

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33983
Docket No. CL-34691
00-3-98-3-444**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(National Railroad Passenger Corporation (AMTRAK))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12073) that:

- 1. Carrier violated the provisions of Rule 19 when, on June 26, 1996, it held Claimant from service pending a disciplinary investigation.**
- 2. Carrier acted in an arbitrary, capricious and unjust manner in violation of Rule 19 of the Agreement, when by notice of June 17, 1997, it assessed the discipline of “Termination From Service” against Claimant, pursuant to an investigation held on June 10, 1997.**
- 3. Carrier shall now reinstate Claimant (Sandra Shaw) to service with seniority rights unimpaired and compensate Claimant in amount equal to what she could have earned, including but not limited to daily wages, holiday pay and overtime, had she not been held from service and had discipline not been assessed.**
- 4. Carrier shall now expunge the charges and discipline from Claimant’s record.**
- 5. Carrier shall now reimburse Claimant for any amounts paid by her for medical, surgical or dental expenses to the extent that such payments would be payable by the current insurance provided by Carrier.”**

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.

On June 26, 1996, the Claimant was working her assigned position of Service Attendant on Train 4, The Southwest Chief. The Claimant was observed by the train's Lead Service Attendant (LSA) telling some passengers that the dining car was closing more than an hour before it was scheduled to be closed. Around this same time the Claimant allegedly had confrontations with Amtrak passengers. The LSA reported the Claimant's behavior to the On Board Service Chief (Chief) who observed the Claimant's irregular behavior and subsequently pulled her out of service on a Rule G violation. The Chief informed the Claimant she would be getting off the train in Albuquerque for drug testing.

The Claimant was escorted from the train to the Occupational Health Center in Albuquerque, New Mexico. While at the testing site the Claimant agreed to submit to a blood alcohol test, but then asked to speak with her Supervisor as she wanted to plead the Red Block. After being told it was too late for a Red Block, and asking to use the restroom several times, she refused the test. She was informed that a refusal to take the test would be an admission of a positive test. After the documentation of her refusal to take the test was completed (a period of about 15 minutes from the time she was first asked to take the test), the Claimant asked to take the test. She was not allowed to take the test. The Claimant cited personal reasons including a prescription drug as her reason for not initially submitting to the test.

The Carrier assessed three charges against the Claimant, which read in pertinent part:

“Charge 1: Violation of Amtrak’s Standards of Excellence titled, “Alcohol and Drugs,” . . . violation of Rule G in Amtrak’s Rule of Conduct, titled “Alcohol and Drugs”

Charge 2: Violation of Amtrak’s Standards of Excellence titled, “Professional and Personal Conduct” subheading “Teamwork,” . . . violation of Rule L in Amtrak’s Rule of Conduct.”

Charge 3: Violation of Amtrak’s Standard of Excellence title, “Professional and Personal Conduct” subheading “Conduct,” . . . violation of Rules F, Paragraphs 1 and 2 in Amtrak’s Rules of Conduct.”

The Carrier’s position is that the Claimant’s conduct and performance on the day of the incident had changed to the extent it was unprofessional, rude, and it compromised the satisfaction and well being of the Carrier customers. LSA Albert Chrikjian and Chief Faye Reed both witnessed the Claimant’s irregular behavior on the day of the incident. The LSA heard the Claimant telling passengers the dining car was closed at 8:30 A.M. when it was scheduled to be open more than an hour longer and observed the Claimant confronting a passenger. Chief Reed observed the Claimant’s irregular behavior of being hyper, talking loud and acting strange. The Chief obtained three written statements from passengers who recounted being treated poorly by the Claimant on the day of the incident. The Claimant’s actions were such that the Chief surmised the Claimant had some type of substance in her system.

The Carrier’s position on the Claimant’s refusal to comply with instructions to take the drug and alcohol test, is that the Claimant twice refused to take the test. The Claimant also requested to layoff on Red Block, which the Carrier deems an admission of guilt of being under the influence of drugs. The Carrier also asserts that the Claimant’s excuses are disingenuous. The Carrier points out that the Claimant’s concern that her prescription drug Dalmane might show up positive on the test does not support her position as the prescription label is dated nine months after the incident and the drug is a hypnotic agent used for treatment of insomnia.

The Carrier asserts that none of the Claimant's contractual rights were violated when she was withheld from service pending the Investigation. Had the Claimant been allowed to remain in service with her suspicious conduct and refusal to be tested leading to a positive test assessment could have been detrimental to the Claimant, another person and/or the Carrier.

Key to the Carrier's position is that this incident is not the first involving rude conduct or drug and alcohol testing. In 1989 the Claimant signed a Rule G Waiver for alcohol and, while still under her Rule G Waiver, she tested positive for cocaine and was dismissed. She was granted leniency and was reinstated. The current charges in the case at hand warrant her dismissal because this is not her first offense for drug use or rudeness to passengers.

The Organization's position in this case is that the Carrier's decision is arbitrary, capricious, without just cause and in violation of the Agreement. In particular, the Organization cites violation of Rule 19 - Discipline-Investigations-Appeal. Key to the Organization's position is that the Claimant, a ten-year employee, initially failed to comply with the drug and alcohol testing out of fear, but was willing to submit to the test just 15 minutes later. An expert witness, Amtrak's Manager of Occupational Health, testified at the Hearing that there was no reasonable explanation to refuse the Claimant her request to take the Drug and Alcohol Test after visiting the restroom as there was no way she could have changed the results of that test by one trip to the bathroom.

After careful review of the record, the Board does not find substantial evidence to warrant the "Professional and Personal Conduct" charges as none of the passengers who submitted the complaints were present for questioning at the Hearing. However, this does not exonerate the Claimant of any blame for such conduct as may have precipitated such complaints. The Carrier has a reasonable expectation that its customers be treated well by the Carrier employees.

The Claimant is not without culpability for not immediately following the Carrier's drug and alcohol policy guidelines. The Claimant was granted leniency regarding her last charge of this nature, yet the Claimant initially failed to cooperate with the drug testing process in the present case. Such refusal is usually considered tantamount to an admission of guilt. In light of the fact that there is unrefuted testimony on the record that the Claimant could well have been tested when she asked to be, however, her initial confused reluctance does not rise to the level of a dismissible offense.

After careful review of the record, the Board finds that the Carrier did not produce evidence substantial enough to warrant dismissal. Accordingly, the Claimant shall be returned to service with seniority and all other rights unimpaired. However, the Claimant's contributory culpability in this matter precludes any award of back wages.

AWARD

Claim sustained in accordance with the Findings.

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 28th day of March, 2000.