

PUBLIC LAW BOARD NO. 6394

AWARD NO. 61

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissed from all service with Norfolk Southern Railway) of Mr. T. Dewitt, issued by letter dated July 10, 2012 in connection with his alleged failure to comply with the Carrier's Policy on Alcohol and Drugs and the instructions of the Medical Director, in that the drug screen performed on Mr. Dewitt's specimen provided on May 22, 2012 was positive for cocaine was imposed in violation of Mr. Dewitt's due process rights under the Agreement (Carrier's File MW-FTW-12-22-SG-204).
2. As a consequence of the violation referred to in Part 1 above, Mr. Dewitt shall receive the remedy prescribed under Rule 30(d) of the Agreement."

Upon the whole record and all the evidence, after hearing, the Board finds the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as precedent in any other case.

AWARD

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The Claimant entered service for the Carrier on May 22, 1978 as a Trackman. The Claimant was subjected to a drug test on September 19, 2011 as part of the Carrier's normal return to work procedures following a medical leave of absence. The test was positive for cocaine, a substance prohibited under the Carrier's drug policy. The Claimant was subsequently dismissed but was later reinstated after completing the Carrier's Drug and Alcohol Rehabilitation Service (DARS) on February 15, 2012. All employees who are reinstated after the completing the DARS program agree to random drug tests during their next 5 years of service. The Claimant underwent another test on May 22, 2012 which again tested positive for cocaine. The Claimant was charged with violating the

Carrier's drug policy and the Carrier completed an investigation including a hearing held on June 21, 2012. The Claimant's representative had previously requested a postponement, but the Carrier's Hearing Officer determined there was no good cause to approve the request. There was no record of the hearing postponement having been granted. The hearing was held without the Claimant being present. The Carrier determined the Claimant was guilty and dismissed him from service via letter on July 16, 2012.

It is the Carrier's position that the Claimant clearly violated its policy on drug use by testing positive twice for a prohibited substance. The Carrier notes there is no dispute over the facts of the case. The drug test appropriately complied with the Carrier's strict testing and chain of custody procedures (see Carrier Brief, page 6). As part of the DARS program, the Claimant was specifically informed that his testing positive for prohibited substances in the future would result in dismissal. The Carrier also argues that its decision to hold the hearing in absentia did not violate the Claimant's due process rights. The Carrier characterizes the Claimant's representative as acting unusual in how he requested a postponement. Instead of contacting the Charging Officer, the Claimant's representative stated he left a voicemail requesting postponement with an unidentified employee at the Lake Division office. The Claimant is a System Gang employee, not a Lake Division employee. The Carrier notes the Organization has many times in the past demonstrated it knows the appropriate Carrier official to contact to request postponements. For these reasons, the Carrier believes there was no good cause to postpone the hearing and that dismissal was appropriate and warranted.

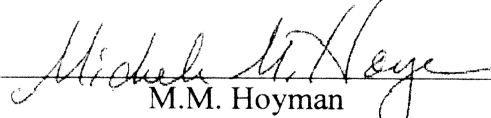
The Organization argues that the Carrier violated the Claimant's due process rights in not postponing the hearing. It notes that Rule 30(d) provides language suggesting automatic postponement upon request ("At the request of either party the investigation will be postponed...") (see Organization Brief, page 6). The Organization characterizes the process used to request postponement in this case as normal – it has always contacted the Lake Division office for this reason and the Carrier did not rebut the practice. Furthermore, the Organization argues that as the Claimant was hospitalized the day of the hearing there was certainly "good cause" for postponement upon request (see Organization Brief, page 5). The Hearing Officer requested immediate submittal of proof regarding the hospitalization to consider postponement, an unreasonable requirement given the circumstances and a requirement which can be found nowhere under Rule 30(d). As the Claimant and his representative were not present, the Organization argues it would be impossible for it to be fair and impartial and thus dismissal is not appropriate (see Organization Brief, page 13).


The Board does not find enough evidence in the record to support the Organization's allegations of a due process violation. Although the Organization customarily had requested postponements through the Lake Division office, the Claimant was a system employee, therefore a request for postponement would not go through that particular office. There is no dispute that the Claimant's representative left a voicemail (at the incorrect office) and did not receive any confirmation that the postponement was approved. The normal procedure is that requests for postponement must be answered

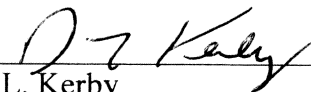
with a confirmation of postponement in order for a postponement to occur. This appears to be an issue of miscommunication, and not capriciousness or bad intent.

The Board finds the Claimant's reinstatement through the DARS program clearly constitutes a type of "last chance agreement" and the Claimant clearly understood he was required to remain free of prohibited substances to maintain employment. As there is no evidence that the positive test was false (or any claim raised to that effect by the Organization), nor that the test was otherwise conducted in an improper manner, there is no basis on which to consider reinstatement. The Claimant himself was responsible for remaining drug free to keep his job and that was made explicit under the previous reinstatement. The Board notes that in coming to this decision, it has carefully weighed the Claimant's long record of service against the misconduct committed in this case. Ultimately, however, given the circumstances the Board finds the discharge must be sustained.

The claim is denied.


M.M. Hoyman
Chairperson and Neutral Member


D. Pascarella
Employee Member
(DISSENT TO FOLLOW)


D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on June 20, 2013.