

PROCEEDINGS BEFORE PUBLIC LAW BOARD NO. 5139

Award No. 17

Case No. 17

Referee Fred Blackwell

Carrier Member: L. C. Hriczak

Labor Member: Jed Dodd

Parties To Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

vs.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

Statement of Claim:

Claim of the System Committee of the Brotherhood that:

1. The dismissal of TLS Track Department employee A. Griffin, for alleged violation of Rules D and G and PERS 19 (v) (c) of Amtrak Rules of Conduct on November 12, 1987, was arbitrary, on the basis of unproven charges, and in violation of the Agreement (System File NEC-BMWE-SD-2063D).
2. The Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record cleared of the charges leveled against him, and he shall be compensated for all wage loss suffered.

Findings:

Upon the whole record and all the evidence, and after March 18, 1992 hearing in the Carrier's Offices, Philadelphia, Pennsylvania, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Claimant, who was duly notified of said hearing and of his right to be present and participate in same, did not attend said hearing; and that this Board is duly constituted by Agreement and has jurisdiction of the parties and of the subject matter.

PUBLIC LAW BOARD NO. 5139 / AWARD NO. 17

Decision:

The Claimant will be reinstated to service on the terms that now follow.¹

The record as a whole does not contain substantial evidence to support the findings of the Claimant's guilt of the offense cited in the charge and hence the discipline will be vacated. Specifically, there is insufficient data in the Carrier's chain-of-custody documentation concerning the specimen obtained from Claimant on November 12, 1987 (Trial Ex. 9), to validate the positive findings on that specimen.

Accordingly, the dismissal of the Claimant will be vacated and he will be reinstated to service in the status defined in Subsection III. C. of the Amtrak Drug Policy dated January 1, 1987. Inasmuch as the Claimant will be ineligible for return to service under such Subsection until and unless he tests negative for drugs in accord with said Policy, there is no basis for allowing his request for lost wages. The reinstatement of the Claimant will be subject to the generally applicable return-to-duty procedures, including a drug/alcohol screen.

OPINION

This case arises from the appeal of the Claimant, Mr. A. Griffin of the Carrier's action of February 18, 1988, whereby the Carrier dismissed the Claimant on the ground(s) hereinafter indicated.

I. FACTS

Based on study of the record and arguments presented by the parties at the hearing of this matter in the Carrier's Office in Philadelphia, Pennsylvania on Wednesday, March 18, 1992, the following Findings of Fact are hereby made:

1. The Claimant held the position of Trackman in the Carrier's Track Laying

¹ Award No. 14 of this Board, which found the AMTRAK Drug Policy valid, is made applicable to this case; hence the issues treated in that Award will not be discussed in this Opinion.

PUBLIC LAW BOARD NO. 5139 / AWARD NO. 17

System, headquartered at the Maintenance of Way Base in Perryville, Maryland, when the events occurred that resulted in the subject discipline.

2. By Notice dated December 23, 1987, sent to the Claimant by Certified Mail, the Carrier notified the Claimant of charges and of a trial on such charges to be held in Perryville, Maryland, on January 6, 1988. After two postponements, sent by Certified Mail, the trial was conducted on February 8, 1988 in absentia.

3. On February 18, 1988, the Claimant was dismissed from the Carrier's service on the basis of a formal investigation conducted on February 8, 1988, in absentia, on the following charge:

"Charge: Violation of Rule G of AMTRAK Rules of Conduct, NRPC 2525 (9/85), which states in part:

Rule 'G' - Employees subject to duty, reporting for duty, or while on duty, are prohibited from possessing, using or being under the influence of alcoholic beverages, intoxicants, narcotics or other mood changing substances...

Violation of PERS 19 (v) (c) which states in part:...An employee who has tested positive for drugs and is returned to service after achieving a negative test result shall, as a condition of being returned to service, be subject to testing for drugs and alcohol by breath or urine sample, at least once each calendar quarter for a period of two years. If the employee tests positive for the presence of drugs or alcohol during such subsequent tests, or during any future return to work or periodic physical, the employee shall be subject to dismissal and shall not be entitled to enter the EAP.

Violation of Rule D of AMTRAK Rules of Conduct, NRPC 2525 (9/85) which states in part: Employees must understand and obey Company and department policies, procedures and special instructions...

Specification No. 1: On March 13, 1987 you failed your physical examination, the urinalysis tests showed positive for cocaine. You were instructed to rid your system of that or any other prohibited drug and by April 12, 1987, to either provide a negative or enter the EAP. You provided another sample on March 19, 1987, that tested negative. You were permitted to return to work.

PUBLIC LAW BOARD NO. 5139 / AWARD NO. 17

However, another urinalysis conducted as part of your recent physical examination of November 12, 1987, was positive for marijuana. In accordance with PERS 19, an employee who initially tests positive for the presence of drugs and tests positive a second time during any future physical examinations shall be subject to dismissal for failure to comply with company policy."

FINDINGS AND CONCLUSIONS

After due study of the foregoing and of the record as a whole, inclusive of the submissions presented by the parties in support of their respective positions in the case, the case is disposed of on the basis of the following Findings and Conclusions:

1. In regard to procedural matters, the Board finds that the Carrier's manner of use of Certified Mail to notify Claimant of charges and of a trial scheduled for a specified date, complied with the Agreement requirements regarding notice of charges and hearing; and that consequently, the trial of Claimant in absentia in the May 31, 1990 hearing cannot be said to have violated the Agreement or the due process rights of the Claimant. The Board finds further that the record contains no procedural irregularities or due process defects that warrant altering the discipline, or that preclude Board consideration of the merits of the case.

2. (a) As regards the merits of the case, the Board finds that the hearing evidence supports the Organization's contention that the chain-of-custody documentation (Trial Ex. 9) contains insufficient data to establish that the urine specimen obtained from the Claimant on November 12, 1987 was processed under the procedures governing the movement of the specimen into, through, and out of the laboratory that tested the speci-

PUBLIC LAW BOARD NO. 5139 / AWARD NO. 17

men.

(b) Trial Exhibits 9 and 10 were the subject of testimony by Carrier witness Ms. Loretta Burton, Occupational Health Nurse-Wilmington Maintenance Facility. These exhibits show that the subject urine specimen was drawn on November 12, 1987, was received by the MetPath Laboratory, Kensington, Maryland, on November 12, 1987, and was reported by Metpath as positive for marijuana on November 15, 1987. The specimen was thus in the custody of MetPath for two (2) to three (3) days. The bottom left of Trial Exhibit 9, MetPath's chain of custody form, is signed by a MetPath employee under the certification that MetPath's "Instructions for ...Chain of Custody Form have been followed." However, all four (4) categories on the right hand side of the form, which provide space for entries of signatures and dates for the subjects of Specimen Entry, Screening, Confirmation, and Storage, are blank.

(c) Trial Exhibit 9 was objected to during the trial by the Claimant's hearing representative, Ms. Nancy DiStefano, on the ground that since all spaces on the right side of the chain of custody form were blank, the testimony of Ms. Burton regarding Exhibit 9 was an assumption based totally on hearsay information. Ms. Burton's responsive testimony was that since the work on the specimen was to be done in-house by MetPath, there was no reason for the chain of custody form to be filled out.

3. In assessing the foregoing and the entire record, the Board concludes and finds that the chain of custody form (Trial Ex. 9) does not establish that the Claimant's specimen was in the custody of authorized personnel at all times during the two (2) to

PUBLIC LAW BOARD NO. 5139 / AWARD NO. 17

three (3) days that the specimen was in the custody of MetPath Lab. The proof of this fact, if challenged, is an essential element in the proof of a charge of the kind presented in this case, and hence the subject discipline fails for lack of the requisite proof.

In view of the foregoing, and on the basis of the record as a whole, it is specifically found that there is insufficient data in the Carrier's chain-of-custody documentation concerning the specimen obtained from Claimant on November 12, 1987 (Trial Ex. 9), to validate the positive findings on that specimen. Accordingly, the Board concludes and finds that the record as a whole does not contain substantial evidence to support the findings of the Claimant's guilt of the offense cited in the charge and hence an award directing that the subject discipline be vacated is in order.

AWARD:

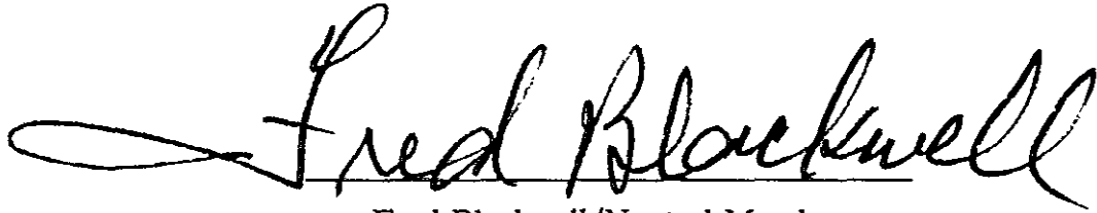
The Board concludes and finds that the record as a whole does not contain substantial evidence to support the findings of the Claimant's guilt of the offense cited in the charge. ACCORDINGLY, the dismissal of the Claimant is hereby vacated and the Carrier is ordered to comply with the following directives:

1. Claimant will be reinstated to service in the status defined in Subsection III. C. of the Amtrak Drug Policy dated January 1, 1987.
2. Inasmuch as the Claimant will be ineligible for return to service under such Subsection until and unless he tests negative for drugs in accord with said Policy, there is no basis for allowing his request for lost wages.
3. The reinstatement of the Claimant will be subject to the generally applicable return-to-duty procedures, including a drug/alcohol screen.

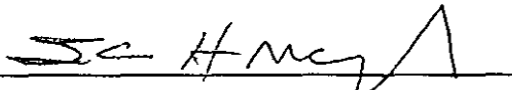
The Carrier shall comply with this Award on or before August 14, 1992.

PUBLIC LAW BOARD NO. 5139 / AWARD NO. 17

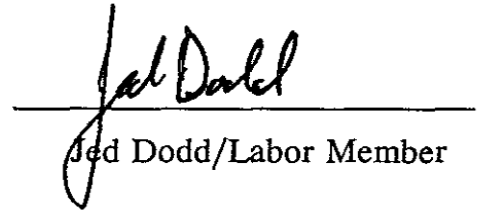
BY ORDER OF PUBLIC LAW BOARD NO. 5139.

A large, stylized handwritten signature in black ink that reads "Fred Blackwell".

Fred Blackwell/Neutral Member

A handwritten signature in black ink that appears to read "L. C. Hriczak".

L. C. Hriczak/Carrier Member

A handwritten signature in black ink that appears to read "Jed Dodd".

Jed Dodd/Labor Member

Executed on 7/27, 1992

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