Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25050
Docket No. 44691
99-1-98-1-S-6757

The First Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

PARTIES TO DISPUTE: (United Transportation Union
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(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Request for reinstatement from unjust dismissal, pay for all time lost including attending investigations, pay for any lost vacation benefits, pay for any lost medical/dental benefits, pay for any lost productivity trip shares, along with expungement from Conductor G. D. Livingston's record for alleged violation of Rule 1.5 of the General Code of Operating Rules as a result of an unannounced follow-up test conducted on March 5, 1996 and also the results of random drug testing conducted on May 24, 1994."

FINDINGS:

The First 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 the result of a random drug test conducted on May 24, 1994, which was positive for marijuana, Carrier charged Claimant with violating Rule 1.5 of the General Code of Operating Rules. Concurrent with the notice of Investigation, Carrier advised Claimant that he had the option of participating in the Employee Assistance Program

in lieu of the Investigation. If he did so, the Investigation would be held in abeyance while Claimant was following the instructions of the Employee Assistance Counselor. Upon successfully completing the prescribed program to the satisfaction of the Employee Assistance Coordinator, the Investigation would be canceled and he would be permitted to return to work. By letter dated June 14, 1994, the Carrier confirmed that the Investigation had been postponed indefinitely. Claimant was ultimately returned to service.

On March 5, 1996, Claimant was again tested by the Carrier for drugs. This test, too, was positive for marijuana. As a consequence, Claimant was directed to attend an Investigation in connection with the positive March 5, 1996, test. The Carrier also directed Claimant to attend an investigation in connection with the 1994 test. Separate Investigations were held, and, by letter dated March 29, 1996, Claimant was informed that he was dismissed as a result of both Investigations.

First, we agree with the Organization that it was improper to hold an Investigation in connection with the 1994 test. The agreement by which Claimant exercised the option to seek rehabilitation promised him that the Investigation would be canceled. It was therefore improper for the Carrier to reinstate that charge. This conclusion, however, does not invalidate the Investigation for the 1996 test. Although one basis for Claimant's dismissal was improper, Carrier could still discipline him for the remaining charge. In that case, we find that Claimant did not dispute the results of the test. His suggestion, however, that the positive finding was the result of being with people who were smoking marijuana is simply not credible.

The Organization has raised procedural objections that we do not find meritorious. First, the Organization protests the fact that the hearing officer also administered the discipline. This Board has often held that it is the hearing officer who is in the best position to make determinations as to an employee's guilt, having actually observed all of the witnesses as they gave testimony. Award No. 1 of Public Law Board No. 5715, cited by the Organization, involved a hearing officer who also gave testimony. That Award, therefore, is not on point. Because of that Award, however, we conclude that the Organization's objection that the hearing officer refused to be examined lacks validity.

The Organization's second objection is that the charge against Claimant referred to Rule 1.5 of the General Code of Operating Rules, which it says is in violation of

Article 9, Section (a) of the Agreement, which states, "There shall be no citation of rules in the investigation notice." We agree with the Carrier that the 1984 Agreement establishing the joint union-management commitment to a drug/alcohol free work place supersedes that provision in cases such as this. That Agreement provides as follows:

> "If in the opinion of the Carrier Officer or Supervisor a violation of Rule 'G' [the predecessor of Rule 1.5] has occurred, the employee will be withheld from service, and cited with a Rule 'G' violation."

Finally, the Organization objects to the conduct and the rulings of the hearing officer. Looking at the totality of the Investigation, we cannot conclude that Claimant was denied a fair and impartial Investigation. It must be remembered that disciplinary Investigations are not court proceedings, and judicial rules of evidence and procedure do not apply.

We conclude the Carrier established substantial evidence that Claimant was in violation of Rule 1.5 as a result of his positive drug test on March 5, 1996. Having reached that conclusion, we find that the discipline imposed by the Carrier was neither arbitrary nor unreasonable. This was Claimant's second drug offense. He was already extended leniency when he was permitted to enter the Employee Assistance Program in 1994. The Carrier is not obligated to give him a third chance. Claimant knew the consequences of a positive test.

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 First Division

Dated at Chicago, Illinois, this 9th day of September 1999.