

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44853
Docket No. MW-46505
23-3-NRAB-00003-210457**

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

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

PARTIES TO DISPUTE: (
(CP Rail System/Delaware and Hudson Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. A. Barrett, by letter dated March 16, 2020, for alleged violation of condition No. 5 of his Drug and Alcohol Policy Violation Waiver and Admission of Responsibility dated January 4, 2019, upon results of his Department of Transportation (DOT) Federal Railroad Administration (FRA) Authority follow up drug and alcohol test on February 25, 2020 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (Carrier’s File USA-DM&E-BMWE-2019-00013945 DHR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Barrett must have any reference to this incident removed from his record, must immediately be reinstated to his position and compensated for all losses suffered.”**

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 entered service with the Carrier on April 28, 2014. On that date he established seniority in the Maintenance of Way Department.

On September 27, 2018 the Claimant signed a Drug and Alcohol Policy Violation Waiver and Admission of Responsibility as a result of his Drug and Alcohol violation on September 11, 2018 when he tested positive for cocaine metabolite. Section 5 in the waiver states:

I further understand that if I refuse to be tested at any time, or if I test positive in any drug and/or alcohol test, adulterate a sample or provide a substituted sample within a ten (10) year period after my return to active service, I understand that my employment in all capacities with the company will be immediately terminated without the necessity of a hearing under the terms of the collective bargaining agreement.

On February 25, 2020 the Claimant was administered an observed DOT-FRA follow-up drug and alcohol test. The Carrier received notice on March 2, 2020 that the Claimant tested positive for amphetamine, methamphetamine and cocaine. The Claimant did not request a split sample or challenge the validity of the test. Director Kincaid - Track and Structures dismissed the Claimant on March 16, 2020.

On March 21, 2020 the Organization appealed the dismissal. Notwithstanding the Carrier's right to proceed under the waiver's section 5 without affording the Claimant a hearing, the Carrier failed to provide any evidence of a positive test or that the proper procedures for a valid test had been followed which are "necessary to activate" section 5.

The Carrier denied the appeal on May 20, 2020 whereupon the parties proceeded to conference on July 9, 2020. With no resolution attained at conference, the Organization filed its claim dated February 18, 2021. The claim is before the Board for final adjudication as it was timely and properly presented and handled at all stages of appeal up to and including the Carrier's highest appellate officer. The Board is fully informed of the on-property record and each party's position and argument in its submission including awards submitted in support thereof.

The Board reviews the record for substantial evidence of the Carrier's decision to dismiss the Claimant pursuant to section 5 in the waiver. Substantial evidence resides at the lower level, if not lowest level, on the evidentiary spectrum and is not

an onerous level to reach. The Board finds there is substantial evidence that the Claimant tested positive for proscribed drugs on March 2, 2020 and, pursuant to section 5 in the waiver, the Carrier dismissed the Claimant. In this regard, the Claimant did not exercise his right by requesting a hearing to challenge the validity of the DOT-FRA test or request a split specimen test. The Claimant received the DOT-FRA test results. The Carrier secures its copy of those test results in the Claimant's medical file. The Claimant did not sign a release authorizing the Carrier to disclose the documented test procedures and result to the Organization and the Claimant did not voluntarily share the evidence with the Organization. The Carrier's burden of proof does not attach to releasing an employee's medical record containing personal identifying information to the Organization unless authorized to do so. Any information available to support the Claimant's position that he tested negative was not disclosed by the Claimant with the Carrier or shared with the Organization during on-property handling. After the Claimant's dismissal the Organization submitted a drug and alcohol test showing a negative result but there is no name on the document identifying the person tested or record establishing chain of custody.

The Organization asserts the Claimant has a right to demonstrate that he did not violate the waiver before it is activated against him. Exercising that right resides with the Claimant during the allotted seventy-two (72) hours after receiving notice of his positive test to challenge the validity of the DOT-FRA test or request a split sample. He failed to exercise his right, failed to authorize the Organization to access his medical file and failed to disclose his test result directly to the Organization. The Board finds that the Carrier acted in accordance with section 5 of the waiver when it dismissed the Claimant from service.

Given these findings, the Board will deny the claim.

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 10th day of March 2023.