

****CORRECTED****

**Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 38128
Docket No. MS-39283
07-3-06-3-157**

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

**(John P. Daly, Jr.
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak) –
(Northeast Corridor**

STATEMENT OF CLAIM:

“I, John P. Daly, Jr. am appealing the termination from the National Railroad Passenger Corporation (Amtrak) Amtrak Case No. 05-121.

On August 10, 2005, I was given a follow-up Alcohol Breath Test due to a previous violation of Amtrak’s Drug & Alcohol policy. Breath Alcohol Technician (BAT) Michelle Brennan performed the test. She used a CMI Intoxilyzer 400, Serial No. 047962D.

I tested .027 at 7:34 am and .021 at 7:52 am and was taken out of service. I was found guilty of violating Amtrak’s Drug & Alcohol policy and my employment was terminated on November 21, 2005. I appealed this decision to Amtrak on December 16, 2005 and was denied. In accordance with 49 CFR Part 40, Subpart N, 40.267,(c)(5), I am asking the Board to overturn my termination based on the following information pertaining to the incident.

On July 31, 2005, Ms. Brennan performed an external calibration test on the Intoxilyzer 400, Serial No. 047962D using External Calibration Gas No. 33801G with an expiration date of December 11, 2005 and a value of .085. The machine read .086, which falls

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between the plus or minus 2% acceptable range, as specified by the manufacturer of the Intoxilyzer and the gas supplier.

After my positive reading on August 10, 2005, at 11:09 am, Ms. Brennan recalibrated the Intoxilyzer 400, Serial No. 047962D using External Calibration Gas No. 333801G with an expiration date of December 11, 2005 and a value of .085. The machine read .043, which clearly exceeds the acceptable range of plus or minus 2% as specified by Scott Specialty Gas, the supplier of the gas.

Based on the above test results and in accordance with the above referenced CFR, the test must be treated as if the test never occurred. Applicable portions of the above CFR states: 'As an employer, a BAT, or an STT, you must cancel an alcohol test if any of the following problems occur. These are 'fatal' flaws. You must inform the DER that the test was cancelled and must be treated as if the test never occurred.' (c) 'In the case of a confirmation test: (5) The next external calibration check of the EBT produces a result that differs by more than the tolerance stated in the QAP from the known value of the test standard. In this case, every result of 0.02 or above obtained on the EBT since the last valid external calibration check is cancelled.'

I formally request my termination to be overturned by the Board, and that I be made whole from the time of my suspension to date of return. This shall include returning to my position as a Substation Election [sic] on Amtrak's Metropolitan Division at Princeton, Junction, NJ, with no loss of time or seniority, as well as all pay, including straight time, overtime, vacation, and holiday pay that I would have been entitled to if I had not been suspended or terminated. All benefits to be restored."

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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.

After testing positive for alcohol on a federal random test on February 17, 2004, the Claimant signed an Alcohol and Drug Waiver Agreement dated March 2, 2004 under the Carrier's Drug and Alcohol Policy. The Waiver signed and agreed to by the Claimant provided for periodic random testing and further provided, in pertinent part, that "I further understand that if I test positive in any future drug/alcohol test, including tests taken as part of any physical examination, I will be dismissed from all Amtrak service."

On August 10, 2005, the Claimant submitted to a follow-up test. The initial alcohol test was .027, which was above the permissible cut off level of .020 as established in the Carrier's Drug and Alcohol Policy. A confirmation test was conducted 18 minutes later with a result of .021 - again, above the permissible cut off level.

After an Investigation, which was postponed several times as a result of the Claimant's failure to attend even though notifications were sent to his address of record, on November 22, 2005, the Claimant was dismissed.

The terms of the March 2, 2004 Waiver signed by the Claimant are self-enforcing. The Claimant agreed that ". . . if I test positive in any future drug/alcohol test . . . I will be dismissed from all Amtrak service." The Claimant

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tested positive for alcohol on August 10, 2005 in clear violation of the conditions agreed to by the Claimant in the March 2, 2004 Waiver. Substantial evidence therefore supports the Carrier's determination that the Claimant engaged in misconduct and dismissal was not arbitrary.

The Claimant's arguments that the testing equipment was not correctly calibrated do not change the result. The Claimant was given numerous opportunities to attend the Investigation concerning his positive test result and, after several postponements, failed to attend any of the proceedings. Had the Claimant attended, his arguments and evidence concerning alleged incorrect equipment calibration could have been considered. The Board cannot now consider such arguments made outside of the record developed during the Investigation.

The Carrier's assertions that the testing equipment was correctly calibrated because the testing agent simply entered the wrong serial number for the test canister on the form and that the calibration actually was within acceptable levels (therefore making the Claimant's test valid under the Code of Federal Regulations as an administrative error) need not be considered. Given the Claimant's failure to attend the Investigation and timely raise his arguments concerning the calibration of the equipment, the Carrier's defense is moot.

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 23rd day of April 2007.