

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43092  
Docket No. MW-43897  
18-3-NRAB-00003-160686**

**The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
PARTIES TO DISPUTE: (IBT Rail Conference  
(  
(CSX Transportation, Inc.**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when, by letter dated August 31, 2015, the Carrier terminated Claimant H. Owen, III’s seniority on the basis of an alleged positive random drug and alcohol test on August 11, 2015 (System File D70183615/2015-195433 CSX).**
- (2) The claim\* as presented by Vice Chairman N. Trawick on October 9, 2015 shall be allowed as presented because said claim was not disallowed within sixty (60) days of the conference in accordance with Rule 24(b).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant H. Owen, III shall be exonerated of all charges, restored to service with all reference to the matter stricken from his personnel file and made whole for all losses suffered.**

**\*The initial letter of claim will be reproduced within our initial submission.”**

**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.**

**Following a drug test conducted on March 10, 2015, where he tested positive for marijuana, the Claimant signed an Investigation waiver agreement. Under this waiver, the Claimant agreed to participate in a Drug and Alcohol Rehabilitation/Education Program based upon certain specified terms and conditions. These conditions included the following:**

- a) “You accept full responsibility for this incident.**
- b) You agree to participate in the Program for a period of five (5) years.**

**\* \* \***

- f) If, at any time during the five (5) year period referred to in paragraph “b” above, you fail to follow the course of treatment established by the counselor, the Carrier shall remove you from the Program, and you agree to accept dismissal without the necessity of further disciplinary proceedings.**

**\* \* \***

- i) You are subject to the follow-up testing program as outlined in the Carrier FRA approved Drug and Alcohol Policy for a period of five (5) years.**

- j) No claims shall be progressed by you or on your behalf based on time lost as a result of your participation in the Program or a dismissal pursuant to paragraphs “f” and “g” above.”

On August 11, 2015, the Claimant was required to submit to a random drug screen. The test results were received by the Carrier and showed the Claimant tested positive for THC, the primary cannabinoid in marijuana. Upon being notified of the positive test, the Claimant had a test performed at a laboratory of his choosing on August 25, 2015. This test, as reported on August 29, 2015, was negative for THC. By letter dated August 31, 2015, the Claimant was notified that he was dismissed in accordance with the waiver agreement, as well as the May 1, 2014 Prevention Program Companion Agreement between the Carrier and the Organization.

Similar to paragraph “f” of the waiver agreement, the parties’ May 1, 2014 Prevention Program Companion Agreement contains the following provision:

9. “If, at any time during the five (5) year period referred to in paragraph “2” above, the employee fails to follow the course of treatment established by the counselor, the Carrier shall remove the employee from the Program. If the employee has been returned to service, the Carrier shall, without the necessity of further disciplinary proceedings, also remove the employee from service and the employee shall revert to the status of a dismissed employee.”

In the case before us, we have an employee who agreed that failing to follow the course of treatment would result in his dismissal without the right to a disciplinary hearing. A positive drug test is sufficient evidence that the Claimant had failed to follow the course of treatment. A hearing would have afforded the Claimant an opportunity to challenge the test results, but by waiving the hearing he effectively waived the right to make such a challenge. It was not just the waiver signed by the Claimant that created this situation; it was also the Agreement entered into by the Carrier and the Organization.

This case is clearly distinguishable from Award No. 193 of Public Law Board No. 6302 (UP – BMWED), relied upon by the Organization. That case also involved

an employee who reverted to a dismissed status “without the benefit of a hearing under the Collective Bargaining Agreement.” The Claimant therein had requested an unjust treatment conference, which was denied by the Carrier. In sustaining the claim, the Board ruled that the leniency reinstatement agreement, while denying the employee the right to a disciplinary hearing, did not specifically preclude an unjust treatment conference. In the instant case, however, no such request was made by either the Claimant or the Organization, and there is no indication the parties’ Agreement provides for an unjust treatment conference.

Inasmuch as all concerned have agreed that the Claimant “shall revert to the status of a dismissed employee,” there is no foundation for the Organization’s claim. We need not inquire any further. The Agreement was not violated.

**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.