

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 36

Case No. 36

System Docket No. BMW-238D

STATEMENT OF CLAIM

(a) Carrier's dismissal of Claimant Leroy Burley 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 Burley 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 specification:

In that I [the Charging Officer] received confirmation dated March 26, 1995 that you failed to pass a return to duty urinalysis conducted on Tuesday, March 7, 1995 which tested positive for cocaine metabolite. This testing was in accordance with the Procedures Manual of the National Railroad Passenger Corporation, Section

PERS-19. Your positive testing is in violation of the instructions to you in the Amtrak Medical Director's letter dated February 1, 1988 and your conditional reinstatement agreement signed February 1, 1988 (attached). This also constitutes your second positive urinalysis under Amtrak's drug and alcohol policy.

Following the hearing, the Claimant was dismissed from service.

Despite questions raised by the Organization, the Board finds no basis to conclude that the testing provided to the Claimant was improperly conducted or that the confirmed results should not be accepted as accurate.

The earlier "conditional reinstatement", involving a previous positive drug testing in 1988, included the Claimant's signed acknowledgement of a letter from the Carrier stating in part as follows:

. . . Company policy prohibits employees from working with the presence of substances in their systems which may impair sensory, mental or physical functions. You are, therefore, instructed to keep you 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.

After this initial drug incident, the Claimant did return to work and any drug testing during the first two years thereafter was negative. The Organization argues that, because the Claimant successfully completed these two years, the restrictions imposed on him in 1988 are no longer applicable. Further, the Organization notes that seven years had elapsed since the initial incident.

There is no dispute that the drug test given to the Claimant in 1995 was performed in accordance with established procedure -- that is, as part of a full physical examination after an absence of more than 30 days. It was not simply another "random" test as had been the case during the earlier referenced two-year period. The Carrier, however, emphasizes that the same letter required the Claimant "to keep [his] system free of such substances", and that this applies to all future employment. In addition, the Carrier relies on its general, well understood policy prohibiting work while having drugs in the system (indicating recent use thereof).


The test which the Claimant underwent in 1995 was part of a normal procedure applicable to all similarly situated employees. While the Company has an established program permitting a further opportunity for an employee found positive for drug or alcohol, there is nothing to indicate that this opportunity need be offered an additional time, when the Claimant is shown once again to be have made recent use of cocaine.

The Organization's defense that the Claimant could not read or write did not free him of the responsibility for knowledge concerning drug use and its incompatibility of drug use and acceptable work performance.

The Board has no basis to question the resulting dismissal.

A W A R D

Claim denied.



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



B. A. WINTER, Employee Member



W. H. ROBINSON, Jr., Carrier Member

NEW YORK, NY

DATED: 3-13-96