

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32031
Docket No. CL-32690
97-3-95-3-545**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

**(Transportation Communications International Union
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (AMTRAK)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11178) that:

- 1. Carrier acted in an arbitrary, capricious and unjust manner in violation of Rule 24 of the Agreement, when by notice of June 3, 1994, it assessed discipline of 'Termination from Service' against Claimant, pursuant to an investigation held on May 25, 1994.**
- 2. Carrier shall now reinstate Claimant to service with seniority rights unimpaired and compensate Claimant an amount equal to what he could have earned, including but not limited to daily wages, holiday pay and overtime, had discipline not been assessed.**
- 3. Carrier shall now expunge the charges and discipline from Claimant's record.**
- 4. Carrier shall now reimburse Claimant for any amounts paid by him for medical, surgical or dental expenses to the extent that such payments would be payable by the current insurance provided by Carrier."**

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 this dispute arose, Claimant, Anthony Thomas, was a Ticket Accounting Clerk in Oakland, California. During a routine return-to-work physical, Claimant's urine tested positive for cocaine metabolites. By letter of February 3, 1994, Claimant was instructed by Carrier's Medical Director that, within 30 days from the date of the letter he must either (1) submit a drug-free urine sample, or (2) enter Carrier's Employee Assistance Program. The letter was sent registered mail and not picked up. The same letter was sent by Federal Express and signed for on February 22, 1994. By letter of March 29, 1994, the Medical Director notified Carrier's Occupational Health Nurse that Claimant had failed to comply with the instructions. Subsequently, by letter of April 7, 1994, Claimant was notified to appear for an Investigation into the following charge:

"Violation of Rule 'L' of the National Railroad Passenger Corporation Rules of Conduct, in that, you allegedly failed to comply with Dr. Robert McLean's instructions in a letter dated February 3, 1994, instructing you to rid your system of cocaine or any prohibited drugs, provide a negative urine sample at the Amtrak Approved Clinic within 30 days of your receipt of that letter, or enter the Employee Assistance Program."

An Investigation was held on May 25, 1994. Following the Investigation, Claimant was notified of his dismissal from Carrier's service.

The Organization has raised a threshold issue concerning conduct of the Investigatory Hearing. It alleges that Carrier failed to provide a key witness who could have exonerated Claimant, namely, Mr. Clarence Casey, the EAP counselor for the Western Division. Accordingly, Claimant was not afforded a fair and impartial Hearing

as mandated by the Agreement. Were the counselor's testimony of a nature as crucial as the Organization implies, the failure to call such a witness might constitute a fatal procedural flaw (Public Law Board No. 4275, Award 2). In this case, however, the memorandum from the Western Division EAP office stating that Claimant had failed to contact them was not successfully challenged by Claimant. Thus, the counselor's testimony would have been of no additional material value in this case.

Claimant asserts, and the Carrier has not disproved, that he entered an EAP program on April 18, 1994 and completed it 28 days later. However, the language of the February 3, 1994 letter to Claimant is clear. Within 30 days from the date of the letter, Claimant was to provide a clean urine specimen or enter the Employee Assistance Program. The Organization is correct that, had Claimant made a good faith effort to contact the EAP office and his entry into the program had been postponed by them (for example, due to insufficient space), the 30 day time limit would, technically, have been complied with. On this record, however, Claimant himself is unclear concerning the actual nature of his contact with the EAP counselor. Nothing on this record suggests that Claimant made a good faith effort to enter the EAP program as directed, within 30 days. Accordingly, he failed to comply with the clear and specific instructions of the February 3, 1994 letter. Even allowing for the alleged delay in Claimant's receipt of the letter, he was required to have enrolled in the EAP program by March 24, 1994, or have a "date certain" on that date for his subsequent entrance into the program. Based upon the record before the Board, it is apparent Claimant did neither.

Under the circumstances we find no basis for disturbing Carrier's assessment of discipline.

AWARD

Claim denied.

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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 6th day of May 1997.