

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39132
Docket No. CL-39927
08-3-NRAB-00003-070122
(07-3-122)

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna 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 Brotherhood (GL-13173) that:

- (a) The Carrier violated the Indiana Harbor Belt Railroad Clerks rules agreement, effective December 1, 1949, as amended; when as a result of an investigation held on April 4, 2006 Claimant E. Hult was dismissed from employment in all capacities; and,
- (b) As a result of the Carrier’s arbitrary dismissal of Claimant Hult it will now reinstate him with all rights and benefits as well as make him whole for all lost wages and all out of pocket health and welfare expenses incurred by him.”

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 by the Carrier on November 22, 1976, and at all relevant times held the position of Yard Clerk.

The record discloses the fact that as a direct result of the Claimant's no-call, no-show action on January 25 and 26, the Carrier directed him to report for a clinical evaluation on January 27, 2005. The Carrier's decision to have the Claimant clinically evaluated was based on its concern that as a Yard Clerk, he was required (among other responsibilities) to walk the yards at times to check cars, and accordingly, the Carrier felt duty bound to insure that he was medically fit to perform the essential functions of his job. The record established that as a regular part of any clinical evaluation, employees are drug tested. Accordingly, the Claimant, as part of his clinical evaluation, submitted a urine sample to be drug tested. The drug test was conducted by an independent laboratory using a gas chromatography/mass spectrometry (GC/MS) analysis. As required by federal regulation as well as Company Policy, the laboratory results were then reviewed by the Carrier's Medical Review Officer (MRO) who confirmed the test was positive for the presence of cocaine. The MRO so informed the Claimant as well as appropriate Carrier personnel. By letter dated February 8, 2005, the Carrier's Director of Safety and Security advised the Claimant that he was medically disqualified from service as of February 7, 2005. The Claimant was given specific written instructions that on or before June 8, 2005, he was to have completed the initial phase of the treatment plan developed in conjunction with the IHB Substance Abuse Professional and submit negative urine and breath samples as part of a return-to-duty medical examination. The Claimant was advised that, provided he satisfied the Carrier's conditions as set forth above, he would thereafter be returned to duty and subject to unannounced drug and alcohol tests for up to five years following the date of his return to duty.

The Claimant's failure to comply with the instructions set forth in the February 8, 2005 letter prompted the Carrier to send him a letter dated June 14, 2005 directing him to ". . . contact the Employee Assistance Program vendor . . . make an appointment with a counselor and complete a face-to-face

evaluation with a substance abuse professional on or before June 30, 2005.” The Claimant was further informed that failure to present yourself for this evaluation on or before June 30, 2005, may be construed by the Carrier as a failure to comply with instructions, which may jeopardize your status as an employee.” The Claimant did as instructed, and the Substance Abuse Professional informed the Carrier in writing on August 19, 2005 that the Claimant could be returned to service, pending a medical examination which included a urine sample and breath alcohol test. The Claimant was subsequently medically evaluated, and his urine sample tested negative, thus qualifying the Claimant to return to service on August 29, 2005.

On November 22, 2005, the Claimant provided a urine specimen for a follow-up test as required by Federal Regulations and the Carrier’s policy. The test results came back positive showing the presence of cocaine in the Claimant’s system. The test was conducted by an independent laboratory utilizing GC/MS analysis. The laboratory finding was reviewed by the Carrier’s MRO who confirmed the test as positive. The MRO thereupon informed the Claimant as well as appropriate Carrier personnel of his findings and conclusions. This result represented the Claimant’s second positive drug test within the five year period noted above.

By letter dated November 29, the Claimant was summoned to an Investigation scheduled for December 7, 2005. The notice was sent certified mail to the Claimant’s last known address of record. The Investigation was subsequently postponed three times at the request of the Organization and once at the Carrier’s request. In each instance, letters rescheduling the Hearing were sent to the Claimant’s last known address by Certified Mail, and each such letter was returned to the Carrier marked “unable to forward” or “refused” or “return to sender.” Ultimately, the Investigation was conducted on April 4, 2006. The Claimant was not present during the Investigation.

By letter dated April 24, 2006, the Claimant was informed of the results of the Investigation. In relevant part, he was advised that “[b]ased on the record of that hearing, it has been determined that substantial evidence established that you are responsible for your failure to refrain from the use of prohibited substances as evidenced by the positive test result reported by the Medical Review Officer as positive for cocaine metabolites on November 28, 2005 . . . in violation of Safety Rule 2010 of

the current Safety Rules Stations and Other Clerical Employees, effective December 1, 2004; in violation of the IHB's Drug and Alcohol Policy, effective January 1, 1996; and in violation of the instructions issued to you in a letter dated August 30, 2005. . . .” The Claimant was dismissed from service on April 24, 2006.

The Organization raises a number of objections as a means of challenging the Claimant's discharge.

The first objection raised by the Organization asserts that the Claimant's Agreement due process rights were not honored during the Investigation. In this regard, the Organization maintains that the Carrier had no right to have an “observer” attend the Investigation over the Organization's objection. We cannot find that the observer's presence tainted the Investigation such that it could be said that the Claimant's Agreement due process rights were abridged. In this regard, the Hearing Officer directed the observer, on the record, to sit passively and remain silent throughout the process. The observer did as directed.

The second objection raised by the Organization asserts that the Claimant had not been apprised of the charges. Under the specific facts of this case, the Board finds the objection without merit. Here, the Carrier on at least four occasions placed the notice of charges in an envelope, addressed to the Claimant's last known address on file, placed the proper postage on the envelope, and mailed it Certified. In each case the envelope was returned, and in one such instance it was marked “refused.” Under these facts, the Board finds the Claimant culpable because he either failed to notify the Carrier of any new address or made a conscience decision to reject and/or refuse the attempted delivery of the certified mail.

Next, the Organization challenges the validity of the testing procedures. The record reflects the fact that the Carrier utilized the Department of Transportation's “Gold Standard” in the manner and method associated with the Claimant's November 21, 2005 drug test in that it used an independent laboratory, confirmed the presence of a prohibited substance through use of the GC/MS testing procedure, and finally, confirmed the testing protocol as well as the final determination of the presence of cocaine in the Claimant's urine sample through the use of its MRO. Accordingly, the

Board cannot find any shortcomings in the collection, handling or testing of the Claimant's urine sample.

Finally, Public Law Board No. 4024, Award 13 (involving not only the parties to this dispute, but also the very same Claimant, i.e., E. E. Hult) relied upon by the Organization, does not change our decision in this matter. In Award 13, under a policy requiring all employees returning from a furlough to submit to a physical examination, part of which included a drug test, Claimant Hult tested positive for cannaboids. He followed all instructions issued by the Carrier and was returned to work following a negative drug test. Subsequently, the Claimant was randomly tested and tested positive for THC. He was removed from service as medically disqualified pending charges. Following an Investigation, Claimant Hult was dismissed on March 3, 1989. In its review, PLB 4024 with Referee A. Thomas VanWart participating, concluded, in relevant part, as follows:

"Nothing has been presented to the Board on this case that would suggest, permit or compel a conclusion that the Carrier violated an expressed term of the agreement between the parties or some established past practice between the parties. We find no merit to that portion of Organization's argument. Claimant was found to be medically disqualified for evidencing the presence of THC in his system. We cannot conclude that that medical standard established by Carrier on this property is unreasonable in view of the mission of Carrier, nor is there any evidence suggesting that the medical standard was applied disparately or was somehow lacking in uniformity."

Notwithstanding the foregoing conclusion, PLB 4024 concluded that the Claimant's Agreement due process rights were violated when the Hearing Officer's unreasonable control of the Investigation effectively prohibited the Claimant's representative from cross examining an adverse witness, particularly on the issue of the manner and method used in testing the urine sample involved. This is clearly not the case in the instant matter.

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For the reasons noted and discussed above, we find the Organization's contentions unsupported by the record evidence. Accordingly, the claim must be denied.

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 7th day of July 2008.