

PROCEEDINGS BEFORE PUBLIC LAW BOARD NO. 5139

AWARD NO. 14

Case No. 14

Referee Fred Blackwell

Carrier Member: L. C. Hriczak

Labor Member: Jed Dodd

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The dismissal of Claimant S. Steward for allegedly testing positive on October 10 and 23, 1987, for the metabolites of cocaine was arbitrary, capricious and in violation of the Agreement (System File NEC-BMWE-SD-2023D).
2. As a result of the violations referred to in Part (1) hereof, the Claimant's record shall be cleared, she shall be reinstated to duty and compensated for all lost earnings.

FINDINGS:

Upon the whole record and all the evidence, and after March 18, 1992 hearing in the Carrier's Offices, Philadelphia, Pennsylvania, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Claimant, who was duly notified of said hearing and of her right to be present and participate in same, did not attend said hearing; and that this Board is duly constituted by Agreement and has jurisdiction of the parties and of the subject matter.

DECISION:

Claim denied in part and sustained in part.

The preponderating evidence in the whole record establishes that the Amtrak Drug Policy for Drug Testing of Employees is both reasonable and a valid exercise of the prerogatives of

Amtrak Management and that the unilaterally implemented Drug Testing Policy of Amtrak is not barred by the AMTRAK-BMWE Agreement or prior practice.

Accordingly, the Organization's request to have the Policy vacated is denied.

The Organization's challenge regarding the discharge of the herein Claimant is valid. The Carrier's proof in support of the dismissal of the Claimant on January 21, 1988 is insufficient because the Carrier failed to introduce in the January 11, 1988 hearing the chain of custody documentation regarding the retest of the Claimant on October 22, 1987.

Accordingly, the dismissal of the Claimant will be vacated and she will be reinstated to service with the status she had as a result of testing positive for cocaine as part of her September 10, 1987 return-to-duty physical examination. Inasmuch as the Claimant was medically disqualified from service in September 1987, there is no basis for allowing her request for lost wages. The reinstatement of the Claimant will be subject to the generally applicable return-to-duty procedures, including a drug/alcohol screen.

OPINION

This case arises from the appeal of the Claimant, Ms. S. Steward, of the Carrier's action of January 21, 1988, whereby the Carrier dismissed the Claimant for violating the Carrier's Drug & Alcohol-Free Policy.

The BMWE contends that the Drug Policy is impermissible and invalid under the AMTRAK-BMWE Agreement and asserts that the discharge of the Claimant for failure to comply with the Policy is not supported by the requisite evidence of record.

The specific grounds of the alleged violation of the Policy by the Claimant are that in connection with a return-to-work physical administered to Claimant on September 10, 1987, the Claimant tested positive for cocaine and did not thereafter com-

ply with the requirement of the Policy to rid her system of prohibited drugs within a specified period of time.

The findings that the Claimant violated the Carrier's Drug Policy are based on the evidence developed in a formal investigation conducted on January 11, 1988, in absentia, on the following charges:

"Charges: Violation of National Railroad Passenger Corporation (AMTRAK), Rules of Conduct, NRPC 2525 (9/85), Rules P, O, D, and L which read in part as follows:

'Rule P...OUTSIDE ACTIVITIES...Employees must not engage in any activity which interferes with their efficiency on or availability for duty or creates a conflict of interest...' and

'Rule O...REPORTING & AVAILABILITY FOR DUTY...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 or engage in other than Amtrak business while on duty or on AMTRAK Property without the permission from their supervisor...' and

'Rule D...COMPANY POLICIES AND PROCEDURES...Employees must understand and obey Company and department policies, procedures and special instructions, and PERS 19 and 19.2...' and

'Rule L...OBEYING INSTRUCTIONS...Employees must obey instructions, directions, and orders from AMTRAK supervisory personnel and officers except when confronted by a clear and immediate danger to themselves, property, or the public...'

SPECIFICATION: On September 10th, 1987 a Return to Work Physical was performed in your behalf and which the urinalysis results showed positive for cocaine, and that you were instructed to rid your system of that or any other prohibited drug by October 23, 1987. Wherein Ms. Steward provided another sample for testing on October 23rd, 1987 and that test showed positive for cocaine."

Following the January 11, 1988 hearing, findings of guilt of the foregoing charges were made over the signature of

Hearing Officer F. J. Mulvey on January 21, 1988; assessment of discipline of dismissal was made on the same date over the signature of Acting Director Track Production, C. A. Campbell (Carrier Ex. 2).

Background Facts

The discharge action in this case involves Claimant Ms. Sandra Steward who was administered a return-to-duty physical examination on September 10, 1987. The examination included a drug screen which tested positive for cocaine. The Carrier notified the Claimant by letter dated September 22, 1987 that she was medically disqualified from service due to the positive finding for cocaine and that she was required by Amtrak's Drug Policy to rid her system of prohibited drugs within a specified period of time. The Carrier's letter offered the Claimant the option to be retested within thirty (30) days from the date of the letter or, if eligible, to enter the Employee Assistance Program. The Claimant elected the thirty day retest option, whereupon, on October 22, 1987, she was administered a second drug test that was also positive for cocaine. The second positive test for cocaine resulted in charges, a hearing thereon, and discharge of Claimant for violating Company rules and the Amtrak Drug Testing Policy.

The Drug Policy is designated as PERS 19 and is entitled "DRUG AND ALCOHOL TESTING OF EMPLOYEES". Issued unilaterally by Amtrak under date of August 15, 1987, the Policy, as pertinent to this case, provides the following:

"SUBJECT: DRUG AND ALCOHOL TESTING OF EMPLOYEES

* * *

V. RETURN-TO-WORK AND PERIODIC PHYSICALS

A. Policy

Except as specifically provided in an applicable labor agreement, all employees returning to work after an absence, for any reason other than vacation, of 30 days or more will be tested by urine sample for drug presence as a part of a return-to-work physical. All required periodic physicals and physicals to determine fitness for duty will also include a test for the presence of drugs. Prior to giving a sample, the employee shall complete a form specifying all drugs or medications used within the previous 60 days. The form will include notice that the urine sample will be tested for drug presence and that a confirmation test will be performed at Amtrak's expense if the first test is positive.

B. Confirmation Testing

If the first test of a urine sample indicates the presence of drugs, a confirmation test will be conducted at Amtrak's expense on the same sample at a medical facility selected by Amtrak using another method that is specific for the substance detected in the first test. The employee is entitled to receive a copy of the laboratory report. If the confirmation test is negative, the employee will be paid for any lost wages incurred during the time she/he was withheld from service because of the need to await the results of the confirmation test.

C. Consequences of Positive Test Result

If a test conducted pursuant to this Section V is positive, the Personnel Department will notify the employee that she/he is medically disqualified. The employee must, within 30 days, either be retested by an Amtrak nurse or a medical facility designated by Amtrak or, if eligible, enter the Employee Assistance Program (EAP). Except where the provisions of an applicable labor agreement specify different procedures, any employee entering the EAP shall be governed by the provisions of Section PERS 39 of the Procedures Manual.

If an employee who has had a positive test does

not enter the EAP and elects to be retested and the retest result is positive, the employee shall be subject to dismissal and shall not be entitled to enter the EAP. A confirmation test shall be conducted at Amtrak expense on any sample that has initially tested positive in this retest.

When an employee who has tested positive during a return-to-work or periodic physical enters the EAP, the employee will undergo counseling/treatment as determined by the EAP counselor. When the counselor decides the employee is able to return to duty, the employee must take a new return-to-work physical before presenting himself or herself for duty. If the employee tests positive on the retest, she/he shall be subject to dismissal for failure to follow instructions and shall not be eligible to reenter the EAP.

An employee who has tested positive for drugs and is returned to service after achieving a negative test result shall, as a condition of being returned to service, be subject to testing for drugs and/or alcohol by breath or urine sample, at least once each calendar quarter for a period of two years. If the employee tests positive for the presence of drugs or alcohol during such subsequent tests, or during any future return-to-work or periodic physical, the employee shall be subject to dismissal and shall not be entitled to enter the EAP.

D. Failure to Cooperate with Testing

An employee who refuses to provide a sample or to cooperate in the testing procedures will be treated as if she/he had a confirmed positive test result. However, an employee who intentionally interferes with the administration or integrity of a test sample shall not be entitled to enter the EAP and will be subject to dismissal for dishonesty."

Positions of the Parties

The parties join issue in this case both on the validity of the Amtrak Drug Testing Policy and the validity of Amtrak's discharge of the Claimant for violating that Policy.

The specifics of Amtrak's position now follow.

1) Amtrak has a managerial right to establish and enforce reasonable medical standards, including requiring that Employees' urine samples be tested for drugs during return-to-duty physical examinations.

2. The Federal Legislation that brought Amtrak into existence, the Rail Passenger Service Act, authorized Amtrak to establish standards for the operation, inter alia, of a safe intercity railroad passenger service. In consequence, Amtrak is obligated by its enabling legislation to establish reasonable medical standards to ensure the safety of its Employees and the public.

3. The reasonableness of the policy is evidenced by such considerations as the linkage between the use of prohibited drugs and the risk of impairment of work performance.

4. The tests used by Amtrak to detect the presence of prohibited drugs in an Employee's system are effective and reliable.

5. The dismissal of Claimant Steward is supported by the hearing evidence and the conduct of the hearing in absentia was proper in the circumstances of this case.

The specifics of the Organization's position now follow (page 2, Organization Submission).

"1. The unilateral implementation of the Amtrak drug testing program represents a change in the working conditions in violation of the collective bargaining agreement and the Railway Labor Act.

2. The Amtrak program fails to set forth sufficient en-

forcement safeguards to ensure that it is not applied subjectively and discriminatorily.

3. Amtrak's unilaterally implemented program does not include sufficient scientific and procedural safeguards (specimen collection, chain of custody, lab certification, technician qualifications, etc.) to guard against false positive test results.
4. Amtrak's drug testing program considers positive test results as discipline matters rather than medical matters."

5. In regard to the dismissal action under review in this case, the Organization contends that the Carrier failed in its burden of proof of the charge that the Claimant tested positive for drugs for the following reasons (Page 20, Organization's submission):

- "- The Carrier failed to present the technician who performed the tests as requested by the Union,
- The Carrier failed to present evidence relative to the Chain of Custody documents as requested,
- The Carrier failed to show that all of the required testing procedures were followed,"

FINDINGS AND DISCUSSION

After due study of the whole record, it is concluded and found that the record establishes that the Amtrak Policy for Drug Testing of Employees is both reasonable and a valid exercise of the prerogatives of Amtrak Management and that the unilaterally implemented Drug Testing Policy of Amtrak is not barred by the AMTRAK-BMWE Agreement or prior practice.¹

It is further found that the dismissal of the herein

¹ In arriving at this decision, the willingness of the BMWE to negotiate on the subject of a Drug Policy has not been weighed as evidence against the validity of the BMWE position in this dispute.

Claimant for failure to comply with the requirements of the policy is not supported by substantial evidence in the record as a whole, because the Carrier did not introduce in the hearing the chain of custody documentation regarding the retest of the Claimant on October 22, 1987.

Accordingly, the dismissal of the Claimant will be vacated and she will be reinstated to service with the medically disqualified status which she possessed in September 1987, subject to all conditions provided in the reinstatement directive.

The Amtrak Drug Policy Is Valid

The issue of the validity of the testing of Employees for the presence in their systems of prohibited (legally controlled) drugs, has been debated for the last decade or two in the context of the use of legally controlled drugs by a large segment of our population for so-called recreational purposes. In this atmosphere it is not surprising that the arbitral and judicial decisions on drug issues have produced mixed results. In the railroad industry, where collective bargaining agreements cover most or all of the Employees subject to drug testing, different rulings may be the result of different language in the labor agreements, as well as from forums having different perceptions of the same or similar facts and agreement language, and from forums having different views on what facts should be actionable under a drug policy.

The point here is that although all of the cited author-

ities have been examined, studied, and given appropriate persuasive weight, the herein decision is the result of independent analysis and assessment of the whole record² and not the result of ascribing governing precedential weight to any of the cited authorities.

In regard to the four main BMWWE arguments that challenge Amtrak's Drug Testing Policy, supra pages 7 & 8, such arguments, individually and in the aggregate, have been studied and found unpersuasive and lacking in record support.

The record contains no persuasive evidence or argument that the disputed Drug Policy is barred by the AMTRAK-BMWE Agreement and prior practice. Also, since the disputed policy is deemed reasonable, it follows that the implementation of the Drug Policy is a valid exercise of the prerogatives of the Amtrak Management.

The Board further finds that the Drug Policy does not represent a change in the working conditions of the BMWWE Employees, as contended by the BMWWE. The Organization submits, for example (page 22, Organization's Submission), that because Amtrak's detection of drugs had previously been limited to direct observation by supervisory personnel, "reasonable suspicion", and the possession or use on the property of a proscribed substance, the

² Agreement provisions, evidence, argument, and prior authorities.

change to the current detection procedures is a major change in the Employer-Employee relationship that cannot be implemented without first negotiating under Section Six of the Railway Labor Act.

The fact that Amtrak's prior means for detecting drugs may have been adequate in the past, does not mean that Amtrak is limited to the use of these means in perpetuity. There has been a demonstrable increase in the illegal use of legally controlled drugs and the potential for adverse impact on the safety of Railroad Employees and the public is clearly evident. The disputed change in the detection methodology is responsive to the change in the magnitude and nature of the problem and hence, the change is not deemed to be a major change in the Employer-Employee relationship.

Moreover, the Board does not share the Organization's concern that a Board ruling that allows the disputed policy to remain in place, because the parties' Agreement does not expressly prohibit the policy, would open the door to the unilateral implementation of unwarranted intrusions such as strip searches which are also not expressly prohibited by the Agreement (page 24, Organization Submission). The omission of a contract prohibition of the Drug Policy is a condition precedent to the implementation of the policy in dispute; however, the ultimate standard on the permissibility of the Drug Policy is whether it meets the requirements of the rule of reason which is an arbitral prin-

ciple commonly applied to matters not expressly prohibited by contract. The Amtrak Drug Policy is found reasonable and hence permissible under the Agreement, but this finding of permissibility is based both on the absence of an express prohibition of the policy in the Agreement and a separate finding that the policy meets the requirements of the rule of reason.

The Board further concludes that the record evidence and BMW arguments do not support the BMW assertions that the Drug Policy does not include sufficient safeguards to guard against false positive test results. Even though a false positive finding may occur in the initial test by the EMIT method, the confirmation test performed by the GC/MS³ method eliminates the initial false positive from consideration in the administration of the Policy. As to the argument that the Drug Policy does not provide sufficient safeguards to ensure its non-discriminatory application, the Board notes that there is nothing in the Policy that is inherently discriminatory or that invites the Policy to be applied with bias. However, notwithstanding the lack of any per se discriminatory feature in the Drug Policy, the possibility exists for the Policy to be applied in a discriminatory manner in individual cases and consequently, the right to claim alleged discrimination is a right that may be asserted on behalf of any Employee to whom the Policy is applied.

³ Gas chromatography/mass spectrometry.

The Board also finds unpersuasive the BMWWE argument that the administrators of the Drug Testing Policy treat positive test results as discipline matters rather than medical matters. It is true that an Employee may become subject to discipline under the Policy, but this occurs only after the Employee has been given an opportunity to comply with the Drug Policy. The fact that discipline may be dispensed under the Policy, does not make the Policy unacceptable; indeed, if the Drug Policy did not provide discipline for failure to comply with the Policy, it is probable that the effectiveness of the Drug Policy would be seriously and possibly fatally compromised.

Finally, it is found that the Carrier's use of the return-to-duty physical examination to detect the presence of prohibited drugs in its Employees is an altogether appropriate use of this examination. If society becomes endangered by a new, highly contagious disease that could be only be detected by analysis of body fluids, there would be virtually no argument about the need to detect the disease by return-to-duty physical examinations and to take action to restrict its impact in the workplace. So, too, the use of a return-to-duty physical examination to detect the presence of a prohibited drug(s) in the system of an BMWWE Employee is an acceptable use of this examination; such examination provides the possibility of preventing the Employee with drugs in his system from hurting himself or others in the workplace and from causing damage to property.

The unilaterally established Antrak Drug Testing Policy is thus found reasonable and within the rights of the Management to establish without a concurring agreement from the BMW. ⁴

Inadequate Proof of Claimant's Guilt

As previously indicated and found, the dismissal of the herein Claimant, Ms. Sandra Steward, for failure to comply with the requirements of the Policy is not supported by substantial evidence in the hearing record as a whole.

The fact that the charges against Claimant were heard in absentia does not result in any procedural defects. The Carrier used Certified Mail to notify the Claimant of charges and of a trial scheduled thereon for a specified date; copies of the green receipt cards bearing the signature of Claimant to evidence her receipt of the Certified Mail were entered in the hearing record as Exs. 2, 4, and 6. This evidence shows that the Carrier complied with the Agreement requirements regarding notice of charges/hearing; consequently, the trial of Claimant in absentia in the January 11, 1988 hearing cannot be said to have violated the hearing provisions of the Agreement.

As regards the merits of the case, the Organization's argument overreaches somewhat in describing the scope and nature

⁴ This ruling disposes of the Organization's contention that the Antrak Drug Policy is invalid; consequently, although all arguments advanced by the Organization have been studied, it is not necessary to discuss and rule on all of such arguments in this Opinion.

of the evidence that was required to be proffered by the Carrier in order to support the charge in this case. However, the Organization's targeting the chain of custody documentation as essential evidence is well founded. The reason is that the chain of custody documentation in a case charging the improper use of drugs, is part of the minimum evidentiary proof that is required upon demand by the Claimant's representative, even if the accused does not appear in the hearing to defend against the charges.

During the hearing against Claimant on the subject charges, the Union representative requested that the chain of custody documentation be provided. Such documentation was not provided and the hearing was not ordered to remain open to receive such documentation. The chain of custody documentation was not provided to the Organization until June 22, 1988 (Carrier Exhibit No. 8), which was five (5) months after the close of the hearing record and the findings of guilt/dismissal on January 11 and 21, 1988.

Evidence omitted from the hearing record, absent stipulation, cannot be submitted for consideration by the Board after the hearing record is closed and actions regarding findings of guilt and dismissal are taken. The chain of custody documentation is absent from the hearing record concerning Claimant Steward and therefore, it cannot be said that the hearing record contains substantial evidence to support the Carrier's findings that the Claimant was guilty of the charge of not complying with

the Amtrak Drug Policy.

In assessing these facts the Board concludes and finds that the appropriate disposition of the appeal of Claimant Stewart is to set aside the dismissal of the Claimant and to direct her reinstatement to service in the status that she had as a result of testing positive for cocaine as part of her September 10, 1987 return-to-duty physical examination. Inasmuch as the Claimant was medically disqualified from service in September 1987, there is no basis for allowing her request for lost wages. The reinstatement of the Claimant will be subject to the generally applicable return-to-duty procedures, including a drug/alcohol screen.

ACCORDINGLY, on the basis of the record as a whole, the Board concludes and finds that the Organization's challenge to the validity of the Drug Testing Policy is not supported by the record and the claim in this regard will be denied.

The Board further concludes and finds that the Organization's challenge to the Carrier's proof of the charge against the Claimant is valid because of the absence of the chain of custody documentation from the hearing record and accordingly, the Claimant will be reinstated to the status she held in September 1987; compensation for lost wages will not be allowed.

AWARD:

In view of the foregoing, and based on the record as a whole, it is concluded and found that the Carrier's

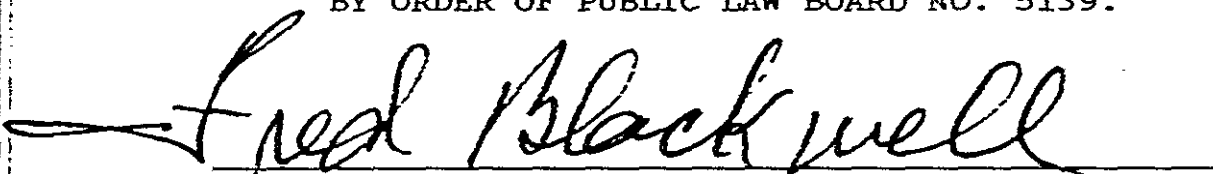
Drug Testing Policy is reasonable and not violative of the parties' Collective Bargaining Agreement.

It is further concluded and found that the hearing evidence was deficient as to the required chain of custody documentation and accordingly the Carrier is hereby directed to reinstate the Claimant to service in the status she held in September 1987. Compensation for lost wages is not allowed.

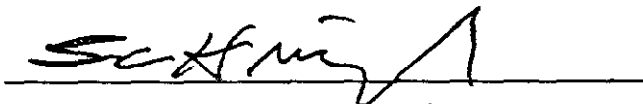
The Carrier shall comply with this Award by July 9, 1992.

The Board will retain jurisdiction of this matter for sixty (60) days after the Carrier has complied with the reinstatement directive of this Award. In addition, if Claimant is dismissed under the Drug Policy in connection with the implementation of this Award, the matter, if protested, may be progressed to this Board within sixty (60) calendar days after said dismissal.

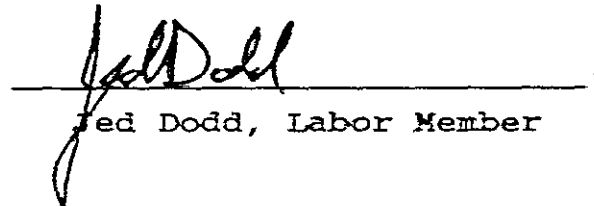
BY ORDER OF PUBLIC LAW BOARD NO. 5139.



Fred Blackwell, Neutral Member



L. C. Hriczak, Carrier Member



Ted Dodd, Labor Member

Executed on July 2, 1992