

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42799
Docket No. MW-42735
17-3-NRAB-00003-140428**

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

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

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier's discipline (termination of employment with the National Railroad Passenger Corporation in all capacities, effective immediately) of Mr. M. Pena, issued by letter dated March 12, 2014, in connection with his alleged failure to comply with the Carrier's Alcohol and Drug standard set forth in its Standards of Excellence, its Drug and Alcohol Policy under Instruction 4.2.1.2 Prohibition 2 and its Maintenance of Way Employees Safety Rules and Instructions, Rule 4002 on January 17, 2014 was arbitrary, unwarranted and imposed in violation of his due process rights under the Agreement (Carrier's File BMW-579D).**
- (2) As a consequence of the violation referred to in Part (1) above, the discipline assessed Claimant M. Pena shall be ‘...removed and Mr. Pena returned to service with his seniority intact and made whole for all wages and benefits he has lost as a result of the carrier disciplinary actions.’”**

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.

Claimant Michael Pena has established and held seniority with the Carrier's Maintenance of Way Department with a hire date of February 4, 2013, and had approximately 13-months of seniority at the time of his termination. The record evidence reflects the following circumstances giving rise to the Claimant's termination.

At the Carrier's request, the Claimant and four other employees (Assistant Foreman Albert Mask, Foreman Clint Workman and "B" plus Operators Aaron Kratochvil and Shafer Johnson), attended welding training in January 2014 in Philadelphia, PA. The Carrier provided an Amtrak van for their ground transportation roundtrip between Jackson, MI and Philadelphia, PA and Amtrak paid each employee 12.0 hours for travel time each way, and there is no dispute that the Claimant was on property, being paid for services and on a company vehicle, when traveling in the van to Jackson, MI on January 17, 2014.

Co-worker Aaron Kratochvil, who as noted above, attended welding training in Philadelphia and traveled in the van with the Claimant, observed the Claimant's possession of alcohol in the Amtrak van on January 17, 2014 during the return trip from Philadelphia, PA to Jackson, MI. In this regard, within an hour of the van departing Philadelphia on the return trip to Michigan, Mr. Kratochvil observed the Claimant and Mr. Mask each holding a can of beer. When the van pulled into a rest stop on the PA Turnpike (after traveling about two hours), Mr. Kratochvil told Foreman Workman there was beer in the van and he mentioned observing the Claimant and Mr. Mask each holding a beer can while in the van. Mr. Workman decided to throw away one beer and they (he and Kratochvil) both decided to throw away the remaining beer. When the Claimant and Mr. Mask returned to the van after using the restroom, Mr. Kratochvil told them he had to throw the beer away to which the Claimant did not issue any response.

Initially, it was Mr. Kratochvil's decision not to report the beer incident involving the Claimant and Mr. Mask. However, within a short period of time following their return, Mr. Kratochvil began facing questions from coworkers upon which time he began to share what he had observed in the van. Mr. Evans interviewed Mr. Kratochvil after hearing a number of people talking about the beer incident. Mr. Kratochvil believed the beer belonged to the Claimant and was theirs [Claimant and Mr. Mask], and at the hearing held in this matter, Mr. Kratochvil reaffirmed his belief that the beer belonged to Claimant and Mr. Mask. Foreman Clint Workman also testified at the hearing and confirmed the seating arrangements of all occupants and also corroborated that Mr. Kratochvil told him that there was alcohol in the van, that he was shown the pillowcase filled with beer, and they agreed to throw the pillowcase and beer away at the rest stop.

On February 19, 2014, an investigation' was convened and continued/concluded on March 5, 2014 before Hearing Officer Michael Mullen during which time the Claimant and his duly accredited representative were present, they cross-examined witnesses who testified on behalf of the Carrier, and the Claimant and his duly accredited representative also presented testimony and other evidence on Claimant's behalf. Based on all the evidence presented at the formal investigation, the Claimant was found guilty of the proven charges by Hearing Officer Mullen in his Decision Letter dated March 11, 2014. In his decision, Hearing Officer Mullen set forth his detailed findings in support of his decision that the Carrier had proven the charges and the Claimant was guilty of violating the Carrier's Standards of Excellence section entitled "Alcohol and Drugs," the Drug and Alcohol Policy (P/I 7.3.0) Instruction 4.2.1.2 Prohibition 2, and the Maintenance of Way Employees Safety Rules and Instructions, Rule 4002. In reaching this conclusion, Hearing Officer Mullen concluded that it was established by the testimony of Carrier witness Aaron Kratochvil that the Claimant (and Mr. Mask) was observed by him to be holding an alcoholic beverage (an unopened can of beer) while on duty and in an Amtrak vehicle on January 17, 2014 while travelling from Philadelphia, PA to Jackson, MI, after completing Amtrak welding school. Based on the testimony and evidence contained in the transcript of investigation conducted, the Hearing Officer found that the charges were proven based on his findings and the hearing record as a whole.

During the hearing, the Claimant and Mr. Mask were questioned at trial by the Charging Officer and both Claimants denied possessing or consuming any alcohol or their observing the other possessing or consuming any alcohol in the van

on January 17, 2014. Witness Mike Evans, Assistant Division Engineer - Jackson, MI, testified that on January 24, 2014, he (together with Track Manager James Lewis) interviewed the five occupants of the van who traveled on January 17, 2014 (including the Claimant, Assistant Foreman Michael Pena, Foreman Clint Workman and Operators Aaron Kratochvil and Shafer Johnson), and that Mr. Workman and Mr. Kratochvil stated there was alcohol in the van, beer cans hidden in a pillowcase and that Mr. Kratochvil observed both the Claimant and Mr. Mask with beer. Based on his investigation, Mr. Evans concluded that Mr. Kratochvil and Mr. Workman were credible and truthful and that there was alcohol in the van.

By letter dated March 25, 2014, the Organization filed a timely appeal pursuant to Rule 15 of the Amtrak-BMW (Off-Corridor) Agreement, alleging that the Carrier failed to meet its burden of proof, the discipline was arbitrary and unwarranted, and the Carrier failed to provide a fair and impartial hearing. The Organization provided a supplemental submission to appeal dated April 14, 2014. Thereafter, an appeal hearing was held on April 21, 2014 with representatives of the Organization and the Carrier's Labor Relations Department to discuss this case. By letter dated April 30, 2014 from the Carrier's Director-Labor Relations, Mark L. Johnson, the Carrier denied the Organization's appeal on behalf of the Claimant in this case.

By letter dated July 14, 2014, the Organization filed its notice of intent to file a submission with the National Railroad Adjustment Board (NRAB), Third Division. By letter dated July 17, 2014, the NRAB Director, Office of Arbitration Services advised the Organization and the Carrier of the Organization's July 14, 2014 notice of intent in this case, and provided the NRAB's request of the parties to submit their Briefs and Exhibits to the NRAB by September 30, 2014.

Initially, this Board notes that it sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, we must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record. Following our careful review of the record in this matter, the Board finds no basis upon which to overturn the findings and conclusions of this Hearing Officer, particularly as they relate to issues regarding credibility determinations. With this point well established, the Board finds and concludes that at the investigation, the Carrier sustained its burden of proof by establishing, through substantive credible evidence that the Claimant did, in fact, possess an alcoholic beverage (beer) in a Company van while on Company

time in violation of Section 4.2.2 of Amtrak's Drug and Alcohol Policy. We have carefully reviewed the Organization's defenses in this case but respectfully find that they do not alter or change our conclusion herein. Accordingly, the Board is left with a determination as to the appropriateness of the penalty chosen by the Carrier in light of the record before us.

As to the discipline imposed, it is well accepted that such disciplinary action should not be modified unless it is shown that in assessing such discipline, the Carrier's action was arbitrary, capricious or discriminatory. Upon our review of the record, it is clear that the Claimant knowingly violated the Carrier's clear and legitimate Policy, which subjects a charged employee to permanent dismissal. Indeed, this is not a case where the Policy states that employees found guilty of violations will be subject to discipline, but one where the penalty for such a finding is absolute and not subject to interpretation or discretion by this Board – that any such employee “shall be terminated.” Accordingly, while this Board takes no pleasure in upholding the termination of an employee, on the basis of the record before us, the Board cannot find any basis to modify the penalty imposed.

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 28th day of November 2017.