

NATIONAL MEDIATION BOARD  
WASHINGTON, DC

SPECIAL BOARD OF ADJUSTMENT 986

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NATIONAL RAILROAD PASSENGER CORPORATION  
(AMTRAK) – NORTHEAST CONFERENCE (“CARRIER”)

AND

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES  
DIVISION – IBT RAIL CONFERENCE

NMB Case No. 297  
Employee: Michael Miller

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Neutral Member:	Barbara Zausner
Carrier Member:	Mark L. Johnson
Organization Member:	Jed Dodd

STATEMENT OF CLAIM

1- The dismissal of Electric Traction Gang Foreman M. Miller by letter dated November 6, 2012 for alleged violation of Amtrak’s Standards of Excellence involving Professional and Personal Conduct and Attending to Duties, as well as an alleged failure to comply with Amtrak’s Drug and Alcohol Policy (P/I 7.3.0), Instruction 4.2.1, Prohibition 7 for purportedly refusing to submit to a Company reasonable suspicion drug test on February 17, 2012 was harsh, capricious and without just cause (System File NEC-BMWE-SD-5101D)

2- As a consequence of the violation referred to in Part 1 above, Claimant shall now ‘be reinstated to full service immediately with full seniority unimpaired and made whole for all wages, benefits and seniority lost for the time of his termination and for the time of his termination and for the discipline to be expunged from his record.’ (Attachment No. 1 to Employees’ Exhibit A-4).

FINDINGS

Upon the whole record and on the evidence, the Board finds that the parties herein are Carrier and Employer within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

The Carrier relies on the testimony of Sr. Engineer Frank Morris, as corroborated by Asst. Supervisor Galen Mull, that there was reasonable suspicion to believe the Claimant might be under the influence of a prohibited substance, that refusal to take a drug test is a dischargeable offense, and that the Claimant understood that.

The Carrier's position is that "the Appellant's failure to remain on the property to submit to a reasonable suspicion drug and alcohol test after receiving a direct order to do so is considered a refusal to test under the Carrier's Drug and Alcohol Policy." (Mini-Brief, pp. 4-5).

The Organization claims that the Appellant was suffering from "severe symptoms of acute pancreatitis" on February 17, 2012. He was ill, did not recall a directive to submit to a drug and alcohol test, offered to take a test within five hours of the original request, and subsequently was hospitalized and diagnosed with pancreatitis. He did not knowingly refuse to take a drug test.

There is substantial credible evidence in the record, by way of the corroborated testimony of several witnesses, that the Claimant's behavior provided reasonable suspicion that he was impaired in violation of the Drug and Alcohol Policy. There is also testimony, corroborated by several witnesses, that the Claimant was warned that his refusal to submit to a test was a refusal to test under the Policy and, therefore, grounds for

discharge. The Carrier did not act arbitrarily or capriciously when it required the Claimant to submit to drug and alcohol testing.

Contrary to the Organization's argument that the Claimant's offer to take a substance abuse test within eight hours after the original request shows that he did not refuse to test is misplaced. The refusal to test occurred when the Claimant did not submit to the test when he was directed to do so. Therefore, the employee is deemed to have refused. The Adams situation, on which, the Organization relies to establish disparate treatment on this issue, is distinguishable. The employee in that case was directed to take a test 15 hours after he left Amtrak, according to the Organization's summary in its earlier appeal. (A-4 attached to the hearing transcript, p. 4).

The burden of proving the medical defense is on the Claimant. The Carrier is not obliged to rebut the Claimant's opinion that his illness began, and his symptoms were due to, his subsequent hospitalization for pancreatitis. There is no satisfactory medical evidence in the record to support the Claimant's defense that the symptoms he displayed on February 17 were the symptoms for which he was hospitalized shortly thereafter. Exhibit 11 to the transcript, a letter from Dr. Kodumal, indicates the onset of the illness was "indeterminate"; that is, he could not tell when it began. He opined that the symptoms of weakness and hunger with a bloated feeling that the Claimant said he felt on February 17 would be consistent with acute pancreatitis." Those, however, are not the only symptoms exhibited by the Claimant on February 17. Others were consistent with intoxication.

The failure of other witnesses to notice or believe that the Claimant was intoxicated on February 17 does not negate that the Claimant's refusal to take a substance abuse test.

Other defenses not reiterated above are not supported in the record.

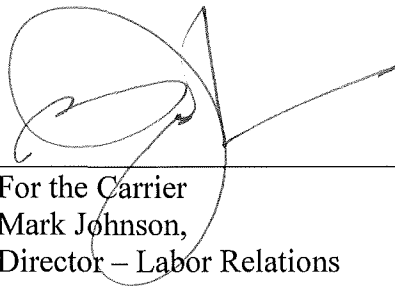
There are no due process violations in the handling of this matter. We conclude on this record that the Claimant refused to submit to testing under the drug and alcohol policy when there was reasonable suspicion to require that testing. There is no basis for disturbing the Carrier's action.

### AWARD

The Claim is denied.

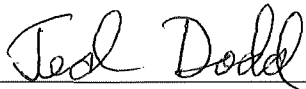


Barbara Zausner, Neutral Board Member  
August 1, 2013



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For the Carrier  
Mark Johnson,  
Director – Labor Relations



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For the Organization  
Jed Dodd,  
General Chairman

