

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32385
Docket No. MS-33011
97-3-96-3-414

The Third Division consisted of the regular members and in addition Referee Jonathan S. Liebowitz when award was rendered.

(Christian Sandifer, Jr.

PARTIES TO DISPUTE: (

(Norfolk Southern Railway Company

STATEMENT OF CLAIM:

"The invalidity of the drug screen urinalysis submitted on September 5, 1995 which indicated a positive for marijuana. The refusal of the hearing officer to consider the fact that company had conducted several tests for urinalysis upon claimant in contravention of rules and regulations. The expressed purpose of these constant tests was to eliminate claimant from his position as tug boat captain due to his race, which is a violation of Federal and State Statutes."

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.

Claimant, in a B&B Mechanic position working as a Tug Boat Operator, was notified by a letter from Carrier dated September 20, 1995 of a formal Investigation to determine the facts and to place Claimant's responsibility, if any, in connection with

failure to comply with the Carrier's Policy on Drugs and the instructions in the January 26, 1995 letter to Claimant from Carrier Medical Director C. R. Prible [instructing Claimant] to keep his system free from prohibited substances in that on September 5, 1995, Claimant tested positive for marijuana.

An Investigation was held on September 27, 1995. On October 13, 1995, Carrier notified Claimant that the facts adduced in the Investigation, as determined by the Hearing Officer, clearly proved Claimant guilty of violating the cited policy and letter from the Carrier's Medical Director and, that in view of the facts, Claimant was dismissed from the services of the Carrier and its affiliates effective on that date.

Claimant and counsel dispute the validity of Carrier's testing procedures and of the disciplinary action taken by Carrier. The Board reviewed those claims and the Carrier's responses to them.

However, the record demonstrates that the Board lacks jurisdiction to determine the validity or lack of validity of this claim. While the Organization timely instituted a claim on behalf of Claimant and while Claimant's attorney, with Claimant's consent, instituted proceedings before this Board in a timely manner, the record shows that this dispute was never discussed in conference on the property prior to instituting proceedings before the Board. Such an effort at adjustment on the property is required by Section 3, First (i) of the Railway Labor Act. A number of Third Division Awards have so held. See, for example, Third Division Awards 27482 and 30114.

A conference between the parties is also required by the National Railroad Adjustment Board Rules of Procedure, Circular No. 1, issued October 10, 1934.

Accordingly, the Carrier's contention that this Board is without jurisdiction to consider this claim must be upheld.

In addition, the record demonstrates that Claimant was employed as a Tug Boat Operator and, as such, was directly or indirectly engaged in the transportation of passengers or property by water. Pursuant to the Railway Labor Act, Section 3, First (h), jurisdiction over such disputes resides with the Fourth Division of the National Railroad Adjustment Board and not with the Third Division of the Board. Section 3, First (i) of the statute provides for referral of disputes "... to the appropriate division of the Adjustment Board...." The statute requires that claims be filed with the appropriate Division of the Board. As a Tug Boat Operator, Claimant does not belong to any of the specifically

enumerated classes or crafts over which the Third Division has been given jurisdiction by the Railway Labor Act. See also Circular No. 1, Jurisdiction, and Third Division Award 32142.

For obvious reasons, the jurisdictional defects were not raised in handling on the property. They have the legal effect of depriving the Board of jurisdiction over this claim. Such objections to jurisdiction may be raised at any time short of a final judgment. See Third Division Award 32142.

Having determined that this Board does not have jurisdiction over this claim, we find it unnecessary to consider and decide the Carrier's further contention that these proceedings were not instituted before the Board by the employee or his duly-authorized representative. We note that Claimant's Submission was made by Claimant and his attorney.

The contentions of Claimant and Carrier with respect to the merits are set forth in the Submissions. However, for the reasons stated above, the Board is unable to consider the merits because it is without authority to take jurisdiction of this claim. Therefore, the claim must be dismissed without consideration of the merits.

AWARD

Claim dismissed.

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 30th day of December 1997.