

SPECIAL BOARD OF ADJUSTMENT NO. 986

Case No. 32

Docket No. NEC-BMWE-SD-1605D

PARTIES: Brotherhood of Maintenance of Way Employees

TO :

DISPUTE: National Railroad Passenger Corporation (Amtrak)

FINDINGS:

Claimant C.R. Dorsey was employed as an EWE-A Gantry operator by the Carrier, National Railroad Passenger Corporation (Amtrak), at its Tie Rehabilitation Yard Operation at Bear, Delaware. On October 15, 1986, Claimant was notified to attend a hearing in connection with the following charge:

Violation of Amtrak Rules of Conduct, Rule G, which states "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, including medication whose use may cause drowsiness or impair the employee's responsiveness."

Specification: In that on October 9, 1986, at 7:00 a.m. at the Tie Rehabilitation yard operation, while on duty, you were using marijuana in violation of the above Rule G.

After a postponement, the hearing was held on October 29, 30, and 31, 1986. As a result of the investigation, Claimant was dismissed from Carrier's service. The Organization subsequently filed a claim on Claimant's behalf, challenging his dismissal.

The Organization initially contends that the discipline should be reversed because Claimant did not receive a fair and impartial hearing, a violation of Rule 68 of the governing agreement. The Organization asserts that the hearing officer was not impartial: Claimant was not allowed to present certain witnesses in his defense; the hearing officer briefed one of Carrier's witnesses prior to that witness' testimony; the hearing officer testified on Carrier's behalf. Moreover, the Carrier officer who rendered the decision to

dismiss Claimant was not present at the hearing, and therefore could not determine the credibility of the witnesses. The Organization argues that Boards repeatedly have reversed discipline assessed in violation of an employee's right to due process.

~~The Organization further asserts that Carrier did not meet its~~
burden of proof. Carrier failed to produce any probative evidence to
~~support its charge that Claimant was using marijuana while on duty.~~

The Organization points out that the charge arises solely from the claim of Foreman Loveless that he smelled marijuana in an area where Claimant was standing with two other employees. The Organization argues that this testimony is not probative because the foreman previously suffered a 40% loss in his olfactory sense, and his testimony was not supported by any other witness at the hearing or any evidence of marijuana usage. The Organization asserts that Loveless' alleged detection of the odor of marijuana does not establish Claimant's guilt.

The Organization also argues that Loveless' report of the odor of marijuana did not constitute sufficient cause, under Carrier's published drug testing procedure, for Carrier to require Claimant to submit to urinalysis. Because Loveless' allegation was not verified by any other supervisor, the Organization argues that under Carrier's own guidelines, it did not have reasonable suspicion to require urinalysis in this instance. The Organization therefore argues that Carrier improperly required Claimant to submit to urinalysis, and this constituted an invasion of Claimant's privacy.

The Organization goes on to contend that there were numerous deficiencies in the administration of the urinalysis test. The

haphazard procedures used in Claimant's urinalysis test cast doubt on the integrity of the results; the Organization argues the result should at least be questioned, but perhaps entirely disregarded. The Organization also points out that according to scholarly literature in the field, the tests used by Carrier in this case may have an inaccuracy range as high as 50%. Moreover, no test can determine how much or when marijuana was ingested. The Organization therefore argues that the test results do not establish that Claimant was using marijuana while on duty on the day in question, and that Carrier cannot validly rely on such inaccurate and unreliable tests in adversarial settings such as the instant dispute. The Organization contends that Carrier did not meet its burden of proof, and the claim should be sustained.

The Carrier takes the position that Claimant was properly disciplined after a fair and impartial hearing, and the record contains substantial, probative evidence of Claimant's guilt. Carrier argues that because Claimant and two other employees were in a very secluded area, there was sufficient foundation for Foreman Loveless' suspicion that the marijuana odor he detected came from this group of employees. Moreover, the urinalysis results confirmed Loveless' suspicions. Carrier asserts that this constitutes substantial evidence that Claimant is guilty of the charge.

Carrier further argues that any testimony regarding Claimant's appearance on the day in question is irrelevant; Claimant was not charged with being under the influence of marijuana. Carrier thus argues that the hearing officer properly refused to allow 25 employees to testify about Claimant's appearance. Carrier also points out that its manual on drug testing procedures pertains only

to those employees covered under the Hours of Service law; Claimant was tested in accordance with Carrier policy governing non-Hours of Service employees. Carrier asserts that the entire record shows that Claimant was not deprived of due process.

~~Carrier also asserts that because of the seriousness of the~~
charge, the assessed discipline was appropriate. Carrier maintains that because Claimant was offered and refused a leniency reinstatement and because leniency is the only basis for Claimant's return to service, this Board cannot reopen the door and reinstate Claimant. Carrier therefore contends that the claim is without merit and should be denied in its entirety.

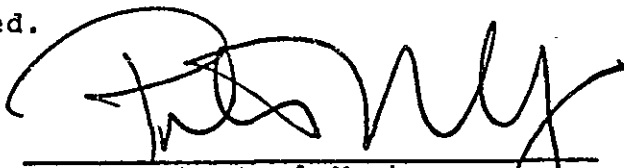

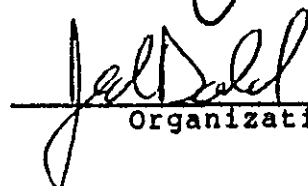
This Board has reviewed the voluminous evidence and testimony in this case, and we hereby find that there is no merit to the Organization's argument that the Claimant was not provided with a fair trial. We have examined the record, and it demonstrates that the Claimant was guaranteed all of his procedural rights throughout the hearing.

With respect to the merits of the case, this Board finds that there is not sufficient evidence in the record to support the finding that the Claimant was guilty of a Rule G violation while at work on October 9, 1986. No witnesses could testify conclusively that the Claimant, while on duty, possessed, used, or was under the influence of marijuana. As we have held before, a carrier bears the burden of proof in cases of this kind; and the record in this case just does not contain sufficient evidence to support the guilty finding against the Claimant. The supervisor's testimony is not conclusive; the urinalysis reports are not conclusive. This Board makes no judgment

as to the effectiveness of the scientific tests, but merely rules that the tests are not conclusive to prove that the Claimant was guilty of a Rule G violation. Contrary to the Carrier's argument, together with the testimony of the supervisor and the positive report from the laboratory, the facts in this case still do not add up to sufficient evidence of guilt. Hence, the claim must be sustained.

Award:

Claim sustained.


Neutral Member
Carrier Member
I Dissent - Attached.
Organization MemberDate: 9/11/87

CARRIER MEMBER'S DISSENT
TO AWARD IN CASE NO. 32,
SPECIAL BOARD OF ADJUSTMENT NO. 986

~~While the Board correctly turned aside contentions relative to trial fairness and drug testing in addressing the merits, it clearly did not give proper weight to the evidence presented. The record substantiated the facts that the employee in question had gathered with others in an isolated location, there was the distinct smell of marijuana, and the employee tested positive for marijuana use. In actuality there was more than enough evidence to reach the determination that Rule G was violated. The carrier submitted awards which were succinctly on point and which supported the determination of a Rule G violation.~~

Underlying Rule G violations at Amtrak are unparalleled safety concerns. Amtrak transports more than a 100,000 passengers over its intercity and commuter routes on a daily basis. This does not include substantial operations by various commuter authorities over Amtrak lines. The magnitude that this passenger rail operation and the concomitant responsibilities to the travelling public, as well as its own employees, require strict adherence to the most stringent safety principles. Given the need to attain the highest degree of safety and the public trust in its operation, Amtrak is committed to work and service environments that are free from the effects of employee use of drugs and alcohol. The Board did not give the unique safety concerns of Amtrak the consideration which is required in light of the gravity of the consequences.

In addition, the Board improperly disallowed Amtrak further response opportunity to the voluminous material submitted by the organization; this material had been submitted in violation of the procedural arrangement between the parties.

In light of the foregoing, the carrier views this Award as being palpably erroneous and without precedential value.


C. E. Woodcock III
Carrier Member

September 11, 1987