

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25971
Docket No. 45876
04-1-02-1-B-2187

The First Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(Burlington Northern Santa Fe Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of Engineer R. B. Wallace for restoration to service with pay for all time lost, seniority, vacation, and all other benefits unimpaired, in connection with a discipline of dismissal assessed July 9, 2001 following the formal investigation conducted June 27, 2001.”

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.

After reporting to work on April 23, 2001, the Claimant, an employee since September 1968 and an Engineer since 1978, was instructed to take a FRA random drug/alcohol test. The test showed a positive result for marijuana. The Claimant had tested positive in February 1993, went through rehabilitation, and was offered a conditional reinstatement for that first violation. After Investigation held on June

27, 2001, and by letter dated July 9, 2001, the Claimant was dismissed for violation of Rule 1.5 of the General Code of Operating Rules and Section 7.9 of the Carrier's Policy on the Use of Alcohol and Drugs.

The Claimant denies smoking marijuana prior to going on duty on April 23, 2001. The Claimant states, "I went through rehab in 1993, taken many tests since then, and I've been clean for many years . . . I was not using any marijuana."

The Claimant testified how the urine samples were taken. According to the Claimant, he and another employee Castillo were given tests:

"A . . . We both went to the third floor on - actually, the second floor, we took our alcohol test, me and Mr. Castillo and Ms. Swan went to the third floor, we urinated into the large vessels, both of us did, promptly, and we went back down to the second floor, set them on the desk, and for a 10 to 15-minute period the two unmarked large vessels remained on the desk while paperwork was filled out.

* * *

. . . During this 10 or 15 minutes of paperwork, I got up and walked around the room, looking at a picture on the wall, papers lying on tables, and also went into the hallway momentarily. I wasn't told, nor did I know, that my attention should have been solely on my specimen. I believed that the two of us were clean and erroneously saw no cause to be so diligent.

After Ms. Swan completed her paperwork Mr. Castillo and I then split the samples to the smaller vessels, which were then labeled. . . .

* * *

Q I need to clarify a couple of things. When you say you were tested together and you both submitted the test at the same time, were you both in the rest room at the same time?

A No.

Q You went in there individually?

A Yes.

Q And when you returned and you set your specimen on the desk, was Ms. Swann at the desk?

A For most of the time that I know, when I was watching she was."

By letter dated May 5, 2001 - prior to the Investigation - the Claimant brought a number of perceived irregularities in the testing procedure to the attention of the Carrier's Manager Drug & Alcohol Testing Dr. M. Crespin including the following:

"I believe the circumstances of the random test were questionable and could have been manipulated. After providing our specimens, both Mr. Castillo and I sat our unmarked containers on the desk while Linda Swann, the technician, was filling out paperwork. During this 10 to 15-minute period, I did not remain at the desk. I walked around the room looking at the pictures on the wall, items on the table, etc. I even walked into the hallway. During this time the vessels were unmarked and within close proximity to each other. It is possible, and in this case highly likely, for the samples to have been labeled incorrectly."

By letter dated May 13, 2001, the Carrier's Manager Drug & Alcohol Testing M. Crespin responded to the Claimant that "[a]fter reviewing records of this test, it has been determined procedural irregularities did in fact occur; however, there were no procedural errors of magnitude that would cause the testing to be fatally flawed. . . ." By letter dated June 21, 2001, Crespin clarified the "procedural irregularities" he referred to in that the Claimant ". . . transported the secured bottles to the location where the Chain of Custody form was located, rather than the collector carrying the bottles herself." Crespin further stated in that letter

“[h]owever, the bottles were not unattended at any time and the integrity of the urine specimen collections remains intact.”

By statement dated June 27, 2001 (which was made part of the Investigation held that date), the Claimant again reiterated that “Mr. Castillo and myself sat at a desk and set the large unmarked vessels on the desk [and f]or the next 10 to 15 minutes, Mrs. Swan was doing paperwork.” In that statement, the Claimant also stated that “[d]uring this 10 to 15 minutes of paperwork I got up, walked around the room, looking at a picture on the wall and papers lying around on other tables. I also went into hallway.” The Claimant again reiterated that position at the Investigation.

At the Investigation, and after the letters concerning the handling of the samples were made part of the record, the Organization stated:

“MR. POPE: . . .

We have shown that Mr. Martin Crespín, Manager Drug & Alcohol Testing, in his letter to Mr. Wallace admits procedural irregularities did in fact occur. . . . The collector did not ask or say anything to Mr. Wallace about remaining at the table while she was doing paperwork. There is no way of knowing what took place with two individual samples sitting there. Procedures were not followed correctly in this test.”

The specimen collector - Swann - did not testify at the Investigation.

Rule 1.5 of the General Code of Operating Rules provides, in pertinent part:

“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.”

The burden is on the Carrier to demonstrate through substantial evidence that the Claimant engaged in the charged misconduct - here, a violation of Rule 1.5. Typically, that burden is met in these kinds of cases through the showing of a positive test result. Absent any other problems, that positive test result would constitute substantial evidence that the Claimant had a prohibited substance in his system in violation of Rule 1.5.

However, based upon what is before us, there are serious problems with the Claimant's test result. The above evidence shows that prior to and during the Investigation, the Claimant and the Organization repeatedly brought to the Carrier's attention their version of the testing procedure which showed that for 10 to 15 minutes, the two unmarked samples from the Claimant and Castillo sat on Swann's desk and that during that period, the Claimant walked around the room and even walked out of the room. Swann did not testify to contradict or clarify what happened to the two unmarked samples which were placed on her desk. Specifically, given that the status of the evidence developed during the Investigation shows that the samples were on Swann's desk and were unmarked, this record is devoid of any evidence showing how Swann knew that the sample labeled as the Claimant's was, in fact, his. Moreover, the Carrier's Manager Drug & Alcohol Testing Crespín acknowledged prior to the Investigation in his letters that "procedural irregularities did in fact occur," but he did not address the specific contention made by the Claimant concerning the unmarked samples left on Swann's desk.

Without evidence from Swann to contradict or explain the assertion that two unmarked samples were on her desk for 10 to 15 minutes; Manager Drug & Alcohol Testing Crespín's acknowledgement that "procedural irregularities did in fact occur" and given the Claimant's adamant denials of use of marijuana, we are unwilling to find that the Carrier met its burden and has shown through substantial evidence that the testing procedure was not compromised and that the sample tested and attributed to the Claimant was, in fact, the Claimant's specimen. Prior to the Investigation and with his letters, the Claimant put the Carrier on notice that there was a problem with respect to the testing procedures and specifically brought the problem concerning the unmarked samples to the Carrier's attention. During the Investigation, the Claimant and the Organization reiterated those objections. The Carrier had ample opportunity to rebut the assertions concerning the handling of the samples by Swann. However, the Carrier did not do so with probative evidence.

Without more, we are unwilling to uphold the dismissal of an employee with over 32 years of service.

The fact that the Claimant signed the chain of custody forms does not change the result. The Claimant and the Organization put the Carrier on notice that there was a specific problem with the testing procedure which could have seriously compromised the results. The Carrier had the obligation to rebut the specific issue raised. It did not do so.

Substantial evidence does not support the Carrier's assertion that the Claimant engaged in the charged misconduct. As a remedy, the Claimant shall be reinstated to his former position without loss of seniority or other rights and benefits, made whole in all respects and his record cleared of the charged disciplinary action.

AWARD

Claim sustained.

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 First Division

Dated at Chicago, Illinois, this 10th day of March 2004.