

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 9

Case No. 9

Carrier File No. BMW-E-D-129

STATEMENT OF CLAIM

(a) Carrier's dismissal of Claimant Kenneth Gibson was without just and sufficient cause, based upon unproven charges in an arbitrary and capricious manner, wholly beyond the Scope of the Scheduled Agreement.

(b) Claimant Gibson 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 "K" of the Scheduled Agreement.

F I N D I N G S

On May 22, 1989, the Claimant was on duty, at which time a Supervisor and a Roadmaster detected the odor of alcohol on his breath. A breath test was performed, producing a positive result for the presence of alcohol. As a result,

the Claimant signed a Rule "G" Waiver, admitting to his violation of Rule "G" and agreeing that he "will be dismissed from service" for failure to comply with a variety of stipulations, including the following:

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 Claimant was subject to a drug and alcohol screening test on February 12, 1990, and the results were negative. He was subject to a further test on April 19, 1990, at which time there were positive results for the presence of phenobarbital and butabarbital. As a result, he was subject to an investigative hearing on the following charges:

CHARGE ONE: Violation of Rule G of the National Railroad Passenger Corporation Rules of Conduct which reads:

Employees subject to duty, reporting for duty, or while on duty, are prohibited from using or being under the influence of . . . narcotics or other mood changing substances. . . .

CHARGE TWO: Violation of Rule L of the National Railroad Passenger Corporation Rules of Conduct which reads in part:

Employees must obey instructions, directions and orders from Amtrak supervisory personnel and officers.

CHARGE THREE: Violation of Rule O of the National Railroad Passenger Corporation Rules of Conduct which reads in part:

Employees must understand and obey
company . . . procedures and special instructions
. . . .

During the hearing, the Claimant denied any knowledge or use of barbituates. He had indicated, in the consent form signed prior to the test, that he had used prescription drugs Davocet and Zantac and "a liquid substance for heartburn" within the past 60 days. Testimony by the Carrier Nurse was to the effect that none of these would have contained barbituates.

Following the hearing, the Claimant was dismissed from service on all three charges, although no evidence was put forth at the hearing concerning the second and third charges.

It is the Carrier's position that the Rule "G" Waiver is self-effectuating; that is, a failure to comply with the Waiver's terms is sufficient to warrant the dismissal, based on the employee's commitment under the Waiver. Previous Awards have supported this view. Here, however, the Board finds circumstances which raise questions of genuine substance.

Charge No. 1 does not refer to violation of the Rule "G" Waiver itself, but rather accuses the Claimant of violation of Rule G itself, namely:

Employees subject to duty, reporting for duty, or while on duty, are prohibited from using or being under the influence of . . . narcotics or other mood changing substances. . . .

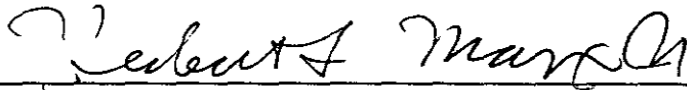
Nowhere in the hearing record is there any indication of use of butabarbital or phenobarbital while "subject to duty" or "reporting for duty", nor does such past use show that the Claimant was "under the influence of narcotics". These are "drugs" employed in various medications. The Claimant's denial of knowledge or use of barbituates may not be totally disregarded.

Some recognition is due to the fact that the Claimant was under three separate charges, while no evidence was put forth as to two of the three charges, much less proof as to their validity.

For whatever reason, the Carrier chose to conduct a hearing based on a charge of Rule "G" violation, without reference to the Rule "G" Waiver. Without providing additional information, the Carrier presumed that a positive showing of barbituate use (when? in what form?) rose to a Rule "G" violation. The Board does not find this convincing. This is particularly so in view of the initial offense of alcohol use, rather than drug use. The claim must therefore be sustained.

A W A R D

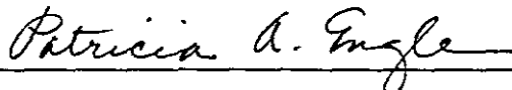
Claim sustained. The Carrier is directed to put this Award into effect within thirty (30) days of the date of this Award.



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



B. A. WINTER, Employee Member



P. A. ENGLE, Carrier Member

I DISSENT

NEW YORK, NY

DATED: *June 11, 1991*