

SPECIAL BOARD OF ADJUSTMENT NO. 1020

PARTIES) **AMTRAK SERVICE WORKERS COUNCIL**
TO)
DISPUTE) **NATIONAL RAILROAD PASSENGER CORPORATION**

STATEMENT OF CLAIM

1. Carrier, acting arbitrarily and unjustly, violated Rule 19, and other related rules of the Agreement, when, on November 25, 1987, it dismissed Claimant Richard Jefferson from service.
2. Carrier further exacerbated its arbitrariness, in justice and rule violation when Passenger Service Director, Ms. L. D. Berberian, who was not present at the hearing, assessed discipline.
3. Carrier shall now be required to reinstate Claimant to service with seniority rights unimpaired, compensate him for all time lost as a result of his wrongful dismissal, and make him whole for any other material injury he may incur in connection with such dismissal. (Carrier file ASWC-D-1970, ASWC file 390-D7-153-D).

OPINION OF BOARD

As a result of charges dated September 14, 1987, investigation eventually conducted November 20, 1987 and by letter dated November 25, 1987, Claimant, a food specialist in the Carrier's service since June 1, 1976, was dismissed for failing to timely submit to a second drug test as directed under the Carrier's return-to-duty drug testing policy.

On May 1, 1987 Claimant went on medical leave due to foot problems. Thereafter, Claimant contracted Hepatitis A. On July 27, 1987 Claimant was released by his doctor to return to work. However, Claimant failed a return-to-duty drug screen taken on August 3, 1987.¹

According to General Supervisor A. G. Tam, after Claimant tested positive Claimant was orally notified of the results and was sent a follow up certified letter dated

¹ The specific results of the test were not supplied during the investigation.

August 5, 1987 (Tr. 9, 12):

[A.] ... And, Mr. Jefferson later called me and I informed him that he did not pass his return back to work physical and I explained to him the procedure that he needs to take another test within thirty days from the date of the known results. I followed up by sending him a letter, giving him all that information in my letter of August 5th, 1987.

* * *

In my letter to Mr. Jefferson, I stated that within thirty days from August the 4th that he must take another drug screen test.

* * *

... I did talk to him and explained to him of his option that he failed his drug screen test and he must take another drug screen test within thirty days before he can come back to work.

Claimant did not appear to take the second drug test within the 30 day period specified by Tam or at any time thereafter.

Claimant denies that he spoke to Tam immediately after the August 3, 1987 drug test. Instead, Claimant asserts that within a few days after taking the drug test he spoke to Crew Base Supervisor R. Settell about returning to work and Settell informed him that a letter was being mailed to him and that Claimant should wait until he received the letter. According to Claimant (Tr. 19), Settell "didn't say what it was for."

Claimant testified that he never received Tam's certified letter of August 5, 1987. The letter was eventually returned unclaimed.

Claimant also testified that on the same day he spoke to Settell he also spoke to a clerk at Crew Base and, because of the letter referred to by Settell, Claimant indicated that he wanted to give the clerk his correct address. According to Claimant, the clerk declined to take his address stating that Claimant had to fill out the appropriate form in person. According to Claimant (Tr. 20):

[A.] They just would not accept it over the phone.

* * *

Now, when he said they tried to mail me a letter, I said, "Well, what address do you have?" And I think they stated the one on Campbell and I said, "Well, that's not my address." And he said, "Well, we cannot accept the address unless it's filled out on the form."

Further, according to Claimant, it was not until later in August 1987 that he spoke to Tam. Claimant testified that it was not until that time that Tam advised Claimant that he failed the drug test and that he sent Claimant a letter.

In Award 21 of this Board we upheld the right of the Carrier to conduct return-to-duty drug tests. The Organization argues that after failing the return-to-duty drug test, Claimant did not have knowledge of the conditions placed upon him under the Carrier's drug testing policy. The Carrier's assertion is to the contrary.

The arguments focus upon whether substantial evidence supports the hearing officer's conclusion that Claimant was told by Tam prior to August 5, 1987 that he had to submit to a retest within 30 days after failing the return-to-duty drug test. Absent compelling reasons established by the record, it is not the function of this Board to make *de novo* credibility determinations. We find no reason to do so in this case with respect to the specific instructions given by Tam to Claimant that he had to retest within the 30 day period, particularly where the hearing officer, who, by being at the hearing, was in a better position to assess the demeanor and credibility of witnesses.²

But giving the Carrier the benefit of any doubt, what is conspicuously missing in this case is that upon testing positive Claimant was advised of his options under the

² Indeed, the hearing officer made credibility resolutions adverse to Claimant on the specific question of having to retest within a 30 day period. We defer to those resolutions. Hearing Officer Baker found:

2. The charge against you was substantiated primarily, but not exclusively, through the testimony of General Supervisor A. G. Tam. Such evidence established that you were instructed to submit to a second drug screen and that you did not do so.
3. Your own testimony established that you were aware of the instructions issued by Mr. Tam, and that you did not comply with them.
4. I did not find your assertion that correspondence to you was improperly addressed credible. ...

Carrier's policy. Under the Carrier's policy, having failed the initial return-to-duty drug test, Claimant:

... must, within 30 days, either be retested by an Amtrak nurse or a medical facility designated by Amtrak *or*, if eligible, enter the Employee Assistance Program.

* * *

If an employee who has had a positive test does not enter the EAP and elects to be retested and the retest result is positive, the employee shall be subject to dismissal and shall not be entitled to enter the EAP. [Emphasis added].

Specifically, while substantial evidence supports the Carrier's conclusion that Tam told Claimant that he had to retest within a 30 day period, the record is devoid of *any* evidence that Claimant was similarly advised by Tam or any other Carrier official that he also had the option under the Carrier's policy to enter the EAP. Typically, the option to enter the EAP is spelled out in the Carrier's letter to the employee after the initial positive test is indicated. Indeed, in Tam's letter of August 5, 1987 Tam suggested that Claimant contact the EAP counselor and further wrote that "If you fail to pass your second test, you will not be able to enter the EAP Program and will be subject to disciplinary action."³

But the record is clear that, for whatever reasons, Claimant never received Tam's August 5, 1987 letter. That deficiency could have been overcome through oral notification to Claimant. However, close review of the record, particularly Tam's testimony, shows that although Tam told Claimant of the need to retest within 30 days, that record does not show that Tam discussed the EAP option with Claimant. Given that the Carrier has made the EAP option an integral part of its return-to-duty drug testing policy, it follows that notification to the employee of that option must be demonstrated, especially where the employee does not receive the formal notification of the results of the return-to-duty drug test.

³ The record shows that Tam was aware of the EAP option. In explaining the Carrier's policy at the hearing, Tam testified (Tr. 20) that "the employee can also join the E.A.P. program."

Claimant shall therefore be permitted to return to service without loss of seniority. However, in that substantial evidence shows that Claimant was made aware in early-August 1987 that he would be receiving a letter from Tam detailing the circumstances surrounding his failure to pass the return-to-duty drug test and further given that Claimant took no concrete affirmative steps to obtain a copy of that letter (i.e., such as contacting the Post Office for forwarding purposes concerning the letter after Claimant learned that the Carrier did not have his correct address or requesting Tam or another Carrier official to forward a copy of that letter to his new address), reinstatement shall be without compensation for time lost. As a further condition of reinstatement, within 30 days of the date of this award, Claimant shall be required to pass a return-to-duty physical including a drug test. However, since this record does not demonstrate that Claimant was informed of his option to enter the EAP prior to his retest under the Carrier's drug testing policy, rather than submitting to a drug test within 30 days of the date of this award, Claimant shall have the option to enter the EAP within 30 days of the date of this award. Should he choose to do so, the terms of the Carrier's drug testing policy for employees choosing that course shall thereafter apply.⁴

AWARD

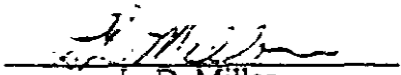
Claim sustained in part. Claimant shall be permitted to return to service without loss of seniority. Reinstatement shall be without compensation for time lost and shall further be conditioned upon successful passage of a return-to-duty physical including a drug test to be taken by Claimant within 30 days of the date of this award. Additionally, rather than submitting to a drug test within 30 days of the date of this award, Claimant shall

⁴ Whether the pivotal date for computing the 30 day period for retesting under the Carrier's policy is the date the test results were known or the date of the Carrier's letter is not a determinative question in this matter and is one that need not be decided in this case. At no time did Claimant in this case ever appear for a retest.

Further, given that the thrust of the investigation concerned the circumstances surrounding the instruction to submit to a retest and the validity of the drug test results were not specifically raised at the investigation, the Organization cannot now attack the validity of those tests. Cf. Award 21, *supra*.

also have the option to enter the EAP within 30 days of the date of this award. Should Claimant choose to enter the EAP, the terms of the Carrier's drug testing policy for employees choosing that course shall thereafter apply.


Edwin H. Benn
Neutral Member


L. D. Miller
Carrier Member


J. C. Campbell
Organization Member

Chicago, Illinois

 1990

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PARTIES) **AMTRAK SERVICE WORKERS COUNCIL**
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SUPPLEMENTAL AWARD

In this Board's initial award, the following remedy was formulated:

Claim sustained in part. Claimant shall be permitted to return to service without loss of seniority. Reinstatement shall be without compensation for time lost and shall further be conditioned upon successful passage of a return-to-duty physical including a drug test to be taken by Claimant within 30 days of the date of this award. Additionally, rather than submitting to a drug test within 30 days of the date of this award, Claimant shall also have the option to enter the EAP within 30 days of the date of this award. Should Claimant choose to enter the EAP, the terms of the Carrier's drug testing policy for employees choosing that course shall thereafter apply.

By letter dated October 4, 1990 the Carrier, on behalf of the parties, advised us that Claimant opted to take the physical examination including a drug screen rather than enter the EAP and successfully passed. The Carrier further advised us that Claimant:

... has returned to active service; however, the parties are in disagreement as to the claimant's status under Amtrak's Drug and Alcohol Policy. It is Amtrak's position that since claimant was subject to quarterly testing prior to the incident which resulted in his dismissal, he should now be subject to quarterly testing for a new two year period. This is consistent with [this Board's] decision in Award No. 36 involving claimant W. J. Wright.

It is the Organization's position that since claimant Jefferson tested clean on his return-to-duty drug screen and because of the difference in wording between Award No. 24 and 36 he is no longer subject to the two year quarterly testing.

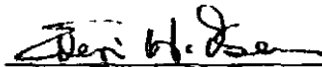
As fully set forth in our award, Claimant was tested for drugs in accord with the Carrier's return-to-duty drug testing policy which policy was found valid in our Award 21. Claimant failed that initial test and did not take a second drug test within the 30 day time frame called for in the policy. As a result, Claimant was dismissed from service. This


Board nevertheless permitted Claimant to submit to a re-test or enter the EAP because the evidence did not demonstrate that Claimant knew or was made aware of his options under the Carrier's return-to-duty drug testing policy.


Because Claimant initially failed the return-to-duty drug test, he became subject to the provisions of the Carrier's return-to-duty drug testing policy at the time he first provided a positive sample. The policy specifically states that:

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/or 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.

Our award merely gave Claimant the ability to re-test under the Carrier's policy. Therefore, since Claimant provided a negative urine sample after the award issued, he nevertheless remains subject to the policy's quarterly testing requirement. Consistent with the Carrier's position in this matter and in accord with the policy, the quarterly testing requirement shall run for a period of two years after his return to service.¹


Edwin H. Benn
Neutral Member


L. D. Miller
Carrier Member


J. C. Campbell
Organization Member

Chicago, Illinois
November 15, 1990

¹ It is therefore unnecessary to rely upon the remedy formulated in Award 36.