

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

, and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 34

Case No. 34

System Docket No. BMW-235D

STATEMENT OF CLAIM

(a) Carrier's dismissal of Claimant Robert Morris 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.

(b) Claimant Morris shall be reinstated into Carrier's 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 15 of the Scheduled Agreement.

FINDINGS

On December 12, 1994, the Claimant (an Assistant Foreman) and a Foreman were clearing debris and ballast from a power switch when a freight train approached the two men, striking the Foreman and seriously injuring him. As one result of the event, the Claimant, who was not injured, was subject to a drug test and found positive

for cocaine. He was subject to an investigative hearing and was dismissed from service.

The record shows that the Claimant had previously signed a Rule "G" Waiver on September 26, 1990 in which he agreed that he was guilty of a Rule "G" violation testing positive for cocaine in a physical examination on September 4, 1990. As a condition of the Waiver, the Claimant agreed that he would be dismissed from service if, among other requirements, he failed to pass "a complete medical examination upon completion of the initial treatment program and any further medical examinations required by policy". (Emphasis added) Except as to this provision, there is no dispute that the Claimant met all requirements of the Rule "G" Waiver.

The primary issue to be resolved here, however, is whether the Carrier was justified in administering a drug test to the Claimant on the basis of the accident above described. The Organization argues that the test was not sanctioned by the established "reasonable cause" testing procedures adopted by the Carrier. In the case of an on-the-job injury, the Policy reads as follows:

An employee's on-the-job injury will provide reasonable cause to test if both [underlined in original] the following conditions are satisfied:

- The injury is reportable to the Federal Railroad Administration under Part 225 of Title 49 of the Code of Federal Regulations, or a supervisor reasonably believes it will be.

AND [underlined in original]

- There is an objective basis for the supervisor to conclude the employee's acts or omissions contributed to the occurrence or severity of the injury [underlining added unless otherwise noted].

The Carrier maintains that the Claimant can be considered "the employee" in the second condition. A reading of both conditions together does not lead the Board to this conclusion; clearly, "the employee" in the second paragraph refers to "an employee's on-the-job injury" in the first paragraph.

The "reasonable cause" provision also calls for testing in the case of violation of an operating rule, but the "Specification" against the Claimant makes no mention of such violation, stating in full as follows:

In that while employed as an Assistant Foreman at Somerville on December 12, 1994 you gave a urine sample that tested positive for Cocaine Metabolites.

This positive drug test is a violation of your Rule G Waiver signed September 26, 1990 and a violation of Amtrak's Drug and Alcohol Policy.

Although the Carrier suggests that both employees failed to be properly alert as to an oncoming train, such is not specifically referenced to in the Specification. The inevitable consequence is that this particular test was not warranted. If it had been warranted, the Board would have agreed that the results would have been a violation of the Rule "G" Waiver as to failure to pass "any further medical examination required by company policy".

As a result, the Board concludes that dismissal under the charges as written was not warranted. On the other hand, the Board cannot ignore the fact that the drug test showed the Claimant positive for cocaine, and the Board has no basis to question the validity of the test. In this circumstance, the Board, while overturning the dismissal, concludes that back pay or retroactive

benefits are not appropriate and that the Claimant must sign a new Rule "G" Waiver in order to return to duty with seniority unimpaired. If these conditions are not acceptable to the Claimant and the Organization, then the Carrier's dismissal action shall remain in effect.

A W A R D

Claim sustained to the extent provided in the Findings. The Carrier is directed to make this Award effective within 30 days of the date of this Award.



HERBERT L. MARX, Jr., Chairman and Neutral Member



B. A. WINTER, Employee Member



W. H. ROBINSON, Jr., Carrier Member

NEW YORK, NY

DATED: 1-11-96