

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33144
Docket No. MS-33439
99-3-96-3-969**

The Third Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

(Steven L. Weems

PARTIES TO DISPUTE: (

(The Kansas City Southern Railway Company (former
(MidSouth/SouthRail Corporation)

STATEMENT OF CLAIM:

“Question 1# how could Kansas City Southern Railway pull me out of services August 17, 1995 when I pulled myself out of services July 17, 1995 for the purpose to receive treatment for my chemical dependency? Secondly, how could the formal investigation take place without my presents (sic)? After all, the investigation had taken place during the time I was receiving treatment under the Dr. Kenneth I. Cronin of St. Dominic Memorial Hospital.

Because of this dilemma, I am requesting for the National Railroad Adjustment Board to review my files, make a determination and reinstate me with employment. I have documents to corroborate my statements.

The remedy sought is for Kansas City Southern Railway to reinstate my employment with this organization and compensate me for lose (sic) wages.”

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.

By certified letter, dated September 19, 1995, Division Engineer J. E. Blaylock informed the Claimant that substantial evidence was presented at a formal Investigation held on August 25, 1995 that he violated Rule G of the Maintenance Way and Signal Department. Accordingly, Blaylock notified the Claimant that he was dismissed from the service of the Carrier effective immediately.

Prior to August 1995, and during the time the events occurred which led to his dismissal from service the Claimant worked as a Trackman Section Gang 10, under the supervision of Foreman T. L. Scott. The Claimant had been employed by the Carrier for five years.

On August 14, 1995, the Claimant was subject to a return to work physical, an aspect of which includes a drug test. On August 17, 1995, the Carrier was notified that the drug test that was administered on August 14 disclosed the use of marijuana metabolites (THC). That same day, August 17, the Claimant was advised that he was removed from service pending Investigation.

In addition, on August 17, 1995, Administrative Manager Linda S. Sorley sent a certified letter to the Claimant in which she notified him "to be present in the Division Engineer's Office, 111 East Capitol Street, Suite 500, Jackson, Ms. (Mississippi), Friday, August 25, 1995 at 0900 hours for a formal Investigation to ascertain the facts and determine your responsibility, if any, in connection with your alleged violation of Rule G on August 14. . . ."

At the request of the Organization, a recess was granted at the commencement of the Hearing on August 25, 1995 because the Claimant failed to be present. The Investigation was recessed to September 25, 1995. The Carrier notified the Claimant by certified mail of the recess.

The Hearing was reconvened on September 25 but again the Claimant failed to appear at the Hearing. A Hearing was then held in absentia at which evidence was presented by the Carrier.

By certified letter dated September 29, 1995, the Carrier notified the Claimant that he had been dismissed from the service of the Carrier, effective immediately, based upon substantial evidence that was presented at the Investigation which established that he violated Rule G which provides as follows:

“RULE G

Employees subject to duty, reporting for duty, on company property, or reporting for any company medical examination as required by the rules or otherwise, are forbidden from possessing, using, or being under the influence of alcoholic beverages, intoxicants, drugs, medications, or controlled substances. Cases involving prescribed medication shall be referred to a company medical officer. The illegal use, possession, or sale of a drug, narcotic, or other controlled substance is forbidden, whether on or off duty.

An employee may be required to provide a urine sample as part of a company medical examination or if the company reasonably suspects violation of these rule. Refusal by an employee to provide a urine and/or blood sample when requested to do so by the company or as part of any company directed medical examination will be considered as an act of insubordination. An employee who refuses such requirement will be promptly removed from service.”

The central query to be addressed is whether the Claimant was deprived of his rights to due process because of the Hearing in absentia that was held on August 25 and September 25 at which evidence was presented which formed the basis of the dismissal from service. The issues relating to due process bear upon the notice of the Hearing and the nature of the Hearing that was held in absentia.

This Board finds that the actions by the Carrier do not violate basic notions of Agreement due process. The Claimant received adequate due notice of the formal Investigation on August 25 and September 25, 1995.

The Carrier notified the Claimant by certified letter of the formal Investigation that was scheduled for August 25, 1995. The letter provided the date, time and location of the Hearing. It also advised the Claimant of the reason for the Hearing, namely, to

determine his responsibility, if any, in connection with his alleged violation of Rule G on August 14, 1995, as indicated by a drug test performed on urine specimen provided by him in connection with a Return to Work Physical.

Despite efforts to contact the Claimant by both Carrier and Organization representatives on August 18, 21 and 25, the Claimant failed to be present at the formal Investigation. At the request of the Organization, the Hearing Officer granted a recess of one month, until September 25, which is more than an adequate period of time for the Organization to contact the Claimant. By certified letter, the Carrier also notified the Claimant, that the Investigation was postponed until September 25.

On September 25, 1995, the Claimant failed to show up for the Investigation. Organization Representative Lawrence Triche was given close to 30 minutes to contact the Claimant but it was to no avail.

This Board concludes that all reasonable and necessary efforts were made by the Carrier to notify the Claimant of the Investigation. A further recess would have served no purpose and would have merely delayed the Investigation. The procedural requirement of an Investigation cannot be nullified by the charged party, who fails to be present at an Investigation after he has been given due notice of the Investigation by the Carrier.

Turning to the Hearing which was held in absentia, substantial evidence was adduced in the Board's judgment, to conclude that the Claimant violated Rule G on August 14, 1995. On that date the urine specimen provided by the Claimant in connection with his return to work physical examination established that he was under the influence of marijuana metabolites (THC), a controlled substance, in violation of Rule G.

At the Investigation held on August 25 and September 25, 1995, the Organization had a representative present who sought to preserve the rights of the Claimant. In light of the circumstances, this Board finds that the Carrier properly conducted the Investigation in absentia and relied upon the evidence which was adduced to warrant dismissal of the Grievant from service.

The record establishes that the Claimant was not deprived of his rights to due process. A necessary and reasonable effort was made by the Carrier to notify the

Claimant of the Investigation. Moreover, at the Hearing that was held in absentia, substantial evidence was adduced to support the Claimant's dismissal from service. This Board concludes that basic notions of fairness and due process were not violated by the Carrier.

As a final matter to be considered, the Organization claims that the Claimant was not offered the same opportunities of waiver as his co-workers, with respect to a violation of Rule G under the Carrier's Co-Worker Referral Policy. This claim is not supported by the record.

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 Third Division**

Dated at Chicago, Illinois, this 25th day of March 1999.