

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 32569  
Docket No. MW-33534  
98-3-96-3-1098

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

(Brotherhood of Maintenance of Way Employees

**PARTIES TO DISPUTE:** (

(Consolidated Rail Corporation

**STATEMENT OF CLAIM:**

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Welder S. R. Floyd for alleged failure to follow instructions given in a ' . . . letter dated February 24, 1995 to you by T. Nowosiwski, MD whereas you failed to comply with Conrail's Drug and Alcohol Testing Policy on October 5, 1995.', was arbitrary, capricious, without just and sufficient cause and at a hearing that was neither fair nor impartial (System Docket MW-4068).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall receive the remedy prescribed by the parties in Rule 27, Section 4."

**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 Claimant was advised to attend an Investigation to determine facts and place responsibility, if any, in connection with his failure to comply with Conrail's Drug and Alcohol Testing Policy on October 5, 1995. According to the letter of charge the Claimant was required to follow instructions given to him in a letter which was dated February 24, 1995. An Investigation was held on November 1, 1995. On November 13, 1995 the Claimant was advised that he had been found guilty as charged and he was dismissed from service. The discipline was appealed by the Organization in the proper manner under Section 3 of the Railway Labor Act and the operant Agreement up to and including the highest Carrier officer designated to hear such. Absent settlement of this claim on property it has been docketed before the Third Division of the National Railroad Adjustment Board for final adjudication.

On February 24, 1995 the Claimant was sent the following letter by the Medical Director of the Carrier which is cited here in pertinent part:

"In my letter to you dated October 10, 1994 I advised you that the drug screen urinalysis conducted as part of your October 4, 1995 medical evaluation was positive for cocaine.

You recently gave another urine sample for drug screening. This recent sample tested negative and you are qualified for return to service on February 24, 1995.

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 will, from time to time, be required to report to a medical facility for further testing in order to demonstrate that you are no longer using cocaine or other prohibited drugs. Should any further drug test, including a test conducted as part of any medical examination . . . be positive, you may be subject to dismissal by your department for failure to follow proper instructions...."

The Claimant's October 5, 1995 physical took place at Corporate Health Services which is a medical sub-contract facility used by the Carrier. According to memos written by two employees at Corporate Health Services, the following occurred. The Claimant provided a urine sample for a drug screen which was cold. Thus it could not be used for a proper test. Upon being requested to provide a new sample, the Claimant refused and left the facility.

According to arguments by the Organization, the Claimant was not afforded a fair and impartial Investigation. Review of the record fails to persuade the Board that such was the case. The Organization did request that the Carrier secure the presence of the employees of Corporate Health Services to be present at the Investigation. The Carrier responded that since these individuals were not Carrier employees they either would not, or could not, fulfill such request. The Carrier did suggest what the Board believes to have been a reasonable alternative by offering to have had one of the employees answer questions by phone during the time frame of the Investigation. While such procedure may not have been ideal, it did reasonably fall within accepted protocols for collecting evidence to be used by forums such as the instant one which frames Awards on basis of substantial evidence. The Board cannot reasonably conclude, in this case, that the Claimant's due process rights were violated by anything which occurred at the Investigation itself.

Argument by the Organization is that the Claimant was not covered by the Carrier's drug testing policies on October 5, 1995 because he did not have written authorization from his doctor to return to work at that time. According to precedent cited by the Organization, there have been a number of recent Awards (Third Division Awards 31534 and 31954) off this Carrier which have held that absent written release from an employee's Doctor, following off-work occupational disability of 15 days or more as outlined by this Carrier's own policy itself, the Carrier cannot discipline an employee for refusing to take a drug screen test. The Organization's argument is: a non-employee cannot be sanctioned for refusing to follow company policy. After study of these two Awards, and the Organization's arguments, the Board concludes as follows.

First of all, the Carrier states at one point, in correspondence on the property, that the Claimant to this case had been cleared for duty by his Physician. At another point, Ballard of Corporate Health Services writes that the Claimant had been cleared by his personal Physician to return to work. The Board can find no written documentation to support such claims nor does the Carrier dwell on this important point

in its Submission to this Board. Further the medical evaluation made after the October 5, 1995 physical shows that the Claimant continued, after that date, to experience certain problems with his carpal tunnel syndrome. On basis of evidence the Board will conclude that this case does fall within the purview of the precedent set by Awards 31534 and 31954.

Secondly, however, this Claimant had a three year window period for being tested for drugs which extended from February 24, 1995 onward which clearly differentiates his situation from those described in the two Awards cited above. However, the language used by the Carrier's Medical Director in establishing the testing window period for the Claimant does, the Board believes, provide additional support for application of precedent found in Awards 31534 and 31954 to this case. The Carrier's drug policy specifically tailored for the Claimant states that "... during (the Claimant's) first three years following (his) return to work. . . ." he would be required to submit to drug screens. On October 5, 1995 the Claimant was not working. He was collecting no compensation. And there was no written doctor's clearance for him to return to work at that point.

Given such considerations the Board is constrained to conclude that it was improper for the Carrier to have disciplined the Claimant for alleged insubordination on October 5, 1995. The Claimant could not have been insubordinate. He was not in a working relationship with the Carrier at that point.

There is no information of record before the Board that the Claimant has ever been cleared by his personal Physician to return to work. This Board has no authority to authorize such clearance. What this Board does have authority to do is to rule that once the Claimant is cleared to return to work by his personal Physician, he then has the right to reapply to work as member of the Maintenance of Way craft with the Carrier. If the Claimant has written clearance to return to work by his Physician, and upon presentation of such to the Carrier, the Carrier then has the right to require the Claimant to take a return-to-duty physical. When the Claimant returns to work his seniority, going back to the date of July 18, 1995, shall be unimpaired. The payment of relief, in accordance with precedent set in Awards 31954 and 33534, because of this sustaining Award, shall be as follows. The Claimant shall be compensated backpay from the date his personal Physician states, in written document, that the Claimant would have been eligible to return to work, and to have taken his physical, up to the date that physical and subsequent return to work is accomplished. If the Claimant fails the

physical, including a drug screen under conditions outlined in the foregoing, and if the Carrier applies sanctions outlined in its February 24, 1995 letter to the Claimant and discharges him, then there shall be no monetary relief whatsoever attached to this Award.

**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 29th day of April 1998.**