

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36201
Docket No. MW-35956
02-3-99-3-906

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Casual Driver M. T. Tytula for his failure to follow instructions ‘ . . . in letter from Conrail Medical Director N.P. Hartenbaum, M.D. dated March 31, 1998, and reinforced in letter dated May 29, 1998, in that you failed to refrain from the use of alcohol and/or prohibited substances as evidenced by breathalyzer given on October 29, 1998 in Syracuse, NY . . . ’ was without just and sufficient cause and based on an unproven charge (System Docket MW-5400-D).
- (2) As a consequence of the violation referred to in Part (1) above, Casual Driver M.T. Tytula shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.”

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 F. A. Tytula was a Trackman-Casual Driver, headquartered at the DeWitt Diesel Terminal, Syracuse, New York.

On March 27, 1998, the Claimant was required to provide a specimen for a medical evaluation drug screening. As a result of a confirmed positive test for cannabinoids, the Claimant was medically disqualified from service. The Claimant was so informed and instructed to "rid his system of cannabinoids, and all other prohibited drugs" as a condition for returning to duty under the Carrier's Drug and Alcohol Policy. The Claimant was further informed that when the conditions were met, he would be returned to duty subject to unannounced drug and alcohol tests for a period of five years.

The Claimant subsequently produced negative urine and breath samples and was returned to service on May 28, 1998. At that time, the Carrier's Medical Department directed the Claimant to seek the help of the Conrail Medical Office or one of Conrail's Counseling Service Managers, if he "felt he was unable to remain drug free."

Thereafter, on October 29, 1998 the Claimant was directed to provide a specimen that tested positive for the presence of alcohol. Specifically, the Claimant was subject to two tests, a screening test at 3:03 P.M. and a confirming test at 3:21 P.M., which yielded results of .032 and .024, respectively. As a result, the Claimant was directed to attend a November 24, 1998 Hearing, following which he was found guilty as charged and assessed the discipline of dismissal.

The Organization appealed the discipline maintaining that the Claimant was not afforded a fair and impartial Hearing when the "Carrier failed to provide all pertinent witnesses to the case," thereby violating Rule 27 of the Agreement. Specifically, the Organization asserted that the Carrier should have called the technician who administered the Claimant's test to explain the testing process and the function of the breathalyzer machine. The Organization further maintained that the Claimant stated that he was "coerced" into signing the "accuracy" portion of the form.

The Carrier denied the claim, contending that it had complied with all relevant provisions of Rule 27. Regarding the merits of the issue, the Carrier noted that the Claimant had been duly informed that the monitoring period would extend for five years and that a positive test within that period could subject him to dismissal. In that connection, the Carrier asserted that the breathalyzer machine was in proper working order and submitted documentation stating same. Finally, the Carrier contended that the Claimant was not coerced or threatened into signing the form, but had done so "willingly."

At the outset, the Organization asserted that the Carrier had violated Rule 27 of the Agreement. However, following a careful review of the record, we do not concur with that assertion. Specifically, the General Chairman asserted that the Carrier should have the technician who administered the Claimant's October 29 drug/alcohol test present at the Hearing. However, the Carrier submitted documentation which confirmed that the breathalyzer machine used by the Claimant was in proper working order, despite the Organization's assertion to the contrary. Further, if the Organization believed that testimony from the technician could have exonerated the Claimant or that an explanation of the functions of the breathalyzer machine was crucial testimony which would have benefitted the Claimant, the Organization could have made arrangements for the technician to be present, in accordance with Rule 27, section 1(e).

In that connection, the Claimant asserts that he was "forced" to sign the portion of the form which states: "I certify that I have submitted to the breath alcohol test, the results of which are accurately recorded on this form," because the technician told him that if he refused to do so the test would be considered positive. However, there is no probative evidence on the record which substantiates the Claimant's allegation.

Turning to the merits of this dispute, in mid-May 1998, the Claimant was returned to service. Just prior to his reinstatement, the Claimant received a letter from the Carrier's Medical Director which stated that:

"During the first five years following your return to work you will, from time to time, be required to report to a medical facility for further testing in order to demonstrate that you are no longer using cannabinoids or other prohibited drugs. Should a further drug or alcohol test, a test performed under Federal regulation applicable to either Federal Railroad

Administration (FRA) or Federal Highway Administration (FHWA) or a test in the five-year monitoring period, be positive, you may be subject to dismissal by your department for failure to follow proper instructions.”

The Claimant was instructed, in no uncertain terms, that he must remain drug/alcohol free, and that he would be subject to follow-up drug testing. Further, in her letter the Medical Director advised the Claimant that for a five-year monitoring period following his return to work he would be subject to dismissal should he again test positive for prohibited drugs. In that same correspondence, the Medical Director encouraged the Claimant to seek help from the Conrail Medical Office or one of Conrail’s Counseling Service Managers, if he felt he was unable to remain drug free. The Claimant failed to comply with those instructions and in the absence of mitigating factors, there is no justification for his actions. Therefore, this claim must be denied.

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 24th day of September 2002.