

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30819
Docket No. MW-31375
95-3-93-3-211

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of B&B Helper J. A. Brainard for alleged '... failure to pass the drug screen test due to the presence of an illegal substance in your system on January 21, 1992....' in connection with a collision inside Tunnel 27 near Cliff, Colorado on that date, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.
2. The Claimant shall be returned to service with seniority and all other rights unimpaired and he shall be compensated for all wage losses 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.

On January 21, 1992, Claimant was inside a contractor-owned hy-rail truck when the truck was struck from behind by another vehicle. Claimant was taken to Denver where he gave urine and blood samples for drug and alcohol screening. Claimant's drug screen was reported as positive for marijuana.

On January 24, 1992, Claimant was notified of an Investigation, to be held January 30, 1992, concerning Claimant's "alleged failure to pass the drug screen test due to the presence of an illegal substance in your system on January 21, 1992, detected as a result of a drug/alcohol test taken as part of a test for cause following the collision incident at approximately 11:55 a.m., inside Tunnel 27, near Cliff, Colorado, while working as B&B Helper on January 21, 1992." The Hearing was held as scheduled, and on February 7, 1992, Claimant was advised that he was dismissed from service.

The Organization argues that Carrier failed to prove the charge against Claimant. The Organization attacks the sufficiency of the test and the chain of custody of the urine sample. The Organization further argues that Carrier lacked cause to test Claimant. The Organization maintains that Claimant was in the hy-rail truck which was struck from behind, that the truck was not moving and its brakes were set at the time of the collision. In the Organization's view, the fact of the collision gave no cause to order Claimant to submit to a drug screen. Finally, the Organization contends that dismissal was too harsh a penalty in light of Claimant's length of service and prior record.

Carrier contends that the evidence established the chain of custody, the qualifications of the testing lab, and the proper use of an EMIT screening test and GC/MS confirmation test. Carrier argues that both tests were positive for marijuana metabolites in Claimant's urine, and that this conclusively proves a Rule G violation. Carrier further contends that Claimant had previously been dismissed for a Rule G violation in 1988 and that he had been conditionally reinstated, subject to random testing and dismissal if such testing should be positive for illegal drugs. Consequently, Carrier maintains, dismissal was appropriate.

The Board has reviewed the record thoroughly and carefully. We respect the importance of protecting employees, the public and the Carrier from the dangers of employees working under the influence of illegal drugs. Mandatory drug testing plays an important role in providing that protection. Such testing, however, must be ordered on proper authority. Our review of the record convinces us that Carrier has failed to establish such authority in the instant case.

Carrier has been inconsistent in its position regarding the source of authority for Claimant's test. The documents evidencing the chain of custody of Claimant's urine sample indicated that the test was for "other," rather than reasonable suspicion or cause. The Notice of Investigation and notice of dismissal indicated that the test was for cause. In its Submission, Carrier referred to a prior Rule G dismissal after which Claimant was reinstated pursuant to an agreement which included a provision for random follow-up testing.

Claimant's alleged prior Rule G violation and reinstatement agreement were neither presented nor discussed during the handling of this matter on the property. They were mentioned for the first time in Carrier's submission to this Board.¹ Claimant's personal record, as introduced in the Investigation, contains no entries beyond 1985. The prior Rule G violation allegedly occurred in 1988. As an appellate body, we are precluded from considering matters that were not raised on the property. Accordingly, we may not consider Carrier's arguments resting on an alleged prior Rule G dismissal and reinstatement agreement.

Accordingly, we consider whether there was reasonable suspicion or cause to require Claimant to provide a urine specimen for a drug screen. Claimant and another B&B Helper who was also in the hy-rail truck at the time of the accident both testified that the truck was stopped, its brakes were set, the transmission was in neutral and the vehicle was struck from behind by a jeep. The other B&B Helper was not directed to take a drug test. There is simply no evidence of even any remote responsibility on Claimant's part for the accident.

FRA Regulations provide for a good faith determination based on reasonable inquiry by the Carrier representative responding to the accident scene (FRA Regulations § 219.201(c)). The record, however, contains no evidence as to the basis for Carrier's representative's decision to test the Claimant. The only evidence in the record shows that Claimant had the misfortune of being in the wrong place at the wrong time. Mere presence at an accident scene does not establish a reasonable basis for requiring an employee to submit to a drug screen. See Third Division Award No. 27802; Public Law Board No. 3139, Award 86; Special Board of Adjustment No. 924, Award 129.

¹ Indeed, even the documentation appended to Carrier's submission fails to contain the specific reinstatement agreement or any specific terms providing for Claimant to be subject to future random drug screens.

Accordingly, we conclude that Carrier lacked authority to test the Claimant. In the absence of such authority, the test was invalid and cannot support the discipline imposed. As stated in Third Division Award 30698:

"The Board respects the efforts of the Carrier, the Organization and the Government to rid the railroad industry of drug users. Such employees represent genuine threats to safety. No authority wishes to be a party to returning to service an employee unfit to serve because of drug or alcohol conditions. However, the existing assistance and testing procedures of the [carrier's drug testing] Plan provide sufficient protection, through return to work examinations and the ongoing aspects of the Carrier's Plan, to minimize such consequences."

We find the remedy ordered in Award 30698 to be appropriate in the instant matter. The Claimant will be reinstated to service and he shall be made whole for wages and benefits lost as a result of the dismissal. His record shall be cleared of the discharge and the test results. His reinstatement, however, shall be conditioned on his passing a drug test, his participation in any employee assistance program provided for in Carrier's drug testing plan and his being subject to random follow-up tests as provided for in Carrier's drug testing plan. Failure to comply with these conditions shall subject the Claimant to the penalties provided for in Carrier's drug testing plan.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of April 1995.