

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 59

System Docket No. BMWE-423D

STATEMENT OF CLAIM

Claim of the Brotherhood that:

(a) Carrier's dismissal of Claimant Michael Alert 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 Alert shall be reinstated into Carrier's service with all seniority entitlement 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

In 1995 the Claimant tested positive for marijuana during a return-to-duty physical examination. Pursuant to the Carrier's policy, the Claimant was given the choice of retesting and providing a negative sample within 30 days or entering the Carrier's Employee Assistance Program. The Claimant selected the former

option. He was reinstated, subject to the following condition, to which the Claimant agreed in writing:

I understand, that 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 of active service. . . . Furthermore, I understand that if I have another positive test result, I will be subject to dismissal.

The Claimant did not test positive during the two-year period following his return to service. On June 19, 2001, however, the Claimant tested positive for marijuana in the course of a "company rules, drug and alcohol test". Based on this, he was subject to an investigative hearing, charged with violating the Carrier's Alcohol and Drugs Standard and NORAC Operating Rule "G" and, separately, with violating his 1995 reinstatement agreement, quoted above. Following the hearing, the Claimant was dismissed from service.

The Organization argues that the 1995 agreement was not violated, since the positive test occurred after the specified two-year period. There is, however, no basis to find that the reference to "another positive test" is limited to the two-year period; this period simply indicates that the employee acknowledges his obligation to undergo four-times-a-year testing for two years, solely on the basis of his conditional reinstatement. In the instance here under review, the testing was on a separate basis, resulting in the Claimant's violation of Rule "G" and the Carrier's Alcohol and Drugs Standard.

The positive test result leading to the Claimant's dismissal from service is thus in no way protected by the Claimant's comple-

tion of the two-year random testing period. As stated in Award No.
36:

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

The Organization advised the Claimant of his opportunity to be present at the Board's hearing, but he did not appear.

A W A R D

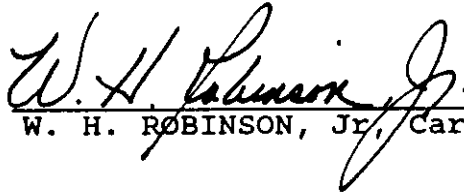
Claim denied.



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



B. A. WINTER, Employee Member



W. H. ROBINSON, Jr., Carrier Member

NEW YORK, NY

DATED: *June 18, 2002*