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

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

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood Railroad Signalmen on the Kansas City Southern:

Claim on behalf of T. C Johnson, for reinstatement to service with compensation for all lost time, his employment rights restored and his record cleared of any reference to this matter, account Carrier violated the current Signalmen's Agreement, particularly Rule 47, when it issued the harsh and excessive discipline of dismissal against the Claimant without meeting its burden of proving the charges in connection with an investigation held on January 12, 2005. Carrier's file No. K0605-5983. General Chairman's File No. 05-010-KCS-185. BRS File Case No. 13423-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.

The Claimant is a Signal Maintainer who had approximately 12 years of service with the Carrier in December 2004. After being released by his personal physician to return to work following a period of absence due to hypertension, the Claimant reported for a return-to-service physical exam, including a drug screen, on December 10, 2004. On December 14 the Carrier's designated drug-testing lab reported that the Claimant had tested positive for marijuana metabolites. After due notice, an Investigation was held on January 12, 2005, the purpose of which, the Claimant was told, was:

"To ascertain the facts and determine your responsibility, if any, in connection with your alleged violation of Rule 1.5 as revised by Kansas City Southern System Timetable No. 6 effective July 1, 2004 as indicated by drug test performed on the urine specimen provided by you on December 10, 2004 in connection with a KCS Return to Work Physical administered to you in Poteau, Oklahoma. The results of which were made known to the Carrier on December 15, 2004."

On January 18, 2005 the Claimant was informed that the charges against him had been sustained and he was dismissed for violation of Rule 1.5 of the Consolidated Code of Operating Rules, as amended. The discipline was appealed in a letter dated March 3, 2005 and timely progressed through all levels of the grievance procedure on the property. On August 25, 2005, the Claimant was offered a leniency reinstatement that would have required that he seek treatment with the Carrier's Employee Assistance Program, submit to follow-up drug and alcohol testing, and withdraw his appeal. The offer was rejected on September 1, 2005, and the matter was subsequently referred to the Board.

Rule 1.5 is the Rule on drugs and alcohol. In relevant part it provides:

“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 examinations). 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.”

The Carrier contends that there is ample evidence in the record to support its finding that the Claimant violated Rule 1.5 by testing positive for marijuana on his return-to-service exam. He consistently refused to accept responsibility for his conduct, and turned down a reinstatement opportunity that tied his reinstatement to obtaining treatment from the EAP, so the claim should be denied. The Organization objects that the Claimant tested below the threshold for a second screening, and contends that the Claimant's positive result was due not to the use of marijuana, but to the legal drug Protonix that he was taking at his doctor's direction. The Organization also contends that the discipline was too harsh because the positive reading came before he had returned to work, so he was not intoxicated or under the influence while on the job.

The Carrier demonstrated substantial evidence to support the termination. The testing lab's administration and documentation of the test cannot be faulted, notwithstanding the reversal of the date and month in one entry on the chain of custody form. Although the Claimant's personal physician reported that taking Protonix may result in a false positive result in a drug screen, the Carrier presented strong evidence that is true only of the standard enzyme immunoassay testing procedure. According to the Carrier's evidence, the Claimant's specimen was tested by means of gas chromatography/mass spectrometry (GCMS) which is a more modern technique that is not vulnerable to false positives from Protonix. The Claimant's physician did not address that distinction in her written comments. Although the second test registered only 32 nanograms per milliliter, i.e., below the 50

nanograms per milliliter threshold for the second screening, the fact remains that the initial screen did trigger the second screen and that even the lower 32 nanograms per milliliter reading constituted a positive test. Therefore, in its role as an appellate body, the Board accepts the laboratory's results as correct, and concludes that they constitute substantial evidence to support the finding that the Claimant violated Rule 1.5.

The question remains whether the Board should overturn the discipline as unduly harsh. However, in their appellate role, the Board and Public Law Boards are reluctant to substitute judgment for that of the Carrier, once guilt has been established, unless the Carrier's decision was so unjust, unreasonable or arbitrary so as to constitute an abuse of the Carrier's discretion. In short, where reasonable minds may differ over the penalty selected, that discretion has not been abused, and the Board should not second-guess the Carrier.

The Board cannot say that the Carrier abused its discretion. The position of Signal Maintainer is undeniably a safety-sensitive position. A violation of the Carrier's drug and alcohol regulation by an employee in that position is a matter for grave concern, and removal of the Claimant from employment with the Carrier cannot be said to have been an unreasonable or arbitrary response to his positive drug test.

The Organization points out that the Carrier offered the Claimant a "leniency reinstatement" as a means of settling the dispute, and suggests that some form of reinstatement would be an appropriate mitigation of the discipline here. Leniency, however, is for the Carrier, not the Board, to dispense. It is up to the Carrier to choose when and how to offer that leniency. The Claimant rejected the proffered leniency at his own risk. In light of the substantial evidence of the Claimant's guilt and his continuing denial of responsibility or wrong-doing, it was the Carrier's right to remove reinstatement from consideration, after that rejection. Because there is substantial evidence to support the Carrier's determination of the Claimant's guilt and its assessment of discipline, the Board will not second guess the Carrier's exercise of reasonable discretion in this case. See First Division Award 23714.

Form 1
Page 5

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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 27th day of March 2008.