

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 2406

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

-and-

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

*
*
*
*
*
*

CASE NO. 35

AWARD NO. 35

Public Law Board No. 2406 was established pursuant to the provisions of Section 3, Second (Public Law 89-456) of the Railway Labor Act and the applicable rules of the National Mediation Board.

The parties, the National Railroad Passenger Corporation (Amtrak, hereinafter the Carrier) and the Brotherhood of Maintenance of Way Employees (hereinafter the Organization), are duly constituted carrier and labor organization representatives as those terms are defined in Sections 1 and 3 of the Railway Labor Act.

After hearing and upon the record, this Board finds that it has jurisdiction to resolve the following claim:

- "1. The Carrier violated the Rules Agreement, effective May 19, 1976, as amended, particularly Rule 71(a) when it assessed discipline of dismissal on Trackman, Anthony J. Cole, Baltimore, Maryland.
- "2. The discipline was arbitrary, capricious, excessively harsh and unsupported by the testimony.
- "3. Claimant Cole's record be cleared of all the charges, he be restored to service with seniority and all other privileges unimpaired, and compensated for all lost wages as a result of being held from service."

The Claimant, Anthony J. Cole, entered the Carrier's service On July 19, 1976, as a Trackman, and was so employed at the time of the incident giving rise to this claim. By notice dated

September 22, 1978, the Claimant was instructed to attend a trial scheduled for September 25, 1978, in connection with his alleged violation of General Rules I and C. The Claimant received the notice after the date scheduled for trial and the trial was re-scheduled for October 11, 1978. The trial was again rescheduled and held on October 17, 1978. The Claimant was present at the trial and accompanied by a duly designated representative of the Organization. On October 30, 1978, the Claimant was notified that he would be assessed the discipline of immediate dismissal for violation of General Rules I and C.

Rules I and C, read in pertinent part:

- I. "Employees will not be retained in the service who are insubordinate... ."
- C. "Reporting for work under the influence of alcoholic beverages...or the use of alcoholic beverages while on or subject to duty or on company property is prohibited."

The record shows that at approximately 11:30 a.m. on September 21, 1978, the Claimant was working at the B&P Tunnel, Baltimore, Maryland. At that time the Claimant's foreman, Luther Perry, saw him fall. Mr. Perry came over to find out what was wrong. He smelled alcohol on the Claimant's breath, determined that he was physically incapable of performing his duties, and ordered him off the property. The Claimant refused to leave, and Mr. Perry called the Assistant Supervisor of Track, Steven Moniz, for assistance in removing the Claimant.

When Mr. Moniz arrived, he too smelled alcohol on the Claimant's breath. Mr. Moniz told the Claimant to cease working and to come

with him to the Medical Center for a sobriety test. When the Claimant refused, Mr. Moniz told him that if he did not obey he would be out of service. The Claimant still refused and Mr. Moniz then put him out of service.

The Claimant acknowledges that he fell, that he refused to leave the property as ordered by his foreman and that he refused to go to the Medical Center for a sobriety test. However, he denies being intoxicated. While there is no specific indication in the record of the Claimant's reason for refusal to obey the orders of his foreman or of the Assistant Superintendent, Track, the Claimant did testify that he was angry with his foreman for accusing him of being intoxicated on the job. It was presumably for this reason, that he felt he was being improperly accused, that the Claimant refused either to leave the property or to go to the Medical Center.

It seems clear to this Board that the Carrier has met its burden of showing by substantial evidence that the Claimant was guilty of violation of General Rule C. It is true that no one saw the Claimant imbibe; however, the testimony of Messrs. Perry and Moniz supports the contention of the Carrier that the Claimant was under the influence of alcohol while on duty. The fact that they are laymen does not mean that they are unqualified to judge when someone is in an intoxicated condition.

Even if, for the sake of argument, this Board were to accept the Claimant's assertion that he was not intoxicated, he was obligated to obey his foreman's order to leave the property. The foreman's concern, as stated at the trial, concerned safety, and

the foreman had the authority to order the Claimant off the property for safety reasons. Finally, Mr. Moniz' order that the Claimant go to the Medical Center for a sobriety test was a perfect opportunity for the Claimant to prove that he was, in fact, sober. Anger because of what he considered unjust accusations does not excuse the Claimant's insubordinate refusal to obey proper orders.

The Organization argues that the Carrier's case is marred by serious procedural flaws, and that the penalty is disproportionately severe, especially considering the fact that the Claimant enrolled in the joint Employee Assistance Program (EAP). The Organization's first procedural objection concerns Rule 71(a), which reads:

"An employee who is accused of an offense and who is directed to report for a trial thereof, shall within fifteen (15) days of date of the alleged offense, be given notice in writing of the exact charge on which he is to be tried and the time and place of the trial."

The original trial was scheduled for September 25, 1978. The Claimant was orally informed on September 23, of the time and place of the trial. However, he did not receive written notice as called for by Rule 71(a), until September 28. As a result, the trial was postponed.

It is this Board's view that neither the letter nor the spirit of Rule 71(a) was violated in this instance. The Claimant received notice within seven (7) days of the incident, although the notice came after the scheduled date of the trial. The trial was postponed, the Claimant had knowledge of the charges against him, and was well represented.

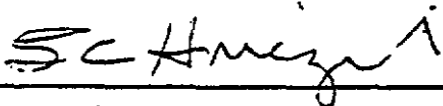
The Organization's second procedural objection concerns the introduction, at the trial, of a letter from the Claimant, dated May 11, 1978. The letter states, "I, Anthony Cole, reported to duty on Thursday, May 11, 1978, under the influence of alcohol." The Organization objects that the letter is irrelevant to the September 21, 1978, incident, and was not brought into the record until the day of the trial.

The Board accepts the Carrier's argument that the May 11, 1978, letter was not part of the charge against the Claimant, but rather that it was intended for use in determining the degree of discipline to be assessed. In the Board's view it would have been preferable if the letter had been made part of the record prior to the trial, but the failure to do so is not a fatal flaw. The use of an employee's prior record may be properly considered in determining the appropriate measure of discipline in a case such as this.

Finally, this Board turns to the issue of the appropriateness of the penalty and the Claimant's participation in the EAP. The efforts of the Carrier and the Organization in establishing an effective EAP deserve commendation, and the Claimant too, is to be commended for his successful participation in the Program. However, participation in the EAP, salutary though it is, cannot be considered an automatic basis for reinstatement where an employee's prior record is poor. Under these circumstances, this Board will not disturb the Carrier's judgment. However, we strongly recommend to the Carrier that in view of alcoholism's recognition as a disease,

that it give the Claimant "one last chance" on a leniency basis, recognizing that leniency is the Carrier's prerogative, not the Board's.

AWARD: Claim denied.



L. Hriczak, Carrier Member



W. E. LaRue, Organization Member



Richard R. Kasher, Chairman and Neutral Member

April 1, 1983
Philadelphia, PA