

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36693
Docket No. MS-36424
03-3-00-3-600

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Kevin B. Sanders
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

“Wrongful termination.”

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.

By letter dated November 17, 1999, the Claimant, a LSA, was advised to attend an Investigation concerning charges that he failed to follow his Supervisor's instructions to take a periodic drug test on November 11, 1999 and did not comply with the Carrier's Alcohol and Drug Policy. An Investigation commenced on November 23, 1999, was recessed, and reconvened on December 3, 1999, at which time the Claimant, his Supervisor L. Garland, and his Union Representative S. Schweitzer testified as to the relevant facts underlying the charges. By letter dated December 10, 1999, Hearing Officer R. Butler issued his decision upholding the

charges, which resulted in his Manager's decision to terminate him from service immediately. An appeal was initiated by the Organization on December 27, 1999, which was processed on the property until the Carrier's June 19, 2000 denial, at which time the Organization ceased handling the matter. The Claimant appealed this matter directly to the Board.

The underlying facts developed during the Investigation reveal that on Friday, November 11, 1999, the Claimant was under pay and attending a class at Metro Plaza Hotel in Los Angeles, California, conducted from 9:00 A.M. to 5:00 P.M. Due to a meeting previously scheduled with Schweitzer and Carrier Representative B. Hanna at 4:00 P.M. at the Crew Base, across the street from the Metro Plaza, he was released early from his class. The Claimant admits that he was tense and stopped at a bar and had two Bloody Mary's prior to attending the meeting. At such meeting held in Hanna's office, an agreement was reached concerning a Notice of Intent (NOI), which had to be reduced to writing for signature. The Claimant and Schweitzer left for a 10-15 minute break while the paperwork was completed, during which time the Claimant was called into the Crew Base Supervisor's office by Garland and informed that he had to pick up a MED-1 form for a periodic drug test, which was to be performed that day. The Claimant explained he had to return to a meeting with Hanna, and was told to wait briefly to get the form. He left without the form, and informed Schweitzer in the parking lot that he had been directed to take a test and did not want to.

The Claimant testified that he told Schweitzer he had consumed two drinks; Schweitzer testified that he assumed it was a drug issue and was not told it involved alcohol, as he would have told the Claimant to drink a gallon of water and go for the testing at the time. Schweitzer stated that the Claimant did not look, smell or act intoxicated. Instead, Schweitzer and the Claimant agreed that he would mark off on the Red Book to solve the problem, which he did after signing the NOI papers. The Claimant left the base without taking the periodic test and drove home, which was 400 miles north of Los Angeles. The Claimant experienced car trouble and did not arrive home until Saturday evening, November 12, 1999. Schweitzer had left a message for a return call immediately and he explained to the Claimant that he was informed that the Red Book program did not cover periodic testing, and that the Claimant should submit to a test as soon as possible Monday morning. The Claimant did so.

The record reflects that the Claimant signed a Conditional Reinstatement Agreement on March 30, 1999 stating:

"I understand, as a condition of returning to work, I will be subject to unannounced drug/alcohol tests at least four times a year for the next two years of active service. Furthermore, I understand that if I have another positive test result, I will be subject to dismissal."

The Claimant, who was present at the Hearing with his wife, asserts that he was on his off day attending a class off site, when he consumed two beers with lunch, which did not intoxicate him, and engaged in no misconduct while on premises attending his meeting. The Claimant argues that he followed the advice of his Union representative to Red Block rather than take the drug test, which led to this unfortunate set of events resulting in his termination, and notes that he took the test immediately after being informed that Red Block did not excuse him from testing on that occasion. The Claimant alleges that he did not understand his Conditional Reinstatement to apply to alcohol because it resulted from the presence of a small amount of marijuana in his system, and that is what he thought he was being tested for. He notes that marijuana would still be in his system at the time he tested on Monday, and the results of the test were negative. The Claimant requests reinstatement to his job and agrees to continued random drug testing.

The Carrier contends that the Claimant fully understood his responsibility to take periodic drug and alcohol tests when requested by his Supervisor under the terms of his Conditional Reinstatement, as well as the consequences, and notes that the November 11, 1999 request was his third that year and he knew the procedure to follow. The Carrier argues that the record supports the conclusion that the Claimant was guilty of the charges by failing to follow Garland's instruction to take the test on November 11, 1999, although he understood the instruction, and consuming alcoholic beverages before coming on the property, both of which violate Carrier's Rules and may result in immediate termination, relying on Public Law Board No. 4788, Award 76. The Carrier asserts that refusal to be tested is considered a positive test result, citing Public Law Board No. 4788, Award 41. It notes that the Conditional Reinstatement covered both alcohol and drug testing, regardless of the nature of his initial offense, Public Law Board No. 4979, Award 26.

The Carrier asserts that much of the Claimant's argument before the Board is contradictory to the evidence established at the Investigation, and that he has shown no basis to mitigate the penalty assessed. See Public Law Board No. 4236, Award 27.

After a careful review of the record, the Board is of the opinion that, despite the thoughtful presentation presented to the Board on the Claimant's behalf, the record evidence supports the Carrier's finding that the Claimant was guilty of the charges for which he was disciplined. By the Claimant's own admission, he consumed two alcoholic beverages just prior to coming onto the Carrier's property for what he knew was going to be a formal meeting with a Carrier official concerning a Notice of Intent to be issued to him. He is, or should be, aware that when he is on Carrier property, regardless of whether he is on duty or on a day off, he is subject to a spot check and a request to take a periodic drug test. (See Third Division Award 15049.) He understood the terms of his Conditional Reinstatement, and knew that he was required to take the test once he was requested to do so by his Supervisor and that a positive test result would subject him to dismissal. To say that he only thought he was subject to testing for drugs, not alcohol, is disingenuous when his conduct reveals that he sought to avoid taking the drug test after consuming alcohol.

The Board discovered a number of inconsistencies between the Claimant's argument and the actual Investigation transcript evidence. Additionally, the Union representative did not confirm that the Claimant told him he had two drinks and did not want to take the test, nor does the record support the Claimant's assertion that he drank two beers during lunch. Garland's request that the Claimant wait for the forms to take to the clinic occurred during the break in his meeting, not prior to it, and the fact that the Claimant had to return to sign some papers was no basis to ignore his Supervisor's direction to take the forms for testing. Regardless of the allegation of whether or not the Claimant may have received improper advice about Red Blocking from Schweitzer, it is clear that he sought out an excuse and method to avoid his responsibility to submit to periodic testing on November 11, 1999, despite knowing that a refusal to test is considered a positive test, and that such could lead to his termination. Despite the Claimant's apparent efforts to make positive strides in his life since his dismissal, the Board can find no basis for concluding that the Carrier was arbitrary or capricious in terminating the Claimant

under the circumstances of this case, or for mitigating the penalty agreed to by the Claimant in his Conditional Reinstatement. While the Board wishes the Claimant the best of luck in his future endeavors, we must deny his claim in this case.

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 August 2003.