

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42257  
Docket No. MW-42767  
16-3-NRAB-00003-140504**

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  
(  
(Terminal Railroad Association of St. Louis

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. J. Rincker by letter dated September 10, 2013 for alleged ‘. . . violation of General Code Of Operating Rule 1.5 and the Company Policy which deals with prohibitions set forth in GCOR 1.5.’ in connection with ‘... you allegedly testing positive for morphine and opiates on a return to duty drug and alcohol test on Tuesday, August 6, “2013, at approximately 8:00 a.m. \*\*\*’ was without just and sufficient cause and on the basis of unproven charges.
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Rincker shall be reinstated to service with seniority and all rights unimpaired and he shall be compensated for all wage loss suffered.”

**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 the Claimant entered into the service of the Carrier on January 9, 2012, he was issued a copy of its Drug and Alcohol Policy, as well as 25 other Carrier policies for which he acknowledged receipt in writing. In pertinent part relevant to the instant claim, the Drug and Alcohol Policy reads as follows:

**“I. INTRODUCTION**

\* \* \*

The Company’s aim is to provide a safe environment for its employees, its customers and the general public; maintain a work place free from the use or effects of prohibited substances; and to identify and assist employees who may have substance abuse problems. Toward this end, we intend to continue a program which requires employees to demonstrate their safety posture through:

1. Urine screens to detect the presence of marijuana, cocaine, opiates (morphine, codeine, heroin).

\* \* \*

Testing under this policy – whether by urinalysis or breathalyzer – is designed to identify and eliminate prohibited substances in the work place. The same standard used by the Department of Transportation will be used.

For those employees . . . who may have a problem . . . about drug or alcohol use, the Company’s Employee Assistance Program will provide professional counseling to deal with the issues of alcohol abuse and drug dependency. \* \* \*

We encourage you to read what follows as it sets forth the Company’s programs and how these affect all employees of TRRA.

\* \* \*

**IV. TYPES OF ALCOHOL / DRUG TESTING UNDER TRRA  
POLICY**

\* \* \*

## **2) RETURN TO WORK PHYSICAL EXAMINATIONS**

Any employee who is . . . recalled to service may be subject to a physical examination including testing. The TRRA will determine the type of examination for the employee's specific class of service. Employees tested under this section will be considered as subject to duty and be handled in accordance with their individual collective bargaining agreements.

\* \* \*

## **VIII. DRUG TEST RESULTS**

**Positive or Otherwise Non-Negative Results:** If the laboratory reports the drug test result as **POSITIVE** or otherwise non-negative, the following procedures will be followed:

- a. The MRO [Medical Review Officer] will immediately inform the person of the result and offer that person the opportunity for an interview to discuss the test result . . . .
- b. The MRO will complete and document the review . . . determining if . . . the person has a legitimate medical explanation for the presence of the controlled substance . . . . In the case of an opiate positive, the MRO will also make the special determinations required by the regulation [49 CFR Part 40 Subpart G] . . . .
- c. If the MRO verifies the test result as positive, the MRO will report the result to the railroad's DER [Designated Employer Representative] . . . .

\* \* \*

## **X. PRESCRIPTION DRUGS (40 CFR 219.103)**

The use of controlled substances . . . is not prohibited as long as they are prescribed or authorized by a medical practitioner and used at the dosage prescribed or authorized. Either one, a treating medical

practitioner or a railroad-designated physician, should determine the use of prescription(s) at the prescribed or authorized dosage is consistent with the safe performance of the employee's duties. Employees should also seek the advice of a medical professional whenever they are taking any over-the-counter drug that may adversely effect (sic) the safe performance of duties. This includes use instructions and medication labeling which could present a safety concern.

\* \* \*

## **XII. POSITIVE TEST RESULTS**

\* \* \*

After successful treatment, the person will be required to provide a return-to-duty urine specimen . . . prior to being allowed to return to service . . . .

\* \* \*

If an employee has a . . . positive drug test the employee will be removed from service and a formal Company Investigation will be scheduled to determine if TRRA 'GCOR' 1.5 has been violated."

As incorporated into the Carrier's Substance Abuse Policy (Revised August 6, 2014), General Code of Operation Rules (GCOR) 1.5 reads in pertinent part relevant to the instant claim as follows:

"The illegal use of any drug, narcotic, or controlled substance is prohibited at any time, either on duty or off duty. Employees are expected to know those drugs, narcotics, or controlled substances that are illegal to use.

Employees must not report for duty or be on Company Property under the influence of, or use while on duty, or have in their possession while on Company property, any . . . illegally obtained drug, narcotic or other controlled substance.

Employees must not report for duty or be on Company property under the influence of, or use while on duty, any over-the-counter or prescription drug or medication which will in any way adversely affect their alertness, coordination, reaction, response, or safety. If an employee has been issued a prescription drug, or is in doubt as to whether an over-the-counter medication may have an adverse effect on their alertness, coordination, reaction, response or safety, the employee should make sure that the following steps are taken:

1. A physician . . . authorized to practice by a state of the United States or a physician designated by the Railroad makes a good faith judgment, in writing, with notice of the employee's assigned duties, and on the basis of the available medical history, that use of the substance by the employee at the prescribed or authorized dosage applicable is consistent with the safe performance of the employee's duties; and
2. The substance is used at the dosage prescribed or authorized; and
3. The employee notifies the Railroad, in writing, prior to use on duty (a) of their need to use the prescribed or authorized drug or medication and (b) of the medical practitioner's judgment, as set out above; and
4. The proper Railroad Official gives approval in writing to the employee for use on duty of the drug or medication."

The Claimant tested positive for marijuana on July 5, 2013. The Claimant waived his right to an Investigation, admitted having violated both GCOR 1.5 and the Carrier's Substance Abuse Policy, agreed to accept whatever discipline the Carrier assessed him – although he requested of the Carrier to grant him leniency – agreed to waive his right to any monetary claims associated with his admission of guilt, waiver, and release, and further agreed not to invoke any appeal process. Pursuant to the applicable provisions of the Carrier's Substance Abuse Policy, the Claimant stated in writing that he would voluntarily submit to undergo an evaluation by a qualified Substance Abuse Professional (SAP) to determine his need for treatment and/or education and indicated further that he understood that he had to participate and comply with the SAP-recommended treatment and any after-care or follow-up treatment that might be recommended or required at his own expense. Additionally, the Claimant vowed that after successful treatment, he would, as required by the

Substance Abuse Policy, provide a urine specimen and/or breath specimen as part of a return-to-duty physical examination, which prove negative prior to being allowed to return to covered service. The Claimant pledged to comply with the Substance Abuse Policy to submit to additional unannounced Carrier follow-up testing as determined by the SAP, with a minimum of six tests being performed in the first 12 months. The Claimant acknowledged per the provisions of the Substance Abuse Policy that failure on his part to comply with said provisions to remain alcohol and/or drug free would result in subsequent removal from covered service and could result in disciplinary action up to and including termination.

Sometime prior to August 6, 2013, the Claimant was released from the Employee Assistance Program (EAP) and as a result, the Carrier instructed the Claimant to report to Gateway Occupational Health Clinic on August 6, 2013 for the required return-to-duty drug and alcohol testing. On July 31, 2013 the Claimant was examined by Dr. Loren Hughes, his primary care physician associated with HSHS Medical Group located in Collinsville, Illinois, for lower back pain that he was experiencing. As treatment for the pain, Dr. Hughes gave the Claimant a month-long prescription for Tramadol, and explained to the Claimant that Tramadol was a partial opiate receptor stimulator, but because it was a synthetic, she had seen testing where this drug did not show up on a drug screen. However, if it did show up on a urine drug screen it would read as a positive result for Morphine. Dr. Hughes noted in a letter later submitted to the Carrier that Tramadol was a legitimate prescription of an appropriate medication for short term use for pain.

Based on what had been explained to him by Dr. Hughes, the Claimant failed to disclose to the Carrier that he was taking the prescribed Tramadol drug medication prior to submitting to the required return-to-duty drug testing on August 6, 2013. On August 9, 2013, still without knowledge that the Claimant was taking an opiate based pain medication, the Carrier received confirmation from the Medical Review Officer that the Claimant's return-to-duty drug and alcohol test was positive for morphine and opiates. It was only after-the-fact of the return-to-duty drug/alcohol test that the Claimant informed the Carrier that he was taking prescribed pain medication. Nevertheless, as a result of testing positive for morphine and opiates, the Carrier cited the Claimant for an Investigation, and by letter dated August 12, 2013, informed him of the following:

**“An investigation will be held . . . Friday, August 16, 2013 to develop the facts, discover the cause and determine your responsibility, if any, concerning your alleged violation of Terminal Railroad Association of St. Louis General Code of Operating Rules, 1.5, Drugs and Alcohol and**

**Carrier's Drugs and Alcohol Policy in connection with you allegedly testing positive for morphine and opiates on a return to duty drug and alcohol test on Tuesday, August 6, 2013 at approximately 8:00 a.m. Carrier was notified of results of the drug test on Friday, August 9, 2013.**

**This investigation will also determine if any Operating Rules, Safety Rules, Company Policies, or Special Instructions were violated, and all circumstances related thereto."**

**Said Investigation was postponed twice by mutual concurrence of the Parties and was finally convened on September 4, 2013. However, in the interim, the Claimant secured two letters from his primary physician Dr. Hughes – one dated August 9, 2013 directed "To Whom It May Concern" and the other dated August 26, 2013 directed to "Dear Employer." The record evidence reflects that the Claimant submitted the August 9 letter to the Carrier, and the Organization submitted the letter of August 26 into evidence during the Hearing on September 4, 2013. Dr. Hughes ended the August 9 letter by stating that if there were any questions or if further documentation was needed, she could be contacted at her office, and specified her office telephone number. In the August 26 letter Dr. Hughes - now knowing the ramifications that a positive test result exacted on the Claimant's employment – explained that in apprising the Claimant that Tramadol was a partial opiate receptor, she minimized the possibility of the medication resulting in a positive reading for Morphine due to the fact that she did not understand the devastating outcome a positive test result without prior disclosure would have on the Claimant.**

**Notwithstanding the two letters from Dr. Hughes submitted into evidence at the Claimant's Investigation, the Carrier by letter dated September 10, 2013 informed the Claimant that the facts contained and developed throughout the transcript of the Investigation clearly showed that the charges alleged against him were proven and that he was thereby in violation of GCOR 1.5 and the Company Policy which deals with prohibitions set forth in GCOR 1.5. Accordingly, the Carrier notified the Claimant that he was dismissed from service.**

**At the Investigation, the Claimant was forthright in admitting that he was required to know the Rules and Policies of the Carrier and to comply with those Rules and Policies. The Claimant admitted that he had signed and received the Carrier's Substance Abuse Policy at the time of his hire by the Carrier, and that subsequent to his date of hire, he received the Carrier's Substance Abuse Policy on two other dates - specifically, July 13, 2012 and April 2, 2013. It is noted that all three dates precede the**

date the Claimant tested positive for marijuana use. The Claimant conceded that between these three dates, he had the time to read said Policy and admitted that he had not complied with the obligations set forth by the provisions of the Carrier's Prescription Drugs section, nor those set forth by GCOR 1.5 incorporated in the Carrier's Substance Abuse Policy. Of major import in this respect, the Claimant failed to notify the Carrier in writing prior to submitting to his return-to-duty fitness examination that he was using a prescribed medication. As the record evidence makes clear, he was prescribed the pain medication Tramadol on July 31, 2013, just six days prior to his scheduled return-to-duty exam ordered by the Carrier to be taken on August 6, 2013. Furthermore, in neither of the two letters obtained from Dr. Hughes did she specify and certify - as is required by GCOR 1.5 - that the prescribed dosage of Tramadol taken by the Claimant for pain relief would be consistent with the Claimant's safe performance of his duties.

Additionally, the Claimant admitted that he did not comply with the written pledges that he had made in a letter following his positive test for the recreational drug, marijuana, on July 5, 2013, wherein he had committed, among other commitments, to providing a negative test result for prohibited drugs in his return-to-duty examination.

There is absolutely no question in the Board's view that the Claimant was completely derelict in abiding by and complying with all relevant Rules, Regulations and Policies governing his use of the prescribed pain medication Tramadol. There is no question either that his infractions of the Carrier's Substance Abuse Policy and GCOR 1.5 represent commission of a second drug offense. However, the subject drug violation is deemed by the Board to be very different from the first in that the instant offense involves a prescribed medication, whereas the first offense involved the use of a recreational drug. We are of the view that the Claimant's failings in complying with the relevant provisions of the Carrier's Substance Abuse Policy and the related GCOR 1.5 were neither intentional nor a planned attempt to hide the fact that he was on pain medication prescribed to him by a licensed legitimate physician for a diagnosed back problem. At the same time, we also recognize that even though the Claimant's failure to notify the Carrier prior to submitting to his return-to-duty exam that he was taking a prescribed medication knowing in advance of some unknown probability that the medication being opiate based would show positive on a drug screen, he put the Carrier at risk of exposure to the possibility that once reinstated to service, safety in the performance of his duties as well as the safety of others on the job would be compromised. In our judgment, this exposure is not one to be minimized.

However, the Board is convinced that the Claimant's non-compliance with the subject Rules, Regulations and Policy governing prescribed medication and its use was



just one giant mistake on his part worthy of being addressed by the assessment of severe discipline, but falling short of dismissal. We therefore rule that the entire time the Claimant remained out of the Carrier's employ due to his dismissal shall be converted to a suspension without pay and without other benefits restored. We further rule that his suspension shall be denoted on his personnel record and remain on his record for the length of time agreed upon in the Parties' Collective Bargaining Agreement. Additionally, we rule that the Claimant's seniority date shall be adjusted to reflect the date of his reinstatement and he shall be subject to any leniency terms imposed upon him by the Carrier at the time of his return to duty.

**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 29th day of February 2016.