

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 28

Case No. 28

System Docket No. BMW-D-213

STATEMENT OF CLAIM

(a) Carrier's dismissal of Claimant Raymond Welcome 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 Welcome 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 15 of the Scheduled Agreement.

FINDINGS

The Claimant was subject to an investigative hearing under the following specifications:

In that on September 22, 1993 at approximately 2:00 a.m. you abandoned your duties as Bridge Tender at Gloucester, then drank alcoholic beverages and were subsequently detained and arrested for driving under the influence of liquor by State Police Trooper Kevin Condon.

You disobeyed prior instructions to keep your system free of alcohol. You accepted payment for time not worked after you had abandoned your duties.

Among the cited rules alleged to have been violated are Rules G and O, which read in pertinent part as follows:

RULE G: Employees subject to duty, reporting for duty, or while on duty, are prohibited from using or being under the influence of . . . alcoholic beverages.

RULE O: Employees must report for duty at the designated time and place and must attend to their duties during assigned working hours. Employees may not be absent from their assigned duty without the permission from their supervisor.

Following the hearing, the Claimant was dismissed from service.

On April 20, 1992, the Claimant signed a Rule G Waiver, based on an on-duty alcohol offense. The Rule G Waiver includes the following:

I must submit to and pass a drug and/or alcohol test by urine and/or breath sample at least four times a year for the first two years of active service following my return to duty. I further understand that if I test positive in any future drug/alcohol test, including tests taken as part of any physical examination, I will be dismissed from all Amtrak service.

The Claimant was the operator of the drawbridge at Gloucester, with a tour of duty from 11 p.m. to 7 a.m. The Claimant's version of what occurred is in his testimony at the hearing, reading as follows:

Well, I got in to work and come around two o'clock I had to use the bathroom. I had diarrhea to be honest. There were no bowl liners in the building and so I wasn't able to go so I made the decision to take my car out to go to the bathroom. I couldn't find a bathroom. I

wasn't familiar with Gloucester and my car, I was having problems with it prior, I couldn't get it started.

I stopped to go and check out one place and it wouldn't start and I waited around, it was late and nobody was around and an old friend came by. A guy that I use to know from years back and he helped me get my car started. We went to his house after to use his bathroom and he had been drinking and I at the time was under a bit of stress in my personal life and, you know, I had cut back a little bit on my meetings and one thing led to another and I found myself with a drink in my hand.

I had a few drinks and it hit me hard, it has been awhile since I drank and I decided that I couldn't get back to the bridge. So I started heading home with the intention of calling and went through Lynn and got stopped, detained, and arrested and thrown in jail and that was it.

For the purpose of this dispute, this version of what occurred was accepted by the Organization and the Carrier. The violation of Rule O is conceded, in that the Claimant left his post at the drawbridge without receiving permission to do so. As to the receiving of pay for time not worked, the Claimant did accept pay for the time beginning with his unauthorized departure from the drawbridge. At some later point, this undeserved pay was returned to the Carrier.

Apart from the abandonment issue, the question is whether, in these circumstances, either Rule G or the Rule G waiver were applicable. The Carrier argues that the Claimant "was subject to duty" until 7 a.m., thus demonstrating violation of Rule G. The Carrier further points out that the Rule G Waiver refers to "any future drug/alcohol test" (emphasis added), with a positive test leading to dismissal from service. The Carrier notes the sobriety test made by the police on the night in question should be accepted as

"any" test. Since the Claimant tested positive in this instance, the Carrier argues that his dismissal under the Rule G Waiver is self-effectuating.

The Organization argues that the Claimant's drinking started after he had left his post at the drawbridge. He did not return to the drawbridge during the remainder of his tour. On this basis, the Organization argues that there is no Rule G violation. Further the Organization contends that "any" test can logically be confined to tests given under Carrier supervision. To accept the results of tests otherwise administered would prohibit both the Carrier and the Organization from examining or contesting the test results. This is supported by taking the reverse example. If an employee under Rule G Waiver declined to undergo quarterly testing by the Carrier but instead offered the results of "any" test made elsewhere, the Carrier would understandably not accept results of such test.

The Board concludes that the Claimant's undisputed abandonment of his job is sufficient to warrant major discipline, although perhaps not dismissal. As to the Claimant's drinking after leaving his post, and thus removing himself from duty, such is not addressed in Rule G (which refers to "subject to or reporting for duty" and "while on duty"). As to the Rule G waiver, this of itself does not require an employee undertake to "keep his system free of alcohol" at all times". This requirement comes from counseling directives, but the Board was not shown any such current guidance for the Claimant.

As noted above, discipline is appropriate for the abandonment of assignment. Since the consumption of alcohol arose from events after such abandonment, the Board finds that neither Rule G nor the Rule G Waiver directly cover these circumstances. As a result, the Board determines that the Claimant should be reinstated with seniority unimpaired, but without back pay or retroactive benefits. As conditions to this reinstatement, the Board directs the following:

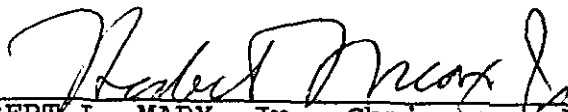
- 1, The Claimant must agree in writing that the reinstatement is based on his complying with a new two-year random testing program and then test negative in all instances where the Carrier provides the testing.

2. The Claimant must establish or re-establish contact with the EAP Counselor and must follow the program established for him.

Failure to meet these objectives will lead to dismissal from service. If the Claimant and/or the Organization do not agree to these conditions, then the pending dismissal is upheld.

A W A R D

Claim sustained to the extent provided in the Findings. The Carrier is directed to make this Award effective within 30 days of the date of this Award.



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



B. A. WINTER, Employee Member



W. H. ROBINSON, Jr., Carrier Member

NEW YORK, NY

DATED: 10-6-94