

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43048
Docket No. MW-44054
18-3-NRAB-00003-170093**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. J. Dickson by letter dated November 10, 2015 for alleged violation of General Code of Operating Rules (GCOR) 1.13 - Reporting and Complying with Instructions, GCOR - Duty - Reporting or Absence, GCOR 1.6 - Conduct, Maintenance of Way and Signal Department Rule 30.3(A) - Employee Responsibilities, Item A - Employees Responsibilities Regarding Notification and Documentation of the Need for Leave and the Drug and Alcohol Testing Policy in connection with alleged abandonment of his position and refusal to submit to a random drug test on October 13, 2015 was without just and sufficient cause, arbitrary and unwarranted and in violation of the Agreement (System File KCS700SN16D/K0416-6585 KCS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Dickson shall have all charges dropped and references to this incidence stricken from his record and he must be returned to service with all rights unimpaired and compensated for any lost time or expense incurred as a result of the Carrier’s improper discipline.”**

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.

After Investigation held October 30, 2015 and by letter dated November 10, 2015, the Claimant – an employee in the Carrier’s service for five years – was dismissed for abandoning his position and refusing to take a federally mandated random drug/alcohol test on October 13, 2015 after he was ordered to submit to take that test.

On October 13, 2015, the Claimant was assigned as a Machine Operator on Production Gang 506 working at Slater, Missouri. On that day, the Claimant was ordered to take a random drug/alcohol test at the Slater, Missouri depot. The Claimant did not follow that order to take the test, but instead left his work assignment without notice or authorization.

Under the governing policy, an employee’s refusal to take a drug test is the equivalent of a positive test result. Carrier Exhibit A at 109 (VII(B) – “A driver who refuses to submit to testing will be handled as if s/he had tested positive”). The Claimant’s effective refusal to take the drug test coupled with his leaving his work assignment without authorization shows through substantial evidence that the Claimant engaged in the charged misconduct. Under the circumstances, dismissal was not arbitrary.

The Organization’s arguments do not change the result.

The Claimant contends that he did not know that he was instructed to submit to a drug test and further contends that he left his assignment in order to retrieve his cell phone which he left at the hotel after the gang checked out that morning. In support of that argument which the Organization asserts shows the Claimant did not engage in the charged misconduct, the Organization relies upon the Claimant's testimony.

According to the Claimant, prior to his start time he was told by Foreman E. Sepaugh that he was "the man of the hour" (a phrase the Claimant contends he did not understand) and the Claimant needed to see Assistant Roadmaster J. Glinski before the end of the day (according to the Claimant, "before I left"). Tr. 64, 66-69. The Claimant testified (and therefore, admitted) that he left his job assignment to retrieve his phone and did so without permission. Tr. 64-66. The Claimant acknowledged that he did not take a drug test on October 13, 2015. Tr. 65. The Claimant further testified that he was not specifically instructed to take a drug test on that date. Tr. 67.

However, Foreman Sepaugh testified that prior to work starting on that day and while using words similar to telling the Claimant that he was "the man of the hour", he specifically told the Claimant that he had to take a drug screen and to meet Assistant Roadmaster Glinski at the depot for that purpose and that the Claimant nodded his head in acknowledgement. Tr. 28-31.

In support of Foreman Sepaugh's version of the events, Track Laborer M. Boutte testified that he was in a truck with the Claimant when Foreman Sepaugh informed the Claimant that the Claimant had to take the drug test and he specifically heard Sepaugh tell the Claimant that he had to meet Assistant Roadmaster Glinski at the depot to take the drug test. Tr. 37-38.

Absent compelling reasons in the record to do so, it is not the function of the Board to make credibility determinations. By the fact that the Carrier issued the discipline, the Claimant's version of the events through assertions that he was not told to take a drug test were not credited by the Carrier. Corroborated testimony in the record from Foreman Sepaugh and Laborer Boutte shows that the Claimant was given an instruction to meet Assistant Glinski specifically so that the Claimant could take a drug test. The Board has no basis to find otherwise.

The Organization next argues that the Claimant had three hours under the Carrier's Drug and Alcohol Testing Policy to provide a sample for the drug test and the Claimant was not afforded that opportunity and that upon return to the work site, the Claimant offered to take the drug test, which was well within the three-hour window. Organization Submission at 3. However, the guidelines for testing referenced by the Organization (2.01(C)) provide that "[a]n employee will be allowed a maximum of three (3) hours in order to provide a urine sample." As the Carrier points out (Carrier Submission at 8), the three-hour window is for employees to provide a sample after appearing at the collection site and is an accommodation to conditions such as shy bladder. The three-hour window is not for employees to report for the drug test after being instructed to do so. The three-hour window is applicable for the employee to provide a sample after reporting for the test. And the record shows that Foreman Sepaugh told the Claimant prior to the 7:00 a.m. job briefing that he had to see Assistant Roadmaster Glinski for the drug test and he was expected to do so immediately – by 7:00 a.m. Tr. 30-31. Thereafter, according to the record, the Claimant simply disappeared from the job site and did not take the test – which is a refusal and is treated as a positive test result. And for reasons discussed above, the Board finds no basis in the record to make credibility findings in order to come to a different conclusion. The three-hour argument to take the test made by the Organization is not supported by credible facts and therefore is not persuasive to change the result.

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 2nd day of May 2018.