

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32427
Docket No. MW-32045
98-3-94-3-422

The Third Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. A. Jinks for alleged violation of National Railroad Passenger Corporation Rules of Conduct Rules 'A', 'D', 'G' and 'P', in connection with a positive drug screen of the urine sample collected on January 10, 1994, was arbitrary, capricious, based on unproven charges and without just cause (System File NEC-BMWE-SD-3328D AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Jinks shall be reinstated to service, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss 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.

Following an Investigation that was held on March 2, 1994, the Claimant, who was employed by the Carrier as a Trackman was "dismissed in all capacities" for violation of the following Rules: Rule A - "Obeying the Rules of Conduct"; Rule G - "Alcohol and Drugs", which, in relevant part, provides that employees, while on duty, are prohibited from . . . using or being under the influence of . . . narcotics or other mood changing substances"; Rule D - "Company Policies and Procedures; and Rule P - "Outside Activities", which provides that employees are prohibited from engaging "in any activity which interferes with their efficiency on or availability for duty or creates a conflict of interest."

The Claimant's dismissal resulted from a "follow up/quarterly" test for drugs on January 10, 1994. The follow up test took place pursuant to a Rule G Waiver Agreement that was signed by the Claimant on November 19, 1993. Under the Agreement, in relevant part the Claimant agreed to submit to, and passing "a drug and/or alcohol test . . . at least four times a year for the first two years of active service, following [his] return to duty." The Claimant further agreed that should he "test positive in any future drug/alcohol test . . . [he] will be dismissed from . . . service."

The Carrier's Nurse J. Teixeira set forth the procedures involved in the initial collection process of the sample taken on January 10, 1994. He labeled and sealed the Claimant's sample. Teixeira then initialed the security seal after which he placed a numbered tag from the chain of custody form on the bottle. A copy of the chain of custody form, that was signed by the Claimant, was placed in the sealed sample in a box which was then sealed and taken to Federal Express for shipping.

The handling of the Claimant's sample was well documented. It shows the measures taken by American Medical Laboratories, Inc. (AML) to ensure that the equipment used to test the Claimant's sample was properly calibrated. A letter from AML's Director of Forensic Toxicology, Dr. Constantino, attests that he reviewed the accompanying documentation and found ". . . all reports, chain of custody and QC records were in order. The paper work indicates that our laboratory procedures were accurately followed in the handling and testing of this sample, and that the results obtained are similarly accurate." The "litigation package" from AML provides the documentation which supports Dr. Constantino's statement.

Teixeira provided testimony explaining the steps taken to ensure the accurate and secure testing of the Claimant's sample. The documentation which is part of the record shows that the sealed sample was received by (AML) which assigned it accession number 20670443. The Claimant's sample was slotted in position 5 of batch 6838.

The handling of aliquots taken from the samples shows that the Claimant's sample tested positive for cocaine metabolites on January 11, 1994. Another aliquot of the Claimant's sample was taken and transferred for confirmation some 30 minutes later than the testing of the initial aliquot on the same date.

The group of samples was transferred from temporary storage to the GCMS extraction area. The handling of the samples is documented from extraction to the completion of the confirmation process. The confirmation testing found a concentration of 410 ng/ml of benzoylecgonine, a cocaine metabolite. These tests provide substantial evidence in support of the Carrier's charges against the Claimant.

The Organization's argument that the Carrier's Drug Policy for Testing of Employees is unreasonable was repudiated in Public Law Board No. 5139, Award 14 in which it was stated:

"The preponderating evidence in the whole record established that the Amtrak Drug Policy for Drug Testing of Employees is both reasonable and a valid exercise of the prerogatives of Amtrak Management and that the unilaterally implemented Drug Testing Policy of Amtrak is not barred by the Amtrak-BMWE Agreement or prior practice."

Moreover, the same Award concluded:

"... that the record evidence and BMWE arguments do not support the BMWE assertions that the Drug Policy does not include sufficient safeguards to guard against false positive test results."

In support of its claim that the AML results are erroneous, the Organization relies upon the results of a drug screen administered by METPATH on January 13,

1994 which was negative. The collection of the Claimant's sample was performed on January 10, 1994.

In our judgment, METPATH's test results cannot be considered probative evidence that the Claimant did not have benzoylecgonine in his system on January 10, 1994. As noted in the record, this substance is usually detectable for one to four days after the use of cocaine. Assuming that the Claimant provided the sample to METPATH, he could have fully excreted this substance in the three days before the sample was provided to METPATH.

Moreover, there is no assurance that the sample provided to METPATH was given by the Claimant. There is also no assurance that there was no tampering with the sample that was provided to METPATH.

The Organization's documentation states that the creatine concentration was below 20 ng/ml. This low concentration is to be contrasted with the Claimant's January 10, 1994 sample which was 113 ng/ml, roughly five times the concentration of the January 13, 1994 sample. The creatinine level provides a measure of the relative dilution of an individual's urine. The extraordinary degree of dilution of the Claimant's urine in three days leads this Board to believe that the negative result of the January 13 drug screen is unreliable in determining whether there was cocaine in his system on January 10, 1994.

On November 19, 1993, the Claimant agreed that if he tested positive in any future drug/alcohol test during "the first two years of active service following [his] return to duty", he would be dismissed from service. The Board cannot ignore this self-executing language in the Rule G Waiver Agreement. As the Referee observed in Public Law Board No. 5341, Award 1:

"By agreeing to these terms, Claimant, in effect, passed judgment on his own future conduct and the penalty to be enforced if there was a relapse."

It is the Board's judgment that the claim be 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 January 1998.