

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30850
Docket No. MS-31582
95-3-93-3-595

The Third Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (Carmen M. Ditommaso
(
(National Railroad Passenger Corporation
((AMTRAK)

STATEMENT OF CLAIM: "Employee's statement of claim:

Since I did not receive any packet or offer to return to work until after the (30) days were up, am I still entitled to the right to go back to work?

This dispute was in reference to Public Law Board 5139 NEC-BMWE-SD-2239D. I found out about the offer through a Brother Maintenance of Way employee.

At this time, I called my union to find out I missed this offer by 2 days. I would like my job back if I could. Enclosed are copies of the letters sent and returned to sender. I would like an oral hearing for this dispute by counsel.

If provided by the union someone will be there to represent me, if not, I will be there in person."

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 a Truck Driver for the Carrier. He was one of several employees who were dismissed for violating the Carrier's drug policy. These dismissals were listed on Public Law Board No. 5139. Following a decision on one of those cases by that Board, the Organization and the Carrier arrived at the following Agreement which became the basis for settling the remaining outstanding claims:

"BMW DRUG AND ALCOHOL AGREEMENT
PUBLIC LAW BOARD NO. 5139

1. All claimants will be offered an opportunity for reinstatement contingent upon passing a return to duty physical examination including a drug and alcohol test. The drug and alcohol test will be a split sample test.
2. Claimants refusing the offer will be given 185 days to progress their own case to the National Railroad Adjustment Board. The BMW agrees to withdraw the case from PLB 5139. BMW also agrees to withdraw blanket claims NMB Case #1 (NEC-BMW-1539) and Case #4 (NEC-BMW-1567).
3. Claimants must accept the reinstatement offer within thirty (30) calendar days of receipt and pass a return to duty physical examination including drug and alcohol test. Upon passing the physical examination referenced above, claimants will be reinstated with full seniority rights restored and subject to the two year testing provisions of PERS-19.
4. Claimants accepting offer and failing the return to duty physical examination including drug and alcohol testing remain dismissed and the case is resolved unless the accuracy of the test is disputed. Any dispute as to the accuracy of the test in such case will be resolved through the testing of the split portion of the sample. Disputes concerning chain of custody will be resolved by a retest.
5. Claimants failing to respond to their offer will have their case continued for ninety (90) days while BMW attempts to locate claimant. If claimant can not be located then claimant will be considered to have refused the offer.
6. Any other disputes concerning this agreement will be resolved between the General Chairman and Director of Labor Relations.
7. This agreement is without precedent or prejudice to the position of either party and will not be referred to in any other forum.

Signed this 17th day of November, 1992, in Philadelphia, PA."

As is evident from the Agreement, employees involved were permitted to return to work without backpay, as long as they accepted the offer within 30 days of notification. As noted, the return was conditioned upon the successful passing of a physical examination, including a drug and alcohol test. In addition, the employees would be subject to the two year testing provisions of PERS-19.

The following presents the chronology of the case before this Board. Attached to each letter was evidence that it was sent, in some cases by certified mail.

"November 24, 1992

Mr. Jed Dodd, General Chairman
Pennsylvania Federation, BMWE
1930 Chestnut Street
Suites 607 - 609
Philadelphia, PA 19103

Re: C. DiTommaso
NEC-BMWE-SD-2239D

Dear Mr. Dodd:

In accordance with our agreement to resolve the pending dismissal cases on Public Law Board 5139. C. DiTommaso is offered an opportunity for reinstatement contingent upon passing a return to duty physical examination including a drug and alcohol test.

C. DiTommaso must accept this reinstatement offer within thirty (30) calendar days of receipt of such offer. BMWE will forward this offer to C. DiTommaso by certified mail with return receipt requested, providing Amtrak with a copy of such letter.

Upon passing the physical examination referenced above, C. DiTommaso will be reinstated with full seniority rights restored and subject to the two year testing provisions of PERS-19. If C. DiTommaso accepts the offer and fails the return to duty physical examination including drug and alcohol testing claimant remains dismissed and the case is resolved unless there is a reason to question the test. Any such case will be resolved consistent with our agreement.

If C. DiTommaso refuses this offer, claimant has 185 days to progress his/her own case to the National Railroad Adjustment Board.

If C. DiTommaso fails to respond to this offer the case will be continued for ninety (90) days while BMW attempts to locate claimant. If C. DiTommaso can not be located then C. DiTommaso will be considered to have refused the offer.

This offer is without precedent or prejudice to the position of either party and will not be referred to in any other forum.

Very truly yours,

L. C. Hriczak"

By certified letter dated December 3, 1992, the Organization notified the Claimant of the reinstatement offer at his last known address. On December 15, 1992, the Organization followed up its certified letter with another letter sent by regular first class mail confirming that the December 3 letter had been sent. On March 8, 1993, the Organization again attempted to notify the Claimant of the reinstatement offer by certified mail to his last known address. On March 22, 1993 the Claimant contacted the Organization by telephone and provided an updated address. That same day, the Organization sent copies of all previously cited correspondence to the Claimant at the new address by certified mail.

The Claimant filed the present claim with the Board on September 1, 1993. In his Submission to the Board, the Claimant stated:

"I would like to have my job back because the chain of custody documentation was not provided at my case, since the chain of custody documentation was absent from the hearing concerning me, it cannot be said the hearing record, contains substantial evidence to support the carrier's finding that I was guilty of the charge of not complying with the "Amtrak Drug Policy."

I would only like to have my job back without back pay. I was also offered my job back from Amtrack (sic), but they could not find me, so by the time I found out about it, from a brother employee, the offer had expired by two days.

I called my union to ask for help, but they couldn't help me. This claim is in reference to Public Law Board 5139-NEC-BMWE-SD-2239D. Enclosed are copies of letters and return to sender envelopes. I would like an oral hearing for this claim by counsel. If provided by the union, someone will be to represent me, if not I will be there in person."

The terms of the reinstatement offer are clear and unambiguous and not subject to misinterpretation. The 30 day time limit for acceptance of the offer is clearly spelled out, as are the consequences of failure to accept the offer within that time limit. The Claimant, despite his phone conversation with the Brotherhood of Maintenance of Way Employees on March 22, 1993 and the subsequent confirmation letter sent by the Organization on the same date, did not, until August 31, 1993, sign and date the original offer letter of November 24, 1992. Even if the Board accepted the Claimant's contention that he did not know about the reinstatement agreement prior to March 22, 1993, his five month delay in even attempting to take advantage of the offer makes it unmistakably clear that his acceptance was well outside the time limits, of which he had been apprised, and was barred thereby.

Furthermore, despite his petition to the Board and his assurance he would represent himself at the Hearing before the Board, if the Organization did not, he failed to attend the Hearing. In addition, he failed to contact the Board to advise that he would not attend. Regardless, the Claimant was properly notified on all accounts. After all, it was the Claimant's obligation to provide his current address to the Organization, particularly in light of his pending claim before Public Law Board No. 5139. His failure to do so indicates a disregard for his job.

AWARD

Claim denied.

O R D E R

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 27th day of April 1995.