

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37730
Docket No. CL-38325
06-3-04-3-265**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(Indiana Harbor Belt Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-13044)
that:

- (a) The Carrier acted in an arbitrary and capricious manner when it unjustly assessed discipline of dismissal on Clerk Donna L. Bevell on January 21, 2004.
- (b) Claimant's record be cleared of the charges brought against her November 24, 2003.
- (c) Claimant be restored to service with seniority and all other rights unimpaired and she be compensated for wage loss sustained in accordance with the provisions of Rule 36.”

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 key facts leading to the Claimant's dismissal are not in dispute. A sample submitted by her for drug testing in September 2003 returned positive for usage of amphetamine and marijuana. She entered EAP counseling and treatment shortly thereafter. The Carrier's policy allowed her from 45 to 125 days in which to complete treatment and successfully return to service. Although the end date of this range was February 5, 2004, the Claimant and her Counselor completed her rehabilitation plan early. On November 11, 2003, the counselor wrote a letter to the Carrier with certain provisions. It notified the Carrier that an acceptable back-to-work plan had been developed. The Claimant agreed to remain abstinent from all mood-altering drugs. The Claimant agreed to comply with follow-up drug testing as prescribed by the Substance Abuse Program. The Claimant agreed that she would be considered to be in non-compliance if she failed to complete the treatment program. The Claimant also agreed that a Carrier official would be notified if the Agreement was breached in any way. The Claimant also signed the letter to acknowledge her understanding of the Agreement.

Apparently in an effort to resume gainful employment as soon as possible, the Claimant stood for a return-to-work physical on November 17, 2003. The Carrier's return-to-work requirements called for a negative drug test during the physical. Its Drug Policy subjected employees to dismissal for a second positive drug test. The Claimant's urine sample submitted in that examination tested positive for amphetamine. The Claimant was dismissed following an Investigation that produced the foregoing facts. At the time of her dismissal, the Claimant had somewhat more than eight years of service with the Carrier.

The Organization and the Claimant advanced a number of procedural objections to challenge the discharge. Our review of the record does not reveal any procedural irregularities of significance. There was no violation of the Claimant's alleged privacy rights because the Claimant authorized the EAP Counselor, in writing, to notify the Carrier of any non-compliance by her with the Agreement. No disparate discipline was established in the record. No gender-based discrimination

was established in the record by virtue of her former position being filled by a male in accordance with the applicable seniority Rules. Nothing in the record established that the Claimant was entitled to continue using prohibited drugs while in treatment so long as she had a negative test prior to February 5, 2004. Finally, the record does not show any shortcomings in the collection, handling, or testing of the Claimant's urine sample; it does not contain any challenges to the validity of the test results.

It should also be noted that the Claimant was given several opportunities to present testimony. For the most part, she declined to answer by saying "... I plead the fifth ..." or words to that effect. Although the Hearing Officer correctly counseled the Claimant and her representative about the applicability of the Fifth Amendment to the Investigation, the Claimant nevertheless continued to decline to testify about material information. The self-incrimination clause of the Fifth Amendment to the United States Constitution reads as follows:

"... nor shall [any person] be compelled in any criminal case to be a witness against himself, ..." (Emphasis added)

Given that the Investigation in question involved a private employment matter pursuant to the applicable Collective Bargaining Agreement, we have no proper basis for concluding that the Claimant was denied a fair and impartial Investigation because she was subjected to questioning during the Investigation.

On the record before us, we find the Carrier's decision to dismiss the Claimant from service was supported by substantial evidence in the record. Her claim, therefore, must be denied.

AWARD

Claim denied.

Form 1
Page 4

Award No. 37730
Docket No. CL-38325
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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 23rd day of February 2006.