

NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 2406

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NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

-and-

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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CASE NO. 38

AWARD NO. 38

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:

- "(a) The Carrier violated the effective agreement, dated May 19, 1976, on October 8, 1980, by unfairly and improperly dismissing Claimant Alfred Lee Mills.
- "(b) Claimant Mills shall be reinstated to Carrier's service, compensated for all wage loss, with seniority and benefits unimpaired and the matter expunged from his record."

Claimant Alfred L. Mills entered the Carrier's service on October 2, 1977. On August 22, 1980, the date of the incident giving rise to this claim, he was assigned as an EWE Operator on the Baltimore Division. On September 12, 1980, the Claimant was

notified that he was being held out of service in connection with "...alleged possession of a controlled drug while on company property in Penn Station, Baltimore, Md. on August 22, 1980." Also on September 12, 1980, he was given notice to attend a trial in connection with the following charge:

"On August 22, 1980, at approximately 11:35 p.m. on company property in Penn Station, Baltimore, Maryland you were observed by AMTRAK Special Agent, Robert Green, to be in possession of a controlled drug."

The evidence before this Board establishes that on August 22, 1980, the Claimant was approached by Baltimore City police at Penn Station, Baltimore, Md. and asked for identification. An AMTRAK Special Agent, Robert Green, accompanied the Baltimore City police.

When the Claimant produced his wallet, a small glassine container holding a white powder was observed to be tucked inside the wallet. The Claimant was escorted to the police office and a field test established that the white powder was heroin.

The Organization has raised the following issues before this Board. First, Rule 71 of the effective agreement provides that an employee accused of an offense must be given notice of the exact charge against him, and the time and place of trial, within fifteen days of the alleged offense. Because the alleged offense took place on August 22, 1980, and the Claimant did not receive notice until September 12, 1980, a gap of 21 days, the Organization argues that the Carrier has improperly exceeded the requirements of Rule 71. Second, the charge against the Claimant never specified that he had violated any rule or directive of the Carrier. The Organization

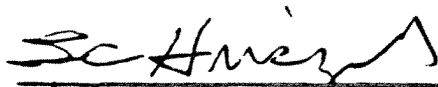
asserts that there is no Carrier rule against possession of a controlled drug, and there is no evidence of the Claimant being arrested in connection with this incident. Third, that the Carrier has not met its burden of proving possession beyond a shadow of a doubt, and fourth, no action should be taken against the Claimant because the incident occurred while he was off duty.

This Board cannot agree with these contentions. The record indicates that while the field test conducted on August 22, 1980, established that the Claimant was in possession of heroin, this information was not conveyed by Special Agent Green to the Claimant's supervisors until September 11, 1980. Mr. Green stated that he waited until then because he was waiting for tests to establish how much heroin was in the Claimant's possession (2.64 grams). Further, while the Carrier could have cited the Claimant under the Carrier's rule prohibiting conduct unbecoming an employee, its failure to do so is not fatal to its case. There are certain infractions that are universally known to be illegal even if not specifically prohibited in a rule or directive. The possession of heroin certainly fits this category. Also, the charge against the Claimant was clear and precise and the Claimant cannot claim surprise.

The record in this case contains substantial evidence to support the Carrier's charge. That is sufficient in a labor-management context; there is no need for guilt to be proven beyond a reasonable doubt. The fact that there is no indication that the Claimant was convicted in a court of law is not controlling here, nor would a conviction, if it had occurred, settle this claim in and of itself.

While the Claimant was not on duty at the time of the incident, certain acts when committed outside the scope of employment may still result in discipline where the Carrier's proprietary interest could be adversely affected. This is such a case, particularly in view of the fact that the Claimant was in possession of heroin on Carrier property. Accordingly, this claim must be denied.

AWARD: Claim denied.

  
L. Hriczak, Carrier Member

  
W.E. LaRue, Organization Member

  
Richard R. Kasher, Chairman and Neutral Member

April 1, 1983  
Philadelphia, PA

P.L.B. - 100 7140 20

DISSENT OF THE EMPLOYEE MEMBER  
AWARD NO. 38  
PUBLIC LAW BOARD NO. 2406

The Board has misinterpreted Rule 71 of the current rules agreement, as amended, which reads as follows:

"Advance Notice of Trial

An employee who is accused of an offense, and who is directed to report for trial therefor, shall within fifteen (15) days of date of 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 rule provides that an employee must be charged within 15 days of the offense, and such charges must be in writing. The Board has amended this rule by Award No. 38 to read that the 15 days is not from the date of the offense but 15 days from the date the Carrier allegedly has knowledge of the offense.

The agreement to establish this Public Law Board, dated April 30, 1979, made provisions in Paragraph 3 of that agreement to provide that the Board is not authorized to change existing agreements, governing rates of pay, rules and working conditions and shall not have the right to rewrite any rules.

In this case should the Award No. 38 be accepted as written, Rule 71 of the agreement would have been rewritten in that the Carrier would now be allowed the time limit of 15 days starting from the date of knowledge of the alleged offense.

Therefore, the Carrier's argument in this matter would be without merit since many such agreements on their property have included such a rule, stating from the time the Carrier had knowledge of the offense. This the Carrier has not done, and the rule does not provide for such.

Similarly, in Third Division Award No. 16262 of the National Railroad Adjustment Board, Referee Paul C. Dugan rendered the following:

"From the testimony above referred to it is the conclusion of this Board that Carrier had notice of the occurrence when Assistant Extra Gang Foreman Sparano became aware of the fact that Claimants were claiming nine hours instead of eight for work performed, and since the record shows that Sparano had knowledge of the overtime claims on or prior to October 12, 1965, Carrier was therefore obligated to hold the hearing no later than 10 days after October 12, 1965. Having failed to do so, (the original hearing was scheduled for November 1, 1965 but continued to November 16, 1965), the Carrier must be charged with violating the agreement."

And again, Referee Ferguson rendered the following in Third Division Award No. 6446:

"Express time limitations in grievance procedure have been many times held to be enforceable; primarily because the parties by including them in their agreement intended thereby to expedite the orderly handling of claims. Application of such rules is sometimes harsh but in the interests of efficient, proper procedure they must be applied. We are not granted any discretion to extend such statutes of limitations as the parties have fixed on themselves. We can only apply their own rule."

As to the trial transcript, the employee was not on duty and, therefore, was not subject to the Carrier's rules.

Similarly, Referee James C. McBrearty held in Third Division Award No. 21293, that the basis for any such decision should be as follows:

"Turning then to the case at hand, the Board notes that an employe may commit improper acts which subject him to disciplinary action while he is on duty or off duty. The most common cases involve on-duty misconduct. However, employes are also frequently disciplined or discharged for committing improper acts while off duty. In the latter type of cases, however, in order to justify disciplinary action, including discharge, there must be some evidence of damage to the Carrier.

Looking at the record as a whole, the Board finds in the instant case that there is not substantial evidence to indicate that Claimant's offense injured his effectiveness on the job, or damaged Carrier's reputation in the marketplace or in the industrial community.

The generally understood principle in the industry is that a Carrier may not discipline an employe for what he does off duty. To do so would constitute an invasion of the employe's personal life by the Carrier and would place the Carrier in the position of sitting in judgment on neighborhood morals, a matter which should be left to civil officers."

Therefore, in view of the foregoing, the Employees must dissent to Award No. 38.

  
William E. LaRue, Employee Member  
Public Law Board No. 2406