AWARD NO. 1
NMB CASE NO. 1
UNION CASE NO. 01
COMPANY CASE NO. MBCR-BMWE-1 8D/1 104

PUBLIC LAW BOARD NO. 6832

PARTIES TO THE DISPUTE:

MASSACHUSETTS BAY COMMUTER RAILROAD

- and -

BROTHERHOOD OF MAINTENANCE OF WAY DIVISION,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

STATEMENT OF CLAIM:

"I appeal to you the dismissal case of Peter DaSilva, (Carrier File 04159) whose hearing was held in absentia on October 13, 2004 and the notice of discipline was dated October 18, 2004 and received by this writer on October 23, 2004."

OPINION OF BOARD: Mr. Peter DaSilva ("Claimant") was first employed by Amtrak in its Maintenance of Way Department on July 7, 1997 at Boston, MA. Effective July 1, 2003, Claimant became a new employee of Massachusetts Bay Commuter Railroad ("MBCR" or "Carrier"), after MBCR succeeded Amtrak as operator of the commuter railroad system for the Massachusetts Bay Transit Authority. When Claimant accepted employment with MBCR, he became subject to MBCR's "Code of Conduct", including a Drug and Alcohol Policy which provides, in pertinent part:

> Drug and Alcohol Policy
>
> MBCR has zero (or no) tolerance for drug use. Employees are prohibited from possessing or being under the influence of alcohol beverages, intoxicants, narcotics or mood changing substances, including medication which may cause impairment, while on either MBCR or MBTA property, and/or while subject to duty or reporting for work. Employees must notify their supervisor if taking medication - either prescribed or over the counter - that could interfere with the safe performance of the job.
>
> The policy is enforced through both drug and alcohol testing. Additional information is located in the MBCR Drug and Alcohol Policy a copy of which you received upon enrollment. Additional copies can be obtained from the Human Resources Department.
>
> * * *
>
> 5. Any employee tested for alcohol whose test result indicates an alcohol concentration of .02 or above may not perform or continue to perform service. The employee will be medically disqualified from performing further service and the employee will be charged with violating MBCR company policy. If eligible, the employee may sign a waiver and enter the EAP; if the employee elects not to

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> enter a mandatory EAP, or produces a second result of .02 or above on a company or federal test will result in a disciplinary hearing in accordance with applicable collective bargaining agreements and disciplinary action up to and including termination. . . . .

On February 25, 2004, Claimant was administered a reasonable cause drug and alcohol test under Carrier's Drug Testing Program and tested positive for a banned substance. As a result of that incident, Claimant waived formal investigation and signed a Waiver Agreement on April 6, 2004, which included the following terms:

> I admit that I violated Rule G as charged. I understand I am being withheld from service without pay except for medical coverage, vacation entitlement, compensatory time and other benefits to which I am entitled, pending my successful completion of treatment as recommended by the Employee Assistance Program Counselor or his/her designated representative. I agree to contact the EAP Counselor within 10 days from the date I sign this waiver and to follow his/her recommendations; should I fail to do so, I will accept discipline of dismissal for the above violation of Rule G.
>
> **I understand that after successfully completing the initial treatment plan recommended by the EAP Counselor, I will be dismissed from service unless I comply with the following requirements:**
>
> 1. After completing the initial treatment plan, I must undergo and pass any medical examination required by company policy. I understand medical examinations may include testing a sample of my urine for the presence of drugs and/or testing my breath for the presence of alcohol.
>
> 2. I must maintain periodic contact with the EAP Counselor for a two-year period after successfully completing the initial treatment program, if directed to do so by the EAP Counselor.
>
> 3. I must adhere to any continuing care plan prescribed by the EAP Counselor.
>
> 4. I must provide a clean drug and/or alcohol test specimen 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 MBCR service.**

At the beginning of his tour of duty at 7:00 a.m. on September 13, 2004, Claimant was administered a follow-up test under the terms of the above-quoted Waiver Agreement. The Breathalyzer test indicated an alcohol content of .038 and a confirmation test administered about 15 minutes later gave a reading of .035, far above the .02 cut-ff level. Under the terms of Carrier's Drug and Alcohol Policy, *supra*, Claimant was medically disqualified from performing service at that time.

As a result of the above incident, Claimant was notified by registered letter, with copy to his Organization Representative, to attend a formal investigation to develop the facts in connection with the following charges:

> It is alleged that you tested positive for alcohol during a company follow-up drug and alcohol-testing event held on September 13, 2004. You were subject to this follow-up as a result of a previous positive test result on February 25, 2004.The above is in direct violation of the Massachusetts Bay Commuter Railroad Code of Conduct and the Drug and Alcohol Policy.

The record shows that Carrier made the following efforts to provide the Claimant with the foregoing Notice of Charge and the opportunity to attend the formal investigation

- Claimant was sent a registered letter dated September 16, 2004, to his last known address, to attend a formal investigation on September 22, 2004. The September 16 letter was returned to Carrier by the postal service marked "Unclaimed, Unable to Forward" on September 20, 2004.

- On September 22, 2004, after learning that he had moved without updating his address of record with the Human Resources Department, Carrier sent the Claimant another registered letter at his (changed) contemporary address. He was further advised that the hearing (copy of the original notice was enclosed) was postponed, and that he would be advised as to the rescheduled date as soon as determined. No signed receipt was ever received from the postal service, but this letter was never returned to Carrier.

- On September 27, 2004, Carrier sent another registered letter to Claimant at his corrected address, advising that the investigation had been rescheduled for October 7, 2004. This letter was eventually returned to Carrier "Unclaimed".

- On September 30, 2004, Carrier sent another registered letter to Claimant advising the investigation had been postponed at the request of his union representative. The letter advised of a rescheduled date of October 13, 2004. This letter was also returned by the postal service marked "Unclaimed".

The Claimant's BMWE Representative appeared at the hearing site at the appointed starting time on October 13, 2005 without the Claimant and asked for a delayed start of the proceedings until the Claimant arrived; explaining that he had spoken to the Claimant just the night before concerning the start time and place of the hearing. The Hearing Officer delayed calling the Carrier witnesses

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to allow the Claimant some extra time. But after the Claimant still had not shown up, answered his cell phone or made any contact after almost 90 minutes, the Hearing Officer went forward with the proceedings, *in absentia*, over the Organization Representative's objection.

Based on the testimony of the technician who administered the Breathalyzer test and documents of record concerning the test protocol and results, the Carrier concluded that Claimant was culpable of violating the terms of his Waiver Agreement and terminated his employment. After carefully reviewing the evidence, arguments and arbitral authorities presented at the Board hearing on this matter, we find no valid basis to overrule or modify the Carrier's decision.

The Organization's primary basis for appeal is that the hearing was held *in absentia*. However, the undisputed fact that the Claimant had actual notice of the charge against him and the time and place of the October 13, 2005 hearing trumps any theoretical argument by the Organization that he might not have received the formal record notices sent to him by Carrier. *Arguendo*, given the extended good faith efforts by the MBCR to make sure that the Claimant had adequate record notice, we find the following findings in NRAB Third Division Award No.35373 (Referee Barry Simon) applicable to the present case: *"The Carrier's burden is to send a proper notice to the employee's last known address. It is not required to guarantee delivery of that notice. Placing the notice in the U.S. Mail satisfies the Carrier's obligation. It is also not necessary to try to locate alternative addresses for the employee, although the Carrier, in this case, took that extra step. Just as the employee has the right to attend the Investigation, he also has the right not to attend. The Board concludes the Carrier afforded the Claimant the first right, but he chose to exercise the second".*

The Organization's alternative theory that Carrier fatally violated the Claimant's contractual due process rights by introducing the June 1, 2003 version of the Drug and Alcohol Policy rather than the updated October 15, 2003 version of the Drug and Alcohol Policy as an exhibit at the hearing also is a non-starter. Even if this was not a *de novo* argument, this is a distinction without a difference because there is no discernible substantive difference in the pertinent provisions of the "old" and "new" drug and alcohol policies. [The Board notes in comparing the two that the language under Section B. MBCR Prohibitions at page 4 of the October 15, 2003 version of the policy is identical to that contained in the July 1, 2003 version of the policy. Further, the record shows that Claimant was furnished a copy of the first version at the time of his employment, and signed for the revised version on June 6, 2004]. If that were not enough notice to the Claimant of his obligations under the drug and Alcohol Policy, there is no room for debate that remaining drug and alcohol free at work during the period of his conditional reinstatement was fully set forth in the self-executing Waiver Agreement which he signed on April 6, 2004.

The Carrier complied with its obligations under the terms of that Waiver Agreement but after taking the benefits of access to rehabilitation and conditional restoration to service the Claimant proved unable or unwilling to comply with the conditions to which he had agreed. In the final analysis, Carrier's termination of his employment was simply enforcement of the clear and unambiguous terms of that Waiver Agreement after the Claimant failed to uphold his end of the bargain. In closing, it is noted that the Claimant appeared in person at the Board hearing, conceded his culpability and asked for a "last chance" reinstatement to his former position. No one can take any measure of pleasure in presiding over the self-inflicted termination of a career, but this Board would be acting far outside the scope of its legitimate authority if it were to grant the Claimant's plea

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for leniency. *See* Third Division Awards 15566. See also Third Division Awards 9775, 11914, 12104, 13116, 14800.

AWARD

Claim denied.

Dana Edward Eischen, Chairman

Union Member

Company Member