Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36378
Docket No. MW-36582
03-3-01-3-89

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

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The discipline (removed from service on June 16, 2000 and subsequent dismissal) imposed upon Mr. A. Corral for alleged failure to follow the 'Alcohol and Drugs' Standard in Amtrak's Standards of Excellence and Rule 1.5 of the General Code of Operating Rules for Maintenance of Way Employees, Amtrak Intercity, in connection with a random drug test sample provided on June 8, 2000 was arbitrary, capricious, based on unproven charges and in violation of the Agreement (Carrier's file BMWE-408D NRP).

2. As a consequence of the violation referred to in Part (1) above, claimant A. Corral shall receive the remedy prescribed by the parties in Rule 15, Section 6."

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 employed for eight years by the Carrier as a Machine Operator within the Maintenance of Way and Structures Department. On January 5, 2000, he signed a Rule G Waiver following his being charged with the use of marijuana. Pursuant to the Waiver, he agreed that he would be subject to random tests for drugs and alcohol for two years and would be dismissed if he tested positive in any future drug/alcohol test.

On June 8, 2000, the Claimant was tested for controlled substances. The results of his test came back positive for cocaine. The Claimant asserts that on June 6 he had had extensive dental work during which he was administered the anesthesia Lidocaine and that he explained this to the Amtrak Medical Review Officer who advised him of the results of the test. The Medical Review Officer told him to contact the dentist to ascertain if the anesthesia contained cocaine. Because the dentist was on vacation, the Claimant was unable to obtain the information within the time set by the Carrier and the result of the test was verified as positive. Several days thereafter he submitted a note from the dentist attesting merely to the fact that he had been administered Lidocaine, but not answering the question as to whether Lidocaine contained cocaine.

By letter dated June 16, 2000, the Claimant was charged with failure to follow the "Alcohol and Drugs" Standard in Amtrak's Standards of Excellence. An Investigation was held on August 1, 2000, and the Claimant was found guilty of the charges by decision dated October 2, 2000. He was terminated by letter dated October 3, 2000.

The Organization appealed the Hearing Officer's Decision by letter dated October 5 and a conference on the appeal was held on November 16. The appeal was denied by letter dated November 28, 2000.

The Claimant denies using cocaine and alleges that the anesthesia that was administered to him during his dental procedure was responsible for the false positive. The Claimant relies on a note from the dentist stating, "a normal dose of Lidocaine was administered for complicated cleaning" and a letter from his family practitioner Dr. Bourand that "in my opinion, [the positive test result] was related to an injection of local anesthesia (Lidocaine 2%) administered by his dentist on June 6, 2000."

The Claimant questions why the Medical Review Officer told him to solicit information from his dentist about the content of the anesthesia and then denied that any such anesthesia could result in a false positive.

The Organization also argues that the Carrier's admitted failure to hold a conference concerning the Organization's appeal to the Carrier's Director of Labor Relations within 30 calendar days of the appeal is in itself sufficient to overturn the Carrier's imposition of discipline in this case.

The Carrier relies on the medical testimony of Amtrak Medical Review Officer, Dr. Reed, that Lidocaine is not related to cocaine and thus could not have caused the Claimant to test positive. Both a screening test and a confirmatory test were performed on the test sample. The confirmatory test is able to detect the breakdown product that is found only in cocaine, and not the local anesthetic Lidocaine.

We find that the Carrier met its burden of proving by substantial evidence that the Claimant tested positive for cocaine and that it was not the anesthesia that precipitated the result. Considering all the medical evidence presented by the Claimant, even that presented to the Carrier after the due date, there is no credible medical evidence that explained why the anesthesia would have caused a false positive result. The dentist, who would have been in a position to know, did not support the Claimant's position, but rather stated only that Lidocaine was administered. The family practitioner gave no support for the conclusion that the test result was related to the anesthesia. Given the conflict between the brief summary note from Dr. Bourand and the detailed expertise and direct testimony of Dr. Reed, we credit Dr. Reed. Following the Claimant's prior execution of the Rule G Waiver, dismissal is warranted.

As to the Organization's argument that the appeal conference was untimely held, we find that the Organization failed to raise the issue before the Director of Labor Relations at the meeting on November 16, 2000 or in its Notice of Intent to the Board on February 22, 2001. Further, under the Agreement, the Carrier has 30 days from the date of the conference to render a decision and thus is allowed 60 days (30 for the conference plus 30 for the decision) from the date of the appeal of the Hearing Officer's decision to the decision on appeal. In the instant case, the decision of the Director of Labor Relations was rendered within 12 days of the conference and thus even with the arguably late conference, almost one week less than 60 days from the date of the appeal. Thus, there was no prejudice to the Claimant.

The Agreement was not violated.

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 18th day of February 2003.