

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 23

Case No. 23

System Docket No. BMW-E-D-183

STATEMENT OF CLAIM

(a) Carrier's dismissal of Claimant Anthony Clark was without just and sufficient cause, was not based on any clear and probative evidence and was done in an arbitrary and capricious manner, wholly beyond the Scope of the Scheduled Agreement.

(b) Claimant Clark shall be reinstated into Carrier's service with all seniority entitlements and shall be compensated for all lost wages, including overtime benefits which would accrue to him, as provided for in Rule "K" of the Scheduled Agreement

FINDINGS

The Claimant, a Crossing Watchman, was dismissed on November 6, 1992, as a result of testing positive for marijuana during a quarterly drug/alcohol test. He had previously tested positive during a return-to-work physical examination on February 4, 1992.

As a result of this, he elected to clear his system of the drug and sign a reinstatement agreement which included the following:

I understand as a condition of returning to work, I will be subject to unannounced drug/alcohol tests at least four times a year for the next two years. Furthermore, I understand that if I have another positive test result, I will be subject to dismissal.

In this dispute, the Organization raises two procedural matters which require resolution. The first concerns a new Rule which states as follows:

B. The Carrier must supply the Organization, five (5) days prior to the hearing, all documents to be used in any investigation under the BMW(NEC) Agreement or the Corporate Agreement.

The hearing record demonstrates that the Carrier did fail to provide the Organization with documents relating to the drug test on October 13, 1992. In view of this, the hearing officer offered to postpone the hearing to provide the Organization with the time and opportunity to review the documents. The Organization declined this offer. The Board concludes that the Carrier failed to carry out the requirement of the new procedural rule. The Board, however, does not find this sufficient to nullify the disciplinary action which resulted. The offer of postponement, while understandably not fully satisfactory to the Organization, would have remedied the situation to provide the Claimant with ample opportunity for a full defense. The Carrier is cautioned, however, that future failure to comply fully with the Rule may well be sufficient grounds to reverse subsequent disciplinary actions.

The second procedural matter concerns Rule K, Section 2, which states in part as follows:

[Following an investigation] a decision will be rendered by the investigating officer within ten (10) calendar days after completion of investigation.

In this instance, the investigation was completed on October 29, 1992. The decision notice to the Claimant was mailed on Monday, November 9, 1992, the eleventh day, although the letter was dated Friday, November 6 and apparently prepared on that day. The Organization argues that "rendered" can mean only when the letter was postmarked. While the Agreement does not specifically define "rendered", the Organization's view is the generally accepted meaning. Nevertheless, in the circumstances of this particular matter, the Board again does not find this unintentional and border-line delay of sufficient significance to require that the resulting disciplinary action be voided. As stated in Third Division Award No. 11775:

We hold to the general view that procedural requirements of the agreement are to be complied with but we are unable to agree that Carrier's failure in this regard, under these circumstances, was a fatal error which justifies setting aside the discipline ultimately imposed.

As to the merits of the dispute, the Board is satisfied that the Claimant failed to comply with the conditions under which he was permitted to return to work following an initial positive drug test. He was aware of the consequences of such failure, and the dismissal action inevitably followed.

A W A R D

Claim denied.



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HERBERT L. MARX, Jr., Chairman and Neutral Member



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B. A. WINTER, Employee Member



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W. H. ROBINSON, Jr., Carrier Member

NEW YORK, NY

DATED: 9-14-93