

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41774
Docket No. MW-41894
13-3-NRAB-00003-120199

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed by letter dated November 8, 2010 imposed upon Mr. D. Hengstl for alleged violation of Company Policy 1807 Drug and Alcohol Free Workplace and Testing Policy, 1810 Troubled Employee Policy second offense, General Code of Operating Rule 1.5 Drugs and Alcohol and On Track Safety Core Rule 8 Substance Abuse in connection with alleged positive drug and alcohol test results on August 6, 2010 during a return to work physical was arbitrary, capricious, excessive and in violation of the Agreement (System File D-23-10-570-05/8-00529 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Hengstl shall now be allowed ‘. . . reinstatement to service with seniority unimpaired, including but not limited to all lost wages, straight time, overtime, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare insurance, dental insurance, supplemental insurance, and any and all other benefits to which entitled, but lost as a result of Carrier’s arbitrary, capricious, and excessive discipline in terminating claimant’s employment and seniority under date of November 8, 2010. In other words, this appeal seeks to make claimant whole and his record expunged as if he were never affected by the termination. A simple joint inspection of Carrier’s records can determine extent of loss.”**

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.

As of November 8, 2010, the date of his dismissal, the Claimant had attained exactly 30 years of seniority (hire date of November 3, 1980) with the Carrier's Maintenance of Way Department. The Claimant began his career employment as a Track Laborer and his last position prior to his dismissal was as a Track Laborer. In and around May 2010, the Claimant incurred an on-duty injury. The only blemish on his work record for the entirety of his 30 years of service was a five-day suspension imposed on May 10, 2010 for his failure to timely report his on-duty injury.

On the morning of August 6, 2010, the Claimant visited his physical therapist for treatment related to his injury. Sometime after the Claimant's return to his residence that morning, the Carrier's medical staff, specifically a Health Services Representative, contacted him by telephone and informed him that he was to immediately report for a return-to-duty drug screen and alcohol test, a prerequisite to being returned to active service. It was noted that the standard operating procedure does not entail any prior notice to an employee for return-to-work drug testing and that such notification is made on the very day the employee is directed to submit to testing. Notwithstanding his admission during this telephone conversation with the Carrier's medical staff that he had consumed alcohol upon return from his physical therapy appointment, the Health Services Representative nevertheless directed him to report to the Gundersen Lutheran Medical Center located in Lacrosse, Wisconsin, for testing. The Claimant complied with the directive and submitted to the testing knowing full well that he would likely fail the tests, but also knowing that if he refused to be tested he, in all likelihood, would be subject to disciplinary action by the Carrier. In fact, within one week of being tested for both drugs and alcohol, his results, as he suspected, came back positive for both tests. The drug test showed positive for the presence of cocaine metabolite.

As a result of the Carrier being notified of the Claimant's test results, by letter dated August 13, 2010, the Carrier directed the Claimant to report for a formal Investigation for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with an alleged positive drug test and alleged positive alcohol test results. The letter further apprised the Claimant based on the alleged information that there may have been a violation of General Code of Operating Rule (GCOR) Rule 1.5 Drugs and Alcohol, a violation of On Track Safety Rules (OTSR) specifically, Core Rule 8 - Substance Abuse and/or violations of Carrier policies as well. Initially, the Investigation was set to be held on August 24, but following several mutually agreed to postponements, the Hearing commenced on October 25, 2010.

GCOR Rule 1.5 - Drugs and Alcohol reads as follows:

"The use or possession of alcoholic beverages while on duty or company property 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.

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 or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property."

OTS CORE RULE 8 - Substance Abuse reads as follows:

"Inappropriate substance use is prohibited as identified in Policy 1806 Alcohol and Drug Policy (Canada) and Policy 1807 Drug and Alcohol Free Workplace and Testing (United States)."

Policy 1807 - Drug And Alcohol Free Workplace And Testing Policy reads, in pertinent part, as follows:

"POLICY STATEMENT

Canadian Pacific Railway is committed to providing a safe work environment for employees and protecting the safety of the general

public. That commitment is jeopardized when any Canadian Pacific Railway employee illegally uses drugs or uses alcohol on the job, or comes to work with these substances present in his/her body, or possesses, distributes, or sells drugs in the workplace. Canadian Pacific Railway (referred to throughout as Canadian Pacific Railway, "CPR" or "Company") will not tolerate drug or alcohol use, which may imperil the health and safety of its employees, its customers, or the public at large. Canadian Pacific Railway will work diligently to provide a drug and alcohol-free environment.

Canadian Pacific Railway expects all employees, management and union alike, to report for work in a condition enabling them to perform their duties safely. The presence of drugs or alcohol on the job and the influence of these substances on employees during working hours are inconsistent with this objective.

The Company's policy with respect to alcohol and/or drugs is as follows:

The use, sale or possession of alcohol or controlled substances is prohibited while on duty or on company property. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property. A limited exception is made for medication which is prescribed by a medical practitioner who is aware of the nature of the work, is used as prescribed and taken only by the person for whom it is prescribed. Canadian Pacific Railway prohibits the use of illegal drugs both on and off the job.

The Company will test employees and potential employees for the measurable presence of drugs and alcohol as outlined in this policy. Employees of other railroads on Canadian Pacific property may be tested at the discretion of Canadian Pacific Railway management consistent with this policy.

Under Federal Authority, Canadian Pacific Railway will conduct drug and alcohol testing of employees in compliance with regulations established by the U.S. Department of Transportation (DOT), 49 CFR § 40 and 219, and 382 .'

CPR will pattern itself after the FRA in drug and/or alcohol testing procedures, when applicable.”

POLICY IMPLEMENTATION FOR DRUG AND ALCOHOL TESTING

1. Controlled Substance or Alcohol use

- A. The use of alcohol by an employee reporting to duty or while working is proper cause for disciplinary action up to and including termination of employment. Employees will not be permitted to work with the measurable presence of controlled substances and/or alcohol in their systems whether consumed on or off the job.
- B. The use of controlled substances whether on or off duty is prohibited by the company and by Federal Regulations, with the limited exceptions noted in Section 2 below. [Use of Prescribed and Over the Counter Substances]

* * *

8. Consequences and Responsibilities After Violation of Drug and Alcohol Free Workplace Policy

* * *

- B. An employee whose drug or alcohol test result is positive, will be immediately withdrawn from service by CPR, and will be subject to disciplinary action, up to and including termination. (Note: Employees who admit to use at the time of a drug test must still be tested, with the sole exception of an employee accepting an offer of the Co-Worker Report Program [See Troubled Employee Policy].)
- C. Under certain circumstances, following a positive test, an employee may be able to waive investigation by accepting the charges, signing the waiver agreement and following all EAP/SAP recommendations.
- D. By waiving investigation, the employee agrees to accept all terms and conditions of the waiver document.

- E. If eligible for the waiver option, it is the employee's responsibility, within five (5) business days of signing the waiver, to contact the EAP for assessment or referral. The employee must notify the EAP within five (5) business days of the appointment time and place of assessment.

* * *

- J. An employee who has a second positive test result or refusal to test within 10 years as defined in this policy is subject to disciplinary action and has no option of a waiver.'"

Policy 1810 - Troubled Employee Policy – reads, in pertinent part, as follows:

“POLICY STATEMENT

The policy is designed with the following objectives in mind:

- To foster employee participation in preventing violations of 49 CFR 219.101-103.
- To prevent the use of alcohol and drugs in connection with covered service.
- To assist the drugs and/or alcohol affected employee to get help and to retain his/her employment, while at the same time protecting the safety of all co-workers and the general public.

With these objectives in mind, CPR has established the following programs and procedures for identifying and assisting covered employees having problems with drugs and/or alcohol.

* * *

2. Voluntary Referral Procedure

- A. An employee can call Employee Assistance Program at 1-800-777-0618.

- B. An employee must complete the EAP recommended course of treatment and establish himself/herself in recommended aftercare; and commit to remain free of alcohol and/or drug problems.

* * *

7. Other Troubled Employees

- A. All other employees (those not covered under FRA regulations or FMCSA regulations) are eligible for troubled employee programs with minor revisions:

* * *

10. Definitions

* * *

- B. Employee Assistance Program (EAP) means a program provided by Canadian Pacific Railway which offers assistance to employees and families with various life and work challenges.

* * *

- G. Waiver – Drug and Alcohol Violation is a contract between the employee and the carrier defining terms and conditions, which govern any possible, return to work.”

The Organization argues that under the facts and circumstances of this case, the Claimant was entitled under the applicable provisions of Policy 1807 as a first time offender of the Carrier’s drug and alcohol policy, to be granted a waiver as a means of averting an Investigation and agreeing to enroll in the EAP to address his alleged addiction to drugs and alcohol. Had the Carrier followed the applicable provisions of its own Policy 1807, the Claimant would not have been subjected to an Investigation and would not have been dismissed after 30 years of service with almost a pristine work record over all those years, with the exception of a five-day suspension for the commission of a “minor” offense.

The Carrier asserts that this was the Claimant's second offense - not his first, inasmuch as he had been a participant in the EAP in 2006 and 2007 pursuant to the provisions of its Troubled Employee Policy 1810. The Carrier posits that pursuant to Section 8 (J) of Policy 1807, which states, "An employee who has a second positive test result or refusal to test within 10 years as defined in this policy is subject to disciplinary action and has no option of a waiver," the Claimant was not entitled to a waiver because his second offense occurred in 2010 and thus, within the ten-year period provided for in Section 8 (J). Accordingly, the Carrier argued that the Board should deny the Organization's claim in its entirety.

The Organization counters that the Claimant voluntarily entered the EAP in 2006 and 2007 pursuant to Section 10 (C) of Policy 1810, which states: "Employee Assistance Program (EAP) means a program provided by Canadian Pacific Railway which offers assistance to employees and families with various life and work challenges." The Organization asserts that the Claimant's participation in the EAP in 2006 and 2007 was for legal problems that he was experiencing and not for any problem associated with drugs and alcohol. As such, the Carrier wrongfully denied the Claimant his right to a waiver for a first-time offense pursuant to the applicable provisions of Policy 1807, which waiver is defined by Section 10 (G) of Policy 1810 as: ". . . a contract between the employee and the carrier defining terms and conditions, which govern any possible, return to work." Accordingly, the Organization sought to have the Board sustain its claim and grant the remedy requested.

In a comprehensive review of the on-property record evidence in its entirety, the Board finds no evidence submitted by the Carrier to support its contention that the Claimant's enrollment in the EAP in 2006 and 2007 was for a first-time offense of its drug and alcohol program and, therefore, no evidence to refute the Organization's assertion that the Claimant's enrollment in the EAP in 2006 and 2007 was not for any problems related to drug and alcohol use or addiction but rather, was for assistance with legal problems. In so finding, the Board further finds that the Carrier failed to adhere to the applicable provisions of both policies (Policy 1807 and Policy 1810) by not offering the Claimant the option of enrolling in its EAP as an alternative to subjecting him to an Investigation for violation of its drug and alcohol policy.

Accordingly based on the foregoing findings, we rule to sustain the subject claim in its entirety. With respect to the remedy, we direct the Carrier to make the Claimant whole for all lost wages and other applicable monetary and applicable non-monetary benefits for the period of time from his dismissal to the date of his reinstatement he suffered as a result of his wrongful termination of employment. Such benefits are to be

offset by any and all earnings the Claimant received during the same period of time from his dismissal to the date of his reinstatement.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 25th day of November 2013.