

Parties to the Dispute

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE

V.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) – NORTHEAST
CORRIDOR

Claimant: Walter Smith

Award No. 259

Organization's Statement of Claim

The Brotherhood of Maintenance of Way Employees ("BMWE" or the "Organization") appealed the disciplinary penalty of termination assessed on Northeast Corridor Engineer Work Equipment Operator "C" Walter Smith (the "Claimant") on charges that were set forth in the Carrier's Notice of Investigation, dated August 7, 2006. The Organization claims the Claimant was harsh, capricious and without just and sufficient cause in violation of the parties' Agreement. As a remedy, the Union requests the Claimant be reinstated to full service with seniority unimpaired and made whole for all wages, benefits and seniority lost for the time of his suspension and for the discipline to expunged from his record.

Background of the Case

The Claimant was hired by Carrier on March 9, 1998. On May 19, 2005, the Claimant entered into an Alcohol and Drug Waiver Agreement as a result of testing positive on April 30, 2005 for cocaine as part of a federal random drug and alcohol testing. As part of that waiver, the Claimant agreed, in exchange for reinstatement, to be subject to submit to and pass unannounced drug and alcohol tests by urine and/or breath sample at least four times a year for the first two years of active service following his return to duty. The Claimant further agreed, as part of his waiver, that if he failed to comply with the terms of his conditional reinstatement, or if he tested positive in any future drug or alcohol test, he would be dismissed from service.

On Friday, July 21, 2006, the Claimant was asked to consent to a breath alcohol test. The test is comprised of two parts. The first is the initial breath sample. If the initial breath sample registers positive (over 0.019% breath alcohol concentration (BAC)), the individual is then given a second breath sample to confirm the results 15 minutes later. The Claimant provided an initial breath sample which registered 0.054% BAC, deemed a positive. He was asked to give a second breath sample. The Claimant was given three opportunities to do so, and he failed to register any breath during the three attempts.

Opinion of the Board

This Board derives its authority from the provisions of the Railway Labor Act, as amended, together with the terms and conditions of the Agreement by and between the BMW and Carrier.

After hearing upon the whole record and all the evidence, as developed on the property, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the hearing hereon. The Claimant, Walter Smith, was present at the Board's hearing, was afforded an opportunity to make a statement on his behalf and was represented by the Organization.

The Carrier contended its actions in this case were justified and supported by substantial evidence. The Carrier cited the Claimant's prior Waiver Agreement as providing it the basis to conduct such testing and require the Claimant's responsibility to comply with request to provide a breath sample. The Carrier argued the evidence showed the Grievant failed to provide an adequate air sample to conclude the breath alcohol test administered to him on July 21, 2006 and, as a result, the Claimant's failure should be deemed failing the test which subjects him to termination.

According to the Carrier, there was no justification for his failure to provide an adequate breath sample. The Carrier noted the breath alcohol technician's testimony which indicated that the Claimant's actions included sucking in air rather than blowing air out. The technician indicated that normally indicates something is getting in the way, like a tongue. The Carrier dismissed Claimant's contention that he experienced "shy lung" due to asthma. According to Carrier's Physician, there was no medical evidence showing the Claimant suffered from this at the time. He concluded that the asthma excuse was inconsistent with being able to provide a good sample earlier.

Carrier contended the penalty of termination was appropriate because the penalty was specified in the Claimant's Waiver Agreement. Specifically, the waiver indicated his conditional reinstatement was subject to cooperating with and passing unannounced breath and urine screening for drugs and alcohol. Here, Carrier argued, his failure to cooperate and provide a breath specimen constitutes a positive test. By the terms of the Waiver Agreement, the Claimant must be dismissed.

The Organization, on the other hand, argued the Carrier lacks sufficient cause because the Claimant did not refuse to comply with the test, but rather had a medical condition that prevented him from doing so. They noted the Grievant complied with the request for urine at the same time and argued if he had been trying to defeat the test, he would not have done so. The Union points to the testimony of Claimant's medical doctor that asthma could have caused him to be unable to provide an adequate breath sample.

Upon a review of the entire record, the Board finds the Carrier's determination herein was appropriate. The evidence established the Claimant was guilty of violating the terms of his Waiver Agreement and is thereby subject to termination. The record contained sufficient evidence for Carrier to conclude the Claimant failed to comply with the breath alcohol test he was asked to submit to on July 21, 2006. The medical testimony provided by the Claimant's doctor was speculative and the Carrier had grounds to determine Claimant had no legitimate reason to fail to provide an adequate sample. Thus, this Board has no basis to disturb the Carrier's findings of guilt.

Likewise, the Board does not find any reason to disturb the penalty in this case. In agreeing to reinstate the Claimant after a failed drug test in 2005, the Carrier made

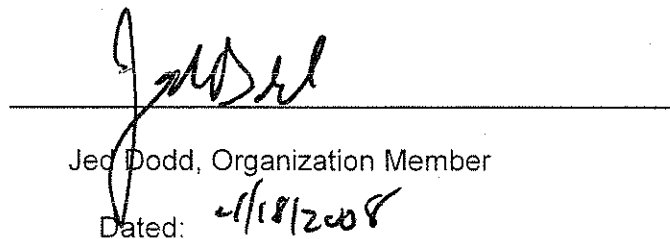
clear that failure of a future drug or alcohol test during the two year period covered by the waiver would subject the Claimant to dismissal. The Claimant failed to take avail himself of the opportunity he had been given in 2005 to continue his employment with the Carrier.

AWARD

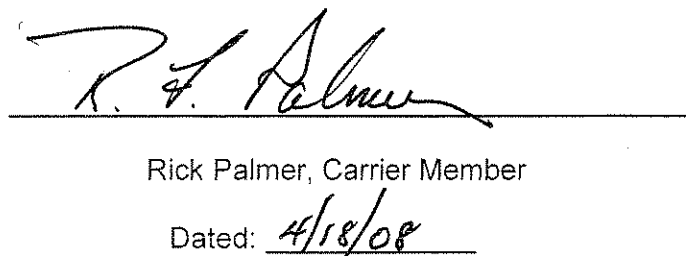
The claim is denied in its entirety.



Gayle A. Gavin, Chair & Neutral Member



Jed Dodd, Organization Member
Dated: 4/18/2008



Rick Palmer, Carrier Member
Dated: 4/18/08