

**PUBLIC LAW BOARD NO. 7035
CASE NO. 2**

PARTIES TO THE DISPUTE: (Brotherhood of Maintenance of Way Employees
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(and
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(National Railroad Passenger Corporation
(Amtrak

STATEMENT OF CLAIM:

- (1) The Carrier's dismissal of Claimant Andrew Patricelli was arbitrary and capricious, without just and sufficient cause and not based on any clear and probative evidence.
- (2) Claimant Patricelli shall be reinstated to his position with the Carrier with his seniority unimpaired and shall be compensated for all lost wages and benefits that would accrue to him provided in the Scheduled Agreement. Claimant's record shall be cleared of the charge.

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement; this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the Hearing held.

Supervisor John Mercier indicated that on November 17, 2006, Claimant Andrew Patricelli displayed behavior during a meeting that subjected him to reasonable suspicion drug and alcohol testing. Claimant questioned why certain individuals were not attending a Track Foreman meeting when Claimant knew, or should have known why said employees were not included in the meeting. Supervisor Mercier considered the questions unusual and noticed that Claimant's eyes were glassy. Also at said meeting, Claimant jumped out of his seat, stood directly in front of another employee and used profanity. Mercier asked Claimant to step outside and told Claimant that Claimant had exhibited aggressive and unacceptable behavior. Mercier indicated that Claimant exhibited memory loss, incoherent behavior, glazed eyes, irritability and aggression. Mercier told Claimant

that he suspected that Claimant was under the influence of drugs and/or alcohol and directed Claimant to remain on the property to undergo a reasonable suspicion drug and alcohol test. Claimant stated, "So that's the way it is" and walked towards his personal vehicle. Mercier followed Claimant and repeated his direct order to Claimant to submit to reasonable suspicion testing and directed him to remain on the property. Mercier further instructed Claimant that leaving the property would be considered a refusal to take the test. Claimant then left the property. Mercier testified that Claimant was insubordinate when he failed to comply with a direct order to submit to reasonable suspicion testing.

By letter dated December 5, 2006 the Carrier notified Claimant that he was to attend a formal Investigation on December 14, 2006. The Investigation took place on that date, addressing the following specification:

On Friday, November 17, 2006, ... Patricelli displayed behavior during a meeting that subjected him to reasonable suspicion drug and alcohol testing. ... Supervisor John Mercier escorted Foreman Patricelli from the meeting and ordered/directed Mr. Patricelli to submit to Drug & Alcohol testing. Mr. Patricelli refused to comply with the direct orders to take the tests, and Mr. Patricelli left the premises without completing the D & A testing. As such, Mr. Patricelli was medically disqualified from duty, and his actions are considered to be insubordinate and in violation of Amtrak's Standards of Excellence and the Carrier's Drug and Alcohol Policy.

In a letter dated December 20, 2006, Claimant was notified that he was terminated, effective immediately, for violating Amtrak's' Drug and Alcohol Policy.

By letter dated December 27, 2006, the Organization appealed the decision indicating that the Carrier did not meet its burden of proof and that the discipline assessed in the case was unwarranted and excessive. In addition, the Organization contended that the Investigation was not scheduled in a timely manner. Further, the Organization contends that Claimant indicated that he was ill and had to leave to see his personal physician. On January 31, 2007, the appeal was denied by Carrier Representative Richard Palmer. On March 27, 2007, the Organization requested that the matter be placed on a docket for hearing as soon as possible.

The Organization contends that the burden of proof in a discipline matter such as this is on the Carrier; that burden of proof has not been met. The Organization claims that the Carrier has been arbitrary and capricious in its treatment of Claimant, that the Carrier has abused its discretion and that the Carrier's determination to discipline Claimant was based on inconclusive evidence, thus rendering the discipline harsh and excessive. In addition, the Organization

asserts that Claimant informed his supervisor that he was ill and needed to leave to visit his physician. The Organization also indicated that the Investigation did not take place in a timely manner. The Organization asserts that the Carrier should now be required to overturn the Dismissal and make Claimant whole for all losses.

Conversely, the Carrier takes the position that it has met its burden of proof. Claimant was afforded a fair and impartial Hearing in accordance with the requirements of the Agreement. According to the Carrier, a review of the transcript developed during the Hearing makes it clear that Claimant was guilty as charged. Based on the instant offense, Dismissal is the appropriate penalty. The Carrier contends that the Investigation did take place in a timely manner.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325, Third Division Award 16166)

This Board has found substantial evidence in the record to sustain the Carrier's position in whole. The Carrier has proven that Claimant did violate Amtrak's Drug and Alcohol Policy when he refused to submit to a reasonable drug and alcohol test. Based on the transcript of the Hearing, this Board cannot find that the Hearing Officer's determination was arbitrary or capricious and this Board will not overturn said determination. We have also carefully reviewed the affirmative defenses presented by the Organization and have determined that they are not sufficient to overturn our findings. We find that the Investigation did take place in a timely manner.

Further, we find that the discipline of Dismissal was not unreasonable and we will not disturb it. *See* PLB 6044 Awards No. 15, 24 and 26 (Zusman). *See Also* PLB 2945 Award 24 (Blackwell).

The Claim is without merit. It will be denied.

Claim denied.

AWARD

Claim denied.



Steven M. Bierig
Chairperson and Neutral Member



Richard Palmer
Carrier Member



Bradley A. Winter
Organization Member

Dated at Chicago, Illinois this 24th day of MARCH 2008