

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41151
Docket No. MW-41133
11-3-NRAB-00003-090501**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
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(National Railroad Passenger Corporation (Amtrak)
(– Northeast Corridor

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. J. San Pedro by letter dated May 19, 2009 for alleged insubordinate, dishonest behavior and/or conduct unbecoming, in connection with charges of improperly ordering a meal without an approved voucher and causing a threatening and/or hostile work environment by allegedly engaging in disrespectful and belligerent behavior toward ET Supervisor M. Traina and alleged violation of Amtrak’s ‘Standards of Excellence’, sections entitled Professional and Personal Conduct, Trust and Honesty and Attending to Duties, during his overnight tour of duty from the evening of February 26 through the morning of February 27, 2009, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File NEC-BMWE-SD-4820D AMT).**
- (2) The discipline (dismissal) imposed upon Mr. J. San Pedro by letter dated May 19, 2009 for alleged insubordination and alleged violation of Amtrak’s ‘Standards of Excellence’ and the Amtrak Drug and Alcohol Policy in connection with charges that he refused and/or failed to complete a Company Reasonable Suspicion Drug and Alcohol Testing Event as ordered/directed during his overnight tour of duty from the evening of February 26 through the morning of February 27, 2009 at the Amtrak ET Office, Penn Station, NY,**

was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File NEC-BMWE-SD-4819D).

- (3) As a consequence of the violation referred to in Part (1) above, Claimant J. San Pedro shall now ‘*** be reinstated to the Carrier’s service with all benefits and seniority rights unimpaired, the record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.’
- (4) As a consequence of the violation referred to in Part (2) above, Claimant J. San Pedro shall now ‘*** be reinstated to the Carrier’s service with all benefits and seniority rights unimpaired, the record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss 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 claim involves two sets of charges lodged against the Claimant involving conduct associated with one set of circumstances that occurred on an overnight shift on February 26 - 27, 2009. The charges were joined for purposes of the investigative Hearing, but they were processed separately during the on-property handling. They were presented concurrently to the Board.

The Claimant is an Electrician/Maintainer. By letters dated March 11, 2009, the Claimant was directed to report for a formal Investigation to be held on March 19, 2009 concerning (1) a meal at a diner on or about February 26, 2009 and (2) a drug and

alcohol test during the early morning hours of February 27, 2009. The Investigations were consolidated and postponed by mutual agreement. The consolidated Investigation was held on May 5, 2009. The Carrier issued the Claimant two separate letters of discipline dated May 19, 2009 – one for each of the Investigation Notices – wherein the Carrier dismissed the Claimant for each set of charges.

According to the Carrier, there was substantial evidence showing that the Claimant's conduct violated three sections in the Standards of Excellence - Professional and Personal Conduct (Teamwork), Trust and Honesty, and Attending to Duties - as well as policies on Workplace Violence and Drug and Alcohol (Instruction 4.2.1.7, Prohibition 7 and Instruction 4.2.2).

The progression of this proceeding on the property reveals it was handled in the usual and customary manner, including placement before the highest officer of the Carrier designated for such matters. Following a conference discussion on June 18, 2009, the dispute is now properly before the Board for adjudication.

In this appellate forum the Board does not sift the evidence anew; however, the record is reviewed to determine whether there is substantial evidence to support the charged misconduct lodged against the Claimant. Should there be substantial evidence supporting the misconduct as charged, the Board will not disturb the penalty imposed by the Carrier unless the Board finds that the Carrier abuses its discretion and acts arbitrarily and/or capriciously towards the Claimant. As explained herein, the Board concludes that the Carrier abused its discretion in dismissing the Claimant.

The Claimant reported for his tour of duty commencing at midnight on February 26 and concluding at 8:00 A.M. on February 27, 2009. The co-worker who the Claimant was relieving informed him there was a safety meal for the Claimant at the diner; this was reaffirmed by another co-worker who was on the same shift with the Claimant and who was at the diner eating that meal when the Claimant contacted him. The Power Director authorized the Claimant to leave the work site for his meal at the diner. Based on the representations made to the Claimant by co-workers, he went to the diner reasonably believing he was part of a group receiving a paid-for meal.

Upon inquiring, the cashier at the diner informed the Claimant that his name was not on the list to receive a meal paid for by the Carrier. Seated in a booth were the Supervisor and Foreman; the Supervisor told the Claimant he was "shit out of luck" for a paid meal because there was no voucher for him. Notwithstanding not having a paid-for meal, the Claimant ordered a take-out meal.

While waiting for his meal, the Claimant discussed “off duty” matters, nothing eventful, with the Supervisor and Foreman in the booth. When the take-out meal was ready, the Claimant was conversing with a female patron in the diner at the cashier stand. At that time, the Supervisor commented about the Claimant’s “bald spot” which the Claimant found to be sarcastic as well as personally humiliating and degrading.

In response to the Supervisor’s comment, the Claimant told the cashier that the Supervisor and/or the Foreman would pay for his meal. The Claimant approached them with his meal and check in hand, reciting the children’s rhyme “eeny, meeny, miny, mo” and slipped the check on the table before the Supervisor. The Claimant exited the diner.

The Claimant testified this was a joke. The Supervisor and Foreman, although surprised, testified they perceived this incident as a joke and the Foreman testified this incident was not a “big deal.” The Foreman offered to pay for the meal, but the Supervisor replied “no, no, no, I’m coming after him.”

Approximately two hours later, the Supervisor went to the Maintainers’ trailer where the Claimant and co-workers were performing their duties. As confirmed in testimony by the Claimant’s co-workers, the Supervisor banged on the door and angrily directed the Claimant to “get your stuff, let’s go” to the Electric Traction (ET) office. While walking to that office the Supervisor informed the Claimant that he had to submit to a drug and alcohol test “for the stunt you pulled at the diner” and the Claimant would be removed from service for 30 days.

At the ET office was Senior Engineer Mew, who testified that he is trained in detecting drug and alcohol symptoms, but he found that the Claimant did not exhibit suspicious, erratic or odd behavior; nor did he exhibit any signs of intoxication. However, even in the absence of any symptoms, the Senior Engineer approved the Supervisor’s request for the Claimant to be tested. Without a reasonable suspicion, the Supervisor reiterated to the Claimant to submit to the test. In this regard, the Hearing Officer excluded the Supervisor’s Alcohol/Drug Report from evidence.

The Claimant perceived the Supervisor as abusing his authority towards him regarding the test. The Claimant became agitated with loud talk and finger pointing; the Claimant ceased pointing when told to do so. The Senior Engineer advised the Claimant there were consequences for refusing to submit to the test. The Claimant’s refusal led to the charge of insubordination and violating the Policy on drug and alcohol abuse which culminated in his dismissal.

On March 11, 2009 the first Notice of Investigation issued alleging the Claimant improperly ordered a meal under Amtrak authority without paying for it. The Carrier asserts (1) the Claimant was insubordinate to the Supervisor at the diner in violation of its Standards of Excellence (2) the Claimant breached the Workplace Violence Policy with threatening and hostile behavior towards the Supervisor and (3) the Claimant brought embarrassment, discredit and disrepute on the Carrier, which jeopardized an Amtrak business relationship.

The second Notice of Investigation issued on March 11, 2009 stating the Claimant's failure to submit to a drug and alcohol test constituted insubordination to the Supervisor's directive in violation of the Standards of Excellence (Teamwork, Alcohol, and Drugs) and the Drug and Alcohol Policy. The notice alleges that the Claimant displayed odd, erratic behavior towards the Supervisor and Foreman at the diner and later in the workplace when the Claimant refused to submit to a reasonable suspicion test.

Axiomatic in labor relations is that in order to impose discipline, the findings must establish the charged misconduct and, if the alleged conduct is so established, the penalty must be proportional to the misconduct. For example, in this case, the Hearing Officer found that the Claimant was not a threat or capable of imminent violent behavior towards the Supervisor. This finding does not support the Carrier's charge in the first notice that the Claimant violated the Workplace Violence Policy. Thus, that charge, cited by the Carrier to support its dismissal of the Claimant, is unfounded.

Another allegation, in both Notices of Investigation, is that the Claimant violated Amtrak's Standards of Excellence and, specifically in the first notice, the section entitled "Attending to Duties." That section deals with an employee reporting to work on time, being fully attentive when performing duties and not interfering with others in their performance of duties. The record establishes that the Claimant reported on time for his shift and performed his duties until taken from the Maintainers' trailer by the Supervisor. There is nothing in the record addressing a charge of or showing that the Claimant interfered with the performance of work by other personnel. The record evidence does not support any violation of "Attending to Duties" so it does not support the dismissal.

When the whole record is summed into its parts, the bottom-line findings to support the dismissal are (1) the incident at the diner and (2) the refusal to submit to the drug and alcohol test. This insubstantial evidentiary record does not establish these two items as charged by the Carrier.

After the Supervisor described the Claimant as “shit out of luck” for a paid meal, the Claimant ordered a take-out meal. The Carrier charged the Claimant with dishonesty, insubordination, disrepute and jeopardizing a business relationship for ordering the meal under the guise of authority of Amtrak without paying for it. Substantial evidence demonstrates otherwise, because the cashier informed the Claimant that he was not on the list for a paid meal. Consequently, the cashier knew Amtrak was not paying for the meal.

The Claimant was not ordering in a manner or with a presentation under the authority of Amtrak. The cashier accepted the Claimant’s order. In response to the Supervisor’s imprudent comment about the Claimant’s “bald spot” the Claimant told the cashier that the Foreman or Supervisor would pay for the meal and he slid the check to the Supervisor for payment after reciting the children’s rhyme. The Supervisor and Foreman both perceived this as a joke by the Claimant and the Foreman testified that the Claimant’s behavior and banter were not a “big deal.”

There is substantial evidence for the charged misconduct if countervailing testimony is discounted. This means that the findings are predisposed to an outcome or based on an incomplete record. When all the testimony is considered, including testimony not supportive of the charges, the record does not contain substantial evidence to support the charges. The Claimant responded to imprudent supervisory comments with juvenile behavior but, the record does not establish that he engaged in dishonesty, insubordination or displayed disrepute and risked a business relationship.

The second notice of charged misconduct to support dismissal is the drug and alcohol test. Officials follow the Policy when assessing whether a reasonable suspicion exists to require an employee to submit to a test. The purported basis by the Supervisor and Foreman was the Claimant’s agitated and nervous behavior at the diner, yet they also found the Claimant’s behavior to be a joke and no “big deal.” Further agitated and nervous behavior in the workplace by the Claimant arose when he contested the Supervisor’s decision to impose the test. The Hearing Officer found that the Claimant did not engage in threatening or violent behavior towards the Supervisor during the robust exchange about the test.

The Claimant refused to submit to the test, which is a terminable offense; however, the test is initiated based on an official’s assessment there is a reasonable suspicion as displayed in symptoms of drugs and/or alcohol abuse. There is no assessment or reasonable suspicion in this record.

When the Foreman offered to pay for the Claimant's meal at the diner, the Supervisor responded "no, no, no I am going after him" and the Supervisor acted within that rubric when he told the Claimant on the way to the ET office the test was mandated for "the stunt you pulled at the diner." Such does not constitute reasonable suspicion to submit an employee to a test.

Confirming the absence of reasonable suspicion is the Senior Engineer's testimony that the Claimant exhibited no behavior or other symptoms that warranted invoking the test. Rather than reasonable suspicion, the Supervisor used the test as discipline. In doing so, the Supervisor acted arbitrarily and capriciously towards the Claimant and the Carrier's decision to dismiss the Claimant based on his refusal to submit to a test without a reasonable suspicion constituted an abuse of discretion.

Because there was an abuse of discretion and arbitrary and capricious action directed toward the Claimant, the penalty assessed the Claimant was harsh, punitive, and not warranted. Accordingly, the dismissal is overturned and the Claimant shall be reinstated with a make whole remedy.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of November 2011.

**CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 41151
DOCKET MW-41133**

(Referee Patrick Halter)

The Majority improperly ignored the Hearing Officer's determination that the testimony of both Supervisor Traina and Foreman Sessa regarding the Claimant's erratic behavior at the diner was more credible than the version of the events as related by the Claimant. It is well established throughout the industry, and in particular on Amtrak property, that the Board may not substitute its judgment for that of the Hearing Officer in making credibility determinations. (See Special Board of Adjustment No. 986, Cases 8 and 135 involving the parties to this dispute).

The Majority compounded its error by determining that the direct order given to the Claimant by his Supervisor to submit to a drug and alcohol test was improper and the Claimant had the right to refuse. Such a ruling is tantamount to affording employees the option of complying with an order or manufacturing a story that makes refusal seem appropriate. It is well established that employees are required to obey orders unless they clearly jeopardize the employee's safety. The Claimant had an obligation to obey the order and grieve later if he believed the order was given in violation of the Agreement. The NRAB and countless other Section 3 tribunals have held that the workplace is not a debating society. (See SBA No. 986, Case 114). Award 41151 clearly flies in the face of well established precedent in this industry.

We dissent to this travesty of justice.

Richard F. Palmer

Carrier Member

Michael C. Lesnik

Carrier Member

November 21, 2011