Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42255
Docket No. MW-42548
16-3-NRAB-00003-140211

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

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference**
(Dakota Minnesota and Eastern Railroad Corporation (DM&E) d.b.a. Canadian Pacific

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (dismissal) imposed on Mr. J. Dick by letter dated January 31, 2013 for alleged violation of General Code of Operating Rules 1.5 Drugs and Alcohol; General Code of Operating Rules - Special Instructions Rule 2.21 Electronic Devices Part C Railroad Supplied Electronic Devices; On Track Safety Rule 29.1 All Roadway workers (General) New Item E - Part 2; Canadian Pacific Policy on Use of Electronic Devices, Policy H&S 4320; and Canadian Pacific Policy 1807 Drug and Alcohol Free Workplace and Testing Policy in connection with charges of alleged '. . . use of a cellular phone on December 18, 2012, while on duty (assigned to operate of tamper) and while fouling the south elevator track in Ventura, Iowa, on the Sheldon Subdivision; your alleged failing a proficiency test concerning the lack of personal protective equipment (hard hat and safety glasses); and your alleged positive alcohol and drug test results.' (Emphasis in original) was without just cause, excessive, on the basis of unproven charges and in violation of the Agreement (System File J-1334D-501/8-0001).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Dick shall '* be compensated all lost time, be made whole all losses and have any reference to the investigation removed from his personnel record as outlined in Rule 34(6) of the effective Agreement.'"**

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 outset, the Organization raised the procedural matter that the Carrier violated Rule 34 – Discipline and Investigations by failing to comply with paragraph 4 of the Rule to provide the Claimant with a timely investigation. Paragraph 4 reads as follows:

> **"The investigation will be held not more than ten (10) working days from the date of the notice referenced in paragraph 2 above, unless postponed by mutual agreement of the Company and the General Chairman."**

The record evidence reflects that the Carrier issued the Notice of Investigation to the Claimant by letter dated January 3, 2013 regarding the incident occurrence on December 18, 2012, and informing that the Investigation would be conducted on January 9, 2013. Had the Investigation convened on January 9, 2012 as originally scheduled, the Investigation would have been timely conducted and in compliance with Rule 34, Paragraph 4. However, Vice General Chairman Rod Mulder received an email dated January 7, 2013 sent at 3:30 P.M. from General Chairman Wayne Morrow informing that he had received a voice mail message from DME Director of Track Renewal Dan Schwartz apprising that he was having to postpone the Claimant's Investigation to January 16, 2013. Morrow indicated that he had checked with his office and his office had never received any letter of charges for Claimant Dick and had no knowledge of the referenced incident.

By email dated January 8, 2013 from Director of Labor Relations Randall Ohm sent at 10:44 A.M. to Morrow, Mulder, Schwartz and two others, Ohm stated the following:

> **"Rod: This will confirm our understanding reached in our telephone conversation today concerning the Jacob Dick investigation that was originally scheduled for tomorrow . . . . As I stated, the original hearing officer may have been too closely involved in the matter. Therefore, we needed to reschedule. Based upon our understanding:**
>
> - **The formal investigation will be rescheduled for Wednesday, January 16, 2013 . . . .**
> - **Dan Schwartz will send a letter confirming this understanding to Wayne Morrow with a copy to you and to Jacob Dick . . . .**
>
> *** * ***
>
> **Thank you for your cooperation in this scheduling matter."**

By email dated January 10, 2013 sent at 6:25 A.M. from Morrow to Ohm, Morrow wrote, in pertinent part, the following:

> **". . . I have had a conversation with Mr. Schwartz and then gave that information to Rod. From looking at the e-mails I think we are okay with everything."**

At 11:51 A.M. on January 10, 2013, Ohm sent Mulder an email confirming their discussion that day specifying certain of the details associated with the rescheduled Investigation to be held on January 16, 2013.

Notwithstanding the above cited exchange of emails and telephone conversations between the identified Carrier Officials and the identified Organization Representatives between January 7 and January 10, 2013, at the outset of the January 16, 2013 Investigation, Vice General Chairman Mulder maintained that there was never any mutual agreement between the Organization and the Carrier to postpone the Hearing. Rather, Mulder explained that he had received an email from General Chairman Morrow on January 7, 2013 informing that he (Morrow) had received a voice mail message from DME Director of Track Renewal Schwartz stating that the Hearing would be postponed until January 16, 2013, which Mulder asserted was evidence that the Carrier had unilaterally changed the Hearing date.

Based on its review of the foregoing record evidence the Board finds that the Carrier initially effected a unilateral change in the Hearing date to January 16, 2013, and if that had been the extent of what had occurred, procedurally, the Carrier would have

been in violation of Rule 34, Paragraph 4. However, the Organization yielded to the date change of the Investigation as evidenced by the January 10, 2013 email from Morrow to Ohm wherein Morrow stated, "I think we are okay with everything." Said email represents acquiescence on the part of the Organization of its acceptance that the Investigation was being changed from January 9 to January 16. Admittedly, this is not the kind of "mutual agreement" envisioned by Rule 34, Paragraph 4, but nevertheless, the Organization's acceptance of the change after-the-fact is not deemed to constitute a violation of Rule 34, Paragraph 4 as alleged by the Organization at the outset of the Claimant's Investigation. What would have constituted a violation of Rule 34, Paragraph 4 is if the Organization had affirmatively objected in writing to the change in the Hearing date, which objection is absent from the totality of the record evidence. Having so ruled, the Board moves to consider the merits of the claim.

The Carrier issued the following Notice of Investigation initially dated January 3 and subsequently re-issued by Notice dated January 8, 2013 to denote a change in the date the Investigation would be conducted, as indicated elsewhere above, from January 9 to January 16, 2013. The Notice reads, in pertinent part, as follows:

> **"The purpose of the investigation/hearing will be to determine all of the facts and circumstances and to place responsibility, if any, in connection with your alleged use of cellular phone on December 18, 2012, while on duty (assigned to operate a tamper) and while fouling the south elevator track in Ventura, Iowa, on the Sheldon Subdivision; your alleged failing a proficiency test concerning the lack of personal protective equipment (hard hat and safety glasses); and your alleged positive alcohol/drug test results."**

By letter dated January 31, 2012, the Carrier informed the Claimant that based on a review of the Investigation transcript, it determined that he was in violation of all five of the charges alleged against him, two of which involved its drugs and alcohol policy, two of which involved the use of electronic devices, specifically a cell phone, and the remaining charge involving track safety.

Upon its own extensive review of the record evidence in its entirety, the Board is persuaded that it is unnecessary to delve into and set forth in great detail the documented account of the events of December 18, 2012 that resulted in the charges against the Claimant and his eventual dismissal from service. Based on observations by two Carrier Managers of the Claimant's movements during the early morning of December 18, 2012 that raised questions about his behavior, more specifically holding a cell phone to his ear while walking and fouling (crossing) tracks, the Claimant was ordered to submit to a "for

cause" drug/alcohol test. The test results revealed that the Claimant tested positive for cocaine metabolite and, as a result, he was found to be in violation of Rule 1.5 of the General Code of Operating Rules and Carrier Policy 1807, its Drug and Alcohol Free Workplace and Testing Policy.

GCOR 1.5 reads, in pertinent part, as follows:

> **"The use or possession of . . . narcotics . . . 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."**

Carrier Policy 1807 mirrors GCOR Rule 1.5 and reads as follows:

> **"The use, sale or possession of alcohol or illegal controlled substances is prohibited while on duty or while 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."**

Other provisions of the policy relevant to the instant claim are as follows:

> **"Accountability Managers are responsible for ensuring a drug and alcohol free workplace and for promoting a safe work environment by effectively managing the objectives of this policy.**
>
> **Employees are responsible for reporting to work and performing their duties with no prohibited substances in their system.**
>
> **Confirmed Positive, Adulterated or Substituted Result – A confirmed positive . . . or a verified positive, adulterated, or substituted drug test will result in disciplinary action, up to and including termination.**
>
> **For Cause Testing (Unexplained Human Response) – A manager or supervisor may refer an employee for drug and alcohol testing under this policy based on events that occur during duty hours, including any period of overtime or emergency service."**

The Board finds that under the circumstances involving the Claimant's observed behavior on the morning of December 18, 2012, the Carrier properly exercised its discretion under its Policy 1807 to subject the Claimant to "for cause" drug testing.

Additionally, the Carrier's decision to dismiss the Claimant from service for violation of GCOR 1.5 and Policy 1807 was reasonable inasmuch as it was based on the substantial evidence standard required to invoke the quantum of discipline assessed. As additional support for the finding that dismissal was proper and warranted, the record evidence reflects that the Claimant had committed a prior violation of GCOR 1.5 by having tested positive for marijuana on a pre-employment drug test administered on March 28, 2007. However, the Carrier responded to that violation by reinstating the Claimant on a leniency basis with his seniority unimpaired upon successful completion of five stated conditions, one of which was condition No.4, which reads as follows:

> **"You understand and agree that a second violation of Rule 1.5 of the GCOR, or its equivalent, as determined by a positive drug or alcohol test will result in permanent dismissal from the IC&E Railroad with no opportunity for re-employment or appeal, notwithstanding any other agreement to the contrary."**

Based on the foregoing findings, the Board rules to deny the subject claim in its entirety.

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 29th day of February 2016.