

The Third Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

PARTIES TO DISPUTE: (Samuel Mumford
(
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

"1. Was Samuel Mumford working at the time of the incident, on 12/22/88?

2. Was the breatholizer test given by the carrier conducted by people trained to do so?

3. Was Mr. Mumford under the influence of Alcohol and was there sufficient evidence for him to have been so declared on 12/22/88?"

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

This dispute concerns the discharge of Claimant on February 22, 1989, by Carrier's Division Engineer. On December 30, 1988, Claimant was notified of the following charges:

"On December 22, 1988, you allegedly failed to pass a quarterly breatholizer test, thereby failing to comply with the directions contained in the June 20, 1988, letter from Amtrak's Medical Director, Dr. Joseph R. Young."

Claimant was charged with having violated Rules "D", "G", "L" and "P" of the Carrier's Rules of Conduct, and PERS-19 Section (V) Paragraph (c) of the Carrier's Personnel Policy. A Hearing was held on February 7, 1989. On February 21, 1989, the Hearing Officer made the following Findings based on the record compiled during Claimant's Investigation:

"1. At all times in question, in this case, Rules "D", "G", "L" and "P" of Amtrak's Rules of Conduct, and NRPC Personnel Policy PERS. 19 were in effect and applicable to you as they are to all Amtrak employees.

2. The testimony of Nurse Martelli-Callis, General Foreman Lano and evidence introduced at your investigation primarily established, although not exclusively, that you failed to pass a quarterly breatholizer test on December 22, 1988. Such failure constituted a violation of the above quoted Rules of Conduct and Personnel Policy.

3. Your own denials of misconduct in the circumstances under investigation, alleging that such failure was due to your ingestion of medication for a cough, is not so credible in part, but not exclusively, as no evidence of probative value was introduced to support such contention; nor, is it logical that Carrier witnesses would falsely testify against you."

Based on the foregoing findings, and on the Hearing record as a whole, the Hearing Officer concluded that Claimant was guilty of the above-quoted charges.

On February 22, 1989, the Division Engineer dismissed Claimant "effective immediately." His decision was "[b]ased on the decision of the Hearing Officer as stated above, and taking into account your prior discipline record [A copy of which is attached]...."

Claimant contends that he was improperly charged, since he was not reporting for work when the breatholizer test was administered on December 22, 1988. Rather, he maintains that he was in the office to advise management why he had been absent on the prior three workdays and why he could not work on that or the next day, and to obtain his paycheck. Claimant further argues that he was not under the influence of alcohol when he took the breatholizer test, and that the positive readings on the tests were caused by medications he was taking at that time. Claimant maintains that he advised the nurse and Foreman of this medication before taking the test, and that the nurse testified that the positive test could have resulted from such medication. Claimant also argues that the nurse and Foreman were not properly trained to administer the breatholizer test.

The Carrier argues that Claimant's Statement of Claim is defective, since it contains only questions and does not request a specific remedy. The Carrier further asserts that if this Board addresses the merits of the Claim, this Board should determine that Claimant was properly dismissed when he tested positive on two breathalyzer tests administered during a quarterly examination, as well as on the follow-up urinalysis. The Carrier maintains that Claimant therefore violated Amtrak's Rules of Conduct and Personnel Policy PERS-19, as charged. The Carrier contends that substantial evidence of probative value in the Hearing record supports this conclusion. According to the Carrier, none of the issues raised on Claimant's behalf mitigates his guilt or the seriousness of his offense. The Carrier further asserts that the dismissal was commensurate with the nature of the offense and Claimant's past record.

As an initial matter, this Board has concluded that the Carrier was able to present a meaningful response to the Statement of Claim. Claimant's Statement of Claim was sufficiently precise, and identified issues that were in fact sufficiently close to those previously raised in the handling on the property. In addition, it is clear from Claimant's Submission that he is challenging the accuracy of the December 22, 1988 tests, that he contends the results were the result of his medication, and that he wants to be reinstated to his position as a Trackman.

This Board agrees with the Carrier that the dismissal is supported by substantial evidence in the Hearing transcript and accordingly denies Claimant's Claim. Claimant's assertion that he was not reporting for work on December 22, 1988, is not relevant. On November 29, 1988, Carrier's Medical Director informed Claimant that he was eligible to be returned to service since he had tested negative on the next test following a positive test for Cocaine Metabolite in June 1988. However, the Medical Director's letter specifically stated that:

"I remind you, however, the Company policy prohibits employees from working with the presence of substances in their system which may impair sensory, mental or physical functions. You are therefore instructed to keep your system free of such substances.

During the first two years following your return to work, you will be tested for drugs and/or alcohol at least four times a year. Should a future test be positive, you will be subject to dismissal."
(Emphasis added).

Claimant signed a statement on November 29, 1988, in which he acknowledged receipt of the Medical Director's letter, and further agreed that "...if I have another positive test result [for drug/alcohol], I will be subject to dismissal." Less than one month after Claimant signed this statement, he tested positive for alcohol.

Substantial credible evidence in the Hearing transcript supports the Carrier's conclusion that the tests were accurate, and that the results were not caused by cough medicine. The Hearing transcript indicates that both the Foreman and the nurse smelled alcohol on Claimant's breath on December 22, 1988; that the Foreman witnessed both breathalyzer tests; that the results of both tests were well above the Carrier's standard for a positive result; and that a subsequent urinalysis also tested positive for alcohol. The fact that the nurse and Foreman testified that Claimant did not appear drunk is not dispositive, since he tested well above the limits for alcohol in the Carrier's policy.

The Hearing Officer specifically rejected Claimant's assertion that the alcohol detected in these tests was due to prescription medicine Claimant was taking at that time. The Hearing Officer's conclusion was based in part on his assessment of Claimant's credibility, as well as the evidence in the record as a whole. It is well established that this Board will not overturn the credibility assessments of Hearing Officers who have had the opportunity to observe the testimony and demeanor of the witnesses, and we decline to do so in this instance.

Without detracting from this principle, the Board notes that the evidence in the record supports the Hearing Officer's conclusion. Claimant's consent form for the December 22, 1988 tests did not list a liquid cough medicine. In addition, Claimant did not demonstrate that on December 22, 1988, he still required the cough syrup prescribed on December 12, 1988, for a viral infection. The record indicates that he returned to work after this initial absence, and that his later absence on the days immediately before December 22, 1988, was based on pain in his shoulder, and not a viral infection. The record therefore indicates that it is unlikely that he was still taking cough medication for that illness on December 22, 1988.

Moreover, the nurse testified that Claimant would have to have ingested the cough syrup "in the last fifteen minutes before the test was administered" for any such medication to cause the level of alcohol detected by the two December 22, 1988 breathalyzer tests. She specifically testified that she did not see him taking cough syrup on December 22, 1988. She further testified that if cough syrup had been ingested as Claimant asserted, it would have been detected on the drug screen portion of the subsequent urinalysis, which was in fact negative. In addition, both the Foreman and the nurse testified that they did not recall Claimant showing them any cough medicine when he was tested on that date, and that they told Claimant to list all medicine on the consent form. While Claimant testified to the contrary at the Hearing, the Hearing Officer did not credit his testimony.

This Board further agrees with the Carrier that the evidence in the record demonstrates that the nurse was trained to perform the breatholizer tests, and that the machine she used had recently been calibrated by a qualified individual. Claimant's contrary contention is not supported by credible evidence in the record. His assertion that the Foreman was not trained is accurate, but not relevant, since the Foreman only witnessed the test results and did not administer the test.

Claimant did not seriously challenge Carrier's contention that a total abstinence from the use of any controlled substance is a condition of employment.

The Carrier unquestionably operates a business in which the public places a high degree of trust. Allowing an employee who tests positive to assume a position would be a severe breach of the Carrier's duty and obligation to operate efficiently and safely.

Moreover, it appears that Carrier's policy protects its employees, as well as its customers, since Trackmen such as Claimant are subject to constant danger from moving equipment, high speed trains and/or high voltage. Employees under the influence endanger their fellow workers as well as passengers.


Finally, this Board has concluded that the penalty of discharge was not improper under the circumstances of this case. Claimant was suspended for ninety days in 1982 for providing false information on time worked and for accepting undue compensation. He tested positive for cocaine in June 1988, and acknowledged in writing at that time that further positive tests for drugs or alcohol would subject him to dismissal. Given the extremely serious nature of his misconduct, his status as an eleven year employee does not render the dismissal penalty arbitrary, capricious, discriminatory or excessive.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of October 1991.