

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32453
Docket No. SG-32974
98-3-96-3-356

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Grand Trunk Western Railroad Incorporated

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Grand Trunk Western Railroad (GTW):

Claim on behalf of M.F. Embry for reinstatement to service with payment for all lost time, account Carrier violated the current Signalmen's Agreement, particularly Rule 42, when it did not provide the Claimant with a fair and impartial investigation and imposed the harsh and excessive penalty of dismissal from service against the Claimant in connection with an investigation held on June 16, 1995. Carrier's File No. 8390-1-89. General Chairman's File No. 95-200-GTW. BRS File Case No. 9764-GTW.”

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 or about August 23, 1994 the Claimant, a Signal Maintainer with approximately five years of service, was returned to service despite testing positive for drugs after he executed a leniency reinstatement agreement. Pursuant to the agreement the Claimant admitted violating certain Rules, agreed that he would be reinstated with full seniority and vacation rights but with no backpay, that he would be required to pass a return-to-duty physical exam, that he would refrain from using "narcotics or intoxicants or other illegal substances while on or subject to duty," that he would be subject to random body fluids and breath testing for a period of two years, that if any such tests detected any quantity of narcotics, alcohol or other illegal substances he would be deemed to have violated certain Rules, and that if any of the foregoing terms of the agreement were violated he would be returned to dismissal status "with no further right of appeal."

On or about June 8, 1995 the Claimant was required to submit to a drug test. The urine sample that he provided was clear and without any "apparent frothiness" and did not register on the temperature scale necessary for a valid sample. In addition the filled sample cup was barely warm to the touch. The Claimant was told that the sample was unacceptable and he would not be permitted to leave the clinic until he provided another sample. At that point the Claimant began to leave the clinic asserting that his truck was parked illegally and that he had to move the vehicle. The technician informed the Claimant that if he left he would not be permitted to provide another sample. Despite the technician's comments, the Claimant left the clinic saying nothing more. Later that day the Claimant saw his personal physician who diagnosed that the Claimant had suffered an anxiety attack when he appeared at the clinic.

The following day the Claimant was contacted by the Carrier's Engineer of Signals to determine what had happened. However, the Claimant did not explain why he left the clinic the prior day without leaving another urine sample.

The Organization contends that the Claimant did not intentionally defy the instructions of the technician when he appeared for his drug test, but that the Claimant was medically unable to provide another sample, a condition which was confirmed by the Claimant's personal physician and not rebutted by the Carrier. In the alternative, the Organization asserts that discharge under the circumstances is excessive because no progressive discipline was utilized. The Carrier on the other hand contends that the Claimant's asserted physical inability to provide a urine sample is a pretext because the record establishes that the Claimant was already extremely upset at the prospect of

being asked to provide a urine sample at the time in question and his subsequent visit to his personal physician proves nothing more than he saw the doctor.

We agree with the Carrier upon review of the record that it has met its burden of proof to support the Claimant's removal from service. The record clearly shows that the Claimant did not assert any medical condition until after he left the clinic and failed to follow the technician's instructions. Indeed the only asserted justification for his departure from the clinic was the claim that his truck was illegally parked. Moreover, the record is equally clear that at the time he was summoned to the clinic for the purpose of submitting to the drug test and when he was asked to provide a second sample he was "... in a big rage automatically. . . ." Thus, the inescapable conclusion is not that the Claimant was medically incapable of providing another sample, but that he chose to do so as an expression of his anger. Under such circumstances, and particularly in light of the terms of the leniency reinstatement agreement that operated to preclude any alternative to a return to dismissal status without right of appeal in the event of a violation by the Claimant, the claim cannot be sustained.

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.