

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32178
Docket No. MS-32227
97-3-95-3-39**

The Third Division consisted of the regular members and in addition Referee James E. Yost when award was rendered.

**(Joseph V. Little
PARTIES TO DISPUTE: (
(Norfolk and Western Railway Company**

STATEMENT OF CLAIM:

"Whether or not machine operator Joseph V. Little, 5519 Auburn, Avenue, Sciotoville, OH 45662, was properly dismissed from service on September 7, 1993 for failure to keep his system free of prohibited drugs in accordance with the instructions of the carrier's medical director G. W. Ford, M.D. and company policy as stated in Dr. Ford's letters dated, April 7, 1988 and October 13, 1988 inasmuch as neither letter was ever received by Mr. Little, in violation of the carrier's own policy and rendering the attempted notification null and void. As a result, Joseph V. Little requests reinstatement with back pay for all lost time and all rights unimpaired."

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.

The Petitioner requested a Referee Hearing before the Board. Although due notice of the date, time and place of Hearing was given, the Petitioner failed to appear for the Hearing.

The Petitioner entered the service of the Carrier as an Extra Force Laborer on October 5, 1981.

On March 31, 1988, the Petitioner tested positive for marijuana on the drug screen included as a part of his return-to-work physical examination. The Carrier's Medical Director advised the Petitioner by letter dated April 7, 1988, of the positive drug screen, and notified him that he was being withheld from service pending his furnishing a negative drug test.

The Petitioner furnished a negative drug specimen on April 9 and was qualified by the Medical Director on April 13 to return to service. Subsequent to his return to service, the Carrier's Medical Director addressed a certified letter dated October 13, 1988 to the Petitioner reading:

"Dear Mr. Little:

Your drug screen urinalysis conducted as part of your physical examination was positive for marijuana.

You gave another urine sample for drug screening. This sample tested negative and you were returned to service. I remind you, however, that the use of prohibited drugs is contrary to company policy. You are therefore instructed to keep your system free of such substances.

During the first three years following your return to work, you may, from time to time, be required by me to report to a medical facility for further testing in order to demonstrate that you are no longer using marijuana or other prohibited drugs. Should a further test be positive, you will be subject to dismissal." (Emphasis added)

The Petitioner was working as an Assistant Crane Operator on a burro crane on June 15, 1993 when he sustained a personal injury requiring seven stitches to his scalp.

As a result of the injury, he was required to take a drug screen which tested positive for marijuana.

Under date of July 2, 1993 the Carrier issued a Notice of Investigation to the Petitioner reading:

"Dear Mr. Little:

You are hereby notified to report to the former Office of the Division Engineer, 1025 16th Street, Portsmouth, Ohio, 1:00 P.M., Wednesday, July 14, 1993 for a formal investigation to determine your responsibility in connection with your failure to comply with the instructions of the Carrier's Medical Director, G. W. Ford, M.D., and Company Policy as stated in his letter dated October 13, 1988, copy attached, addressed to you, in that you did not keep your system free of prohibited drugs in accordance with these instructions.

If you desire to have witnesses and/or representatives present at this formal investigation, please make arrangements for their presence.

Be advised this investigation has been rescheduled for Friday, August 13, 1993, same time and location."

At the request of the Organization, the Investigation was rescheduled to Monday, August 30, 1993.

Following the close of the Investigation, the Carrier notified the Petitioner that he was dismissed from all service account failure to keep "your system free of prohibited drugs" in accordance with instructions of its Medical Director and Company policy as stated in the Medical Director's letter of October 13, 1988.

Pursuant to study of the Investigation transcript, the Board concludes that the Carrier substantiated with substantial evidence the Petitioner's responsibility for his failure to comply with instructions to keep his system free of prohibited drugs as shown by the following discussion.

The Carrier's policy on drugs is set forth in its Safety and General Conduct Rules Book distributed to all employees, and contains the following:

"The employee will be instructed by the Medical Director to keep his or her system free of such drugs. That employee will be subject to dismissal if any future test is positive. An employee returned to service in this manner may be required by the Medical Department during the 5-year period following the date of his or her return to service to report to a medical facility for further testing to determine whether he or she is using drugs.

NOTE: Employees who tested positive under a previous version of this policy who were returned to service following a negative test and instructed to keep their system free of prohibited drugs will be subject to dismissal if any future test is positive."

In the Investigation transcript, we find that the Petitioner testified:

"39. Q. Mr. Little have you ever been tested positive prior to June 15th of 93, positive for prohibited drugs?

A. According to that letter, yeah I have.

40. Q. Mr. Little, are you aware of the current Company or Book of Rules and Safety Rules concerning the use of prohibited drugs?

A. Yes sir, I am aware of the rule.

42. Q. Mr. Little, were you ever or have you been aware of or been notified previously that had you ever give another positive sample or positive drug screen for prohibited drugs that you would be dismissed from railroad service?

A. According to the letter that was attached with the 6-23-93 letter thats what I received yes sir it is.

43. Q. So you were aware that those instructions existed to you?

A. Yes sir, I was."

The Petitioner clearly acknowledged that he was aware of the Rules prohibiting the use of drugs, and that if he tested positive a second time he would be dismissed from Carrier's service. He also freely acknowledged that the instruction applied to him.

Moreover, it is to be noted that the Petitioner did not deny receipt of the Medical Director's letter of October 13, 1988 the instructing him that should a further test be positive, he would be subject to dismissal. The Petitioner merely stated "I don't recollect."

All evidence points to the undeniable fact that the Petitioner was well aware that he would be subject to dismissal if he failed to keep his system free of prohibited drugs.

Insofar as the Petitioner's statement that he never received the Medical Director's April 7, 1988 letter of instructions, the record reveals that it was addressed to the exact same address as the letter dated July 2, 1993 notifying him of the formal Investigation to be held to determine his responsibility in connection with his failure to comply with instructions of the Medical Director, which he did acknowledge receiving. The record also reveals that the envelope in which the April 7, 1988 letter was sent to the Petitioner was returned to the Carrier by the Post Office stamped "undeliverable - refused." This indicates the reason he never received it is that he refused to accept his certified mail.

The Carrier cannot be held responsible for the Petitioner's refusal to accept the certified letter of April 7, 1988, and the Petitioner cannot expect to escape dismissal by hiding under the excuse he did not receive the Medical Director's instructions of April 7, 1988.

This Board finds no justification for disturbing the discipline of dismissal from service assessed by the Carrier.

The Carrier, in its Submission to the Board, presented a procedural question, but in view of our findings set forth above, we see no necessity to rule on it.

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 13th day of August 1997.