

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39371
Docket No. MS-38289
08-3-NRAB-00003-040125
(04-3-125)

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

PARTIES TO DISPUTE: (T. D. Petty
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Appeal from Ex-CSX emp. [T.D. Petty, ID# 791073] on wrongfully done drug testing.”

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.

In June of 2001 T. D. Petty underwent a return-to-duty physical, part of which involved a urinalysis screen. As a result of that screen he was found to have tested positive for cocaine metabolites. In lieu of proceeding through an Investigation, Petty agreed to enter the Carrier's Employee Assistance Program. In that regard, on June 29, 2001, Petty signed an EAP contract in which he agreed, among other things, that he would remain free of prohibited substances, and that any report of non-compliance (for example testing positive in a random test) would result in a Hearing on a Rule G/Safety Rule charge. On February 14, 2003, Petty underwent a second return-to-duty

toxicological test, the results of which indicated that Petty's urine was positive for cocaine metabolites. The Claimant was notified of the positive test and withheld from service from March 17, 2003. He was also notified to appear for an Investigation. The Investigation was held after one postponement. Petty failed to appear for the Investigation, but his representative was present.

Based upon the results of the Investigation, the Carrier notified Petty by letter of April 28, 2003 of his dismissal from the Carrier's service. The Organization appealed the discipline on May 6, 2003 and that appeal was denied by the Carrier on June 3, 2003. The matter was not discussed any further by the parties, nor was any further correspondence exchanged.

On February 20, 2004, Petty sent a Notice of Intent to the Third Division appealing his dismissal and seeking adjudication of the matter.

In light of the fact that the claim was not entirely progressed between the parties on the property, the Carrier insists that it is now barred from consideration by the Board. Petty contends that the evidence used to prove his positive test is flawed at the outset and has suggested in his letter of appeal that the documents relied on by the Carrier are simply duplicates of a single test – the one from June of 2001. In support of his allegations, Petty "highlighted" the portions of the documents he feels show that the results presented in February 2003 are simply a repeat of the ones from June 2001.

The Carrier is correct that the appeal herein is barred by the general legislative requirement that claims be conferenced on the property prior to coming to the Board.

Accordingly, the claim should be dismissed on procedural grounds.

However, the Board takes seriously Petty's allegation that the documents relied on by the Carrier in its assessment of the ultimate penalty of dismissal were possibly inaccurate or, worse, falsified. In that regard, the Board carefully examined the documents at issue. It is apparent that the signatures and names of the testing staff are different on each testing date. Further, while Petty had a concern that a document hand dated February 2003 has a small statement at the bottom that it was "printed in 06/01," the Board found that such indication refers to the blank document only, and has no relevance to the date the actual test was taken.

Finally, Petty expressed a concern that the urine screening numerical results for June 2001 and February 2003 are apparently identical. He argues that it is unlikely that such numbers would be exactly the same for both tests. Again, the Board carefully examined the documents at issue. The numbers to which Petty refers (circled by him on the copies of the documents he presented to the Board as evidence) are the constant – and consistent range values for cocaine metabolite screening cutoff (300 nanograms [ng]/ml) and the confirm cutoff (150 ng/ml). Measurement of the actual amount of cocaine metabolites in Petty's tested sample for June 2001 is not expressed as a number, but simply as a "positive" test. On the other hand, in the document for the February 2003 test, the printed result indicates a quantity of 676.0 ng/ml, or more than four times the "confirm cutoff" of 150 ng/ml and more than twice the "screening cutoff" of 300 ng/ml. In other words, the February 2003 test results clearly enumerates the quantity of cocaine metabolites assessed in Petty's toxicology specimen.

In summary we find no evidence of malfeasance on the part of the Carrier. Thus, the claim is 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 21st day of October 2008.