

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39876
Docket No. MS-39929
08-3-NRAB-00003-070096
(07-3-96)**

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

**(Mark A. Usyk
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.**

STATEMENT OF CLAIM:

“On October 05, 2004 I (M. A. Usyk) [Claimant] was immediately terminated from employment due to a false positive drug test from my [Claimant's] Liver Disease and an unknown consumption of hemp oil the night prior to a Follow-up Federal Drug Test taken on July 30, 2004. This consumption of hemp oil was never a willingful act on my [Claimant's] part and if known would have never consumed that meal on July 29, 2004. Furthermore CSX never gave any awareness information on substances that would trigger such an impact. For all the circumstances listed above I [Claimant] should be reinstated employment to CSX Transportation Railroad.”

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, the Claimant was a Signal Maintainer. On April 9, 2002, the Claimant tested positive for Cannabinoids (Marijuana) in his system in a FRA-mandated random toxicological test. He was charged with violation of CSXT Operating Rule G and Safety Rule 21. However, because this was his first verified positive toxicological test, he was offered a "Rule G Bypass" which permits employees to enter the Employee Assistance Program (EAP) for substance abuse treatment. The Claimant agreed to enter the EAP on April 19, 2002, and was subsequently provided substance abuse treatment. Upon completion of the program, he signed a Substance Abuse Treatment Plan on August 7, 2002, which mandated that he "remain abstinent from all illegal drugs and alcohol at all times" for a period of five years thereafter.

By letter dated August 30, the Claimant was instructed to attend a formal Hearing on September 2, 2004 in connection with advice received August 16 from CSXT's Chief Medical Officer that he tested positive for Cannabinoids as a result of his FRA Short Notice Follow-up toxicological testing on July 30, 2004. The letter advised that he was charged with a possible violation of NORAC Operating Rules, General Rule G and Safety Rule 21. Because this was his second verified positive test within the last five years, he was also charged with violation of the substance abuse treatment contract that he signed on August 7, 2002. The notice also reinstated the original Rule G and/or Safety Rule 21 charge dated February 8, 2002, which had been held in abeyance in accordance with the provisions of his election to opt for handling in the Employee Assistance Program. The Claimant was withheld from service pending resolution of the matter.

The Hearing was held, after postponement at the request of the Organization, on September 23, 2004. By letter dated October 5, 2004, the Carrier notified the Claimant that he had been found guilty as charged because "it is obvious that on the date of the short notice follow-up test [he] had a prohibited substance in [his] system." The letter also informed the Claimant that he was immediately terminated as an employee of the Carrier.

The Organization appealed the discipline to the highest officer of the Carrier designated to handle such matters in a letter dated October 11, 2004. It alleged that

the Carrier (i) failed to provide the Claimant a fair and impartial Investigation by refusing to allow pre-investigation discovery (access to the drug-testing “litigation package”) (ii) failed to consider factors that would have caused a false positive in the Claimant’s test and (iii) failed to consider the negative result on a home test that the Claimant took immediately after testing positive on July 23, 2004.

The Carrier declined the Organization's claim in a letter dated October 26, 2004, noting that the discovery requested was not permitted under any of the applicable Rules of the parties' Agreement, and that the record failed to support the Claimant's claim that the positive test was a false positive. The Organization requested a conference by letter dated November 2 and provided the Carrier with additional information from the Claimant on November 4, 2004.

The matter was considered in conference on March 29, 2006, and by letter dated the same day, the Carrier rejected the additional information on the ground that it was untimely and should have been presented at the formal Investigation. The Carrier also noted that the information was irrelevant and did nothing to detract from the July 30, 2004 positive test results. The Carrier concluded, “during conference of this matter, the Organization failed to bring any additional information to light that would cause us to deviate from the decision previously rendered. . . .” and declined the appeal. However, the letter also stated, “This will additionally serve to confirm, as we previously agreed, that any and all time limit arguments for the progression of this matter are waived and that the nine month period for presentation of this matter to either the Third Division of the National Railroad Adjustment Board or other agreed to tribunal will commence upon the date of this letter.”

On February 6, 2007, i.e., more than ten months after the parties' March 29, 2006, agreement to extend the period for presentation of this matter to the Board, the Claimant sent a letter giving notice of his intention to file a Submission with the Third Division of the NRAB for resolution of the unadjusted dispute. The parties subsequently filed their Submissions. The Claimant's Submission included the additional material presented to the Carrier after the close of the formal Investigation and after the Carrier's assessment of discipline. In his Submission, the Claimant repeats his contentions that the positive test resulted from his unknowing and non-willful consumption of Hemp Oil, which he asserts is not an illegal drug, medication

or controlled substance of any kind, and that he therefore should not be held to have violated NORAC Operating Rules General Rule G, Safety Rule 21, or the Carrier's Rule G Bypass Program.

However, the Board is unable to consider the merits of the Claimant's appeal. Rule 4-K-1(c) of the CSXT/BRS Northern Agreement states:

"A grievance or claim denied in accordance with paragraph (b) will be considered closed unless within nine (9) months from the date of the decision of the highest designated Carrier Labor Relations Officer proceedings are instituted before the National Railroad Adjustment Board or such other Board as may be legally substituted therefor under the Railway Labor Act."

On March 29, 2006, the Carrier and the Organization agreed that the nine-month period for the presentation of this matter to the Board would commence as of that date. The Claimant's February 6, 2007 letter was submitted more than ten months later. It was, therefore, filed too late. We recognize that the Claimant submitted this appeal on his own. However, he offers no explanation for the delay. We note, as did the Board in a similar case, i.e., Third Division Award 37083:

"... Board precedents are clear that the Board strictly applies time limits for filing appeals. The Board's procedures must be respected."

See also, Third Division Awards 33915, 35191, 35965 and 36549. For this reason, the Board does not have jurisdiction to consider this appeal and the claim must therefore be dismissed.

AWARD

Claim dismissed.

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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 31st day of July 2009.