

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38368
Docket No. SG-39618
08-3-NRAB-00003-060405
(06-3-405)

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Kansas City Southern Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern:

Claim on behalf of D. A. Luman, to return him to his former position with compensation for all lost wages, with his seniority and benefits restored, and the removal of any mention of this matter from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 47, when it failed to provide a fair and impartial investigation evident when it issued the harsh and excessive discipline of dismissal against the Claimant without first meeting the burden of proving its charges as a result of an investigation held on April 20, 2005. Carrier’s File No. K06056013. General Chairman’s File No. 05-043-KCS-185. BRS File Case No. 13538-KCS.”

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's job, a safety-sensitive position, with the Carrier was to maintain and repair its signal system. He was originally dismissed from service following a formal Investigation regarding his testing positive for a controlled substance in February 2001, in a random drug and alcohol test. On December 17, 2001, the Claimant signed a Leniency Reinstatement Agreement (LRA) in which he agreed to "follow-up drug and alcohol testing for a period of five (5) years." The LRA provided that should he fail any of the drug and alcohol tests during the five year period, the LRA "will be revoked and he will revert to the status of a dismissed employee without further disciplinary hearings."

On January 19, 2005, in an FRA follow-up drug and alcohol test the Claimant tested positive for amphetamines. Following an Investigation held on April 20 and by letter dated April 29, 2005, the Claimant was notified that the charges against him were proven and that he was dismissed from service for violation of the LRA and Rule 1.5 of the Consolidated Code of Operating Rules. Rule 1.5 prohibits the use or possession of alcoholic beverages on duty or on company property and forbids employees to have any measurable alcohol in their breath or to have any prohibited substances in their body fluids when reporting for duty, while on duty, or while on company property.

The Organization contends that the January 19, 2005, drug test was not a valid test because of several discrepancies in the chain of custody and the ID numbers used by the testing laboratory. The Organization also argues that the Claimant was not allowed to choose a lab for testing of his split specimen and that the Carrier failed to provide documentation that the Medical Review Officer was certified. As evidence that the chain of custody was not established the Organization notes a telephone conversation with the assistant of the Medical Review Officer in which the assistant addressed the Claimant by the wrong name.

The fact that a doctor from the lab called the Claimant by the wrong name, the Organization contends, shows that the lab's record-keeping was flawed.

The Carrier maintains that there was substantial credible evidence of the Claimant's guilt. It asserts that the lab reports entered into evidence showed 7,197 NG/ML of amphetamines in the Claimant's urine specimen, a positive test, and that the integrity of the chain of custody and the lab procedures was established.

The Board finds substantial evidence to support the Carrier's determination that the test results showing that the Claimant tested positive for amphetamines were valid. On the date the specimen was collected, January 19, 2005, the Claimant certified on Copy 2 of the Federal Drug Testing Custody and Control Form (CCF) that the bottle containing his urine specimen was sealed with a tamper-evident seal in his presence and that the information affixed to each specimen bottle was correct. The CCF is a multi-copy document, on each copy of which is imprinted the specimen ID number together with a bar code. The Collector of the specimen is required to write the last four digits of the donor's Social Security number (hereinafter "individual ID number") in the appropriate space on the CCF. The specimen bottle must be labeled and sealed, and the specimen ID number must be written on the label or seal. The sealed specimen bottle together with Copy 1 of the CCF, containing the specimen ID number and the Claimant's individual ID number written on it, was sent by Federal Express to Lab One, the testing laboratory for the primary specimen.

An employee of Lab One certified on the CCF that the specimen was received at the lab on January 21, 2005, and that the primary specimen bottle seal was intact. There is no reason to believe that the specimen received at Lab One was not the one that was collected from the Claimant on January 19, 2005. This is so because the specimen arrived at Lab One in the same container as the CCF with the Claimant's individual ID and unique specimen ID number on it. There is no reason to suspect that somehow some other specimen bottle was substituted for the Claimant's and sent to Lab One with the CCF containing the specimen ID number and individual ID number belonging to the Claimant. In addition, had such an unlikely event occurred, the label on the specimen bottle would contain a different specimen number than the number on the CCF, and it would be expected that such

substitution would be discovered before the test was done. In this connection it is to be noted that the Scientist at Lab One responsible for the testing certified on the CCF copy containing the positive test results for amphetamines as follows: "I certify that the specimen identified on this form was examined upon receipt, handled using chain of custody procedures, analyzed, and reported in accordance with applicable Federal requirements."

The Organization attaches significance to the fact that the Medical Review Officer's report dated January 25, 2005, contains a number, 3226175, that does not appear on the CCF. The Board fails to see how the presence of that number in any way casts doubt on the integrity of the chain of custody. The Medical Review Officer's report contains the Claimant's ID number and the same specification ID number as on the CCF. That shows that the MRO was dealing with the Claimant's specimen. So long as the same individual ID number and the same specification ID number appear on the MRO report as on the CCF there is no reason to doubt that the MRO was dealing with the correct specimen. The fact that the MRO report identifies the specification number as "Chain of Custody" instead of "Specification" does not indicate that the MRO was dealing with another sample. The important thing is that the eight digit number is the same number as is found on the CCF. The word "Specification" does not appear at all on the MRO report. This indicates that, for whatever reason, the MRO (or the corporation he works for) decided to designate the eight digit number in question "Chain of Custody" instead of "Specification." Further corroboration that the MRO worked with the correct specimen is that his report shows a collection date of January 19, 2005, i.e., the date that the Claimant's specimen in question was taken.

The testing method used by Lab One, gas chromatography and mass spectrometry, is considered to be an accurate and highly reliable method of testing for controlled substances and their quantity in a particular specimen. In the present case both the primary specimen and the split specimen tested positive for amphetamines. The split specimen was tested at a different lab than the primary lab. Although, in accordance with the applicable federal requirements, the split specimen is tested only for whether it contains a prohibited substance and not for the quantity of the substance, nevertheless it was a positive test. Where there were two positive test results from two different labs and no showing of a break in the

chain of custody, the Board is not able to say that there was not substantial evidence for the Carrier to conclude that the Claimant violated his December 17, 2001 LRA and Rule 1.5 of the Consolidated Code of Operating Rules, as revised by Kansas City Southern System Timetable No. 6.

There is a contention by the Organization that the Claimant was not permitted to choose the laboratory that tested the split specification. The Board is not persuaded that there is substantial evidence that the Medical Review Officer violated federal regulations by denying the Claimant the right to choose the certified lab to do the split testing. First, it is difficult to believe that the MRO would jeopardize his certification by violating a basic rule of the testing procedure that gives an individual in the Claimant's position who has tested positive the right to choose the certified lab that will test the split specification. The Board believes that the more likely explanation is that there was a failure of communication on this subject. The Board finds it significant that in his testimony the Claimant failed to give the name of the lab that he allegedly wanted to do the test instead of Northwest Toxicology. Without even the name of another laboratory in the record that was supposedly the choice of the Claimant to test the split specimen, the Board is unable to find that the Claimant was denied the right to choose the lab to conduct the split testing.

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 20th day of November 2007.