

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 26

Case No. 26

System Docket No. BMW-E-D-198

STATEMENT OF CLAIM

(a) Carrier's dismissal of Claimant John Hurley 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 and the Carrier's own stated policies.

(b) Claimant Hurley shall be reinstated into Carrier service with all seniority entitlements and shall be compensated for all lost wages, including overtime benefits which would accrue to him, as provided for in Rule "K" of the Scheduled Agreement.

FINDINGS

The Claimant was subject to an investigative hearing under the following specification:

In that while employed as an Assistant Foreman at Readville on June 8, 1993, you gave a urine sample that tested positive for cocaine metabolite. Subsequent confirmation was received on June 14, 1993 from American Medical Laboratories. This random periodic positive drug test is in violation of the terms of your Rule G waiver agreement signed October 14, 1992.

Following the hearing, the Claimant was dismissed from service.

The Rule G waiver signed by the Claimant arose from an alcohol-related offense and included the following:

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:

. . .

4. I must submit to and pass a drug and/or alcohol test by urine and/or breath sample 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 Amtrak service.

As one aspect of this dispute, the Organization contends that the use of cocaine by the Claimant was not proven, particularly in view of the Claimant's denial of such use. The Claimant offered as explanation of the positive result (on which there can be no meaningful dispute) that he accidentally ingested the drug by being in the presence of other users or that cocaine was placed in his drink without his knowledge. The Board finds these explanations to be implausible and is satisfied that the confirmed test results are sufficient proof of the Claimant's cocaine use. If there were no

other factors, it would follow that the dismissal from service was inevitable under the terms of the Rule G Waiver.

As a second aspect, however, the Organization argued that the Claimant was improperly tested for drugs since his original offense related to alcohol only. The Board cannot agree. The Rule G Waiver, as quoted above, includes the Claimant's agreement and understanding that he will be tested, over a two-year period, for both alcohol and drug use, as indicated by the combined conjunctive, "and/or", as well as the inclusion of the phrase, "drug/alcohol test".

This finding is supported by Special Board of Adjustment No. 973, Award No. 258, in a closely similar case involving the same Carrier. In reference to this, the Organization contends that the Award therein was under a different Rule G Waiver form. However, that previous form was under language which the Board finds even less, rather than more, precise as to the appropriateness of testing for both alcohol and drugs. The previous comparable language stated:

4. For cases involving the use of drugs or alcohol, submit to and pass a test by urine or breath sample respectfully [respectively?], each calendar quarter for a period of two years.

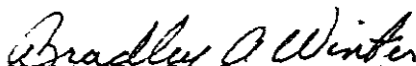
The Board concludes that the Claimant was properly tested for both the presence of alcohol and drug in his system. Whether such use impaired his ability to work or whether the use was work-related are immaterial, given the conditions of the Rule G Waiver to which the Claimant agreed.

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: *January 5, 1994*