

BEFORE SPECIAL BOARD OF ADJUSTMENT 986

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE
and
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)
NORTHEAST CORRIDOR**

Case No. 330

STATEMENT OF CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. V. Jackson, issued by letter dated October 11, 2018, in connection with alleged violation of the Carrier’s ‘Standards of Excellence’ pertaining to the section entitled ‘Alcohol and Drugs’, as well as the Carrier’s Drug and Alcohol-Free Workplace Policy and Guidelines 7.3.4, was lacking in merit and too severe (System File NEC-BMWE-SD-5685D AMT).
2. As a consequence of the violated referred to in Part 1 above, Claimant V. Jackson shall have the decision in this case overturned, discipline revoked, the charges removed from his record and he shall be reinstated in all his capacities and have his seniority fully restored.”

FINDINGS:

By notice dated July 30, 2018, the Claimant was directed to attend a formal investigation on charges that the Claimant had violated the Carrier’s Standards of Excellence pertaining to the section entitled ‘Alcohol and Drugs’, as well as the Carrier’s Drug and Alcohol-Free Workplace Policy and Guidelines 7.3.4 in connection with a July 23, 2018, incident in which illegal drugs allegedly were found in the Claimant’s personal vehicle during a search by Carrier police while Claimant was on duty and his vehicle was parked in a Carrier parking lot. The investigation was conducted, after a postponement, on October 1, 2018. By letter dated October 10, 2018, the Claimant was notified that he had been found guilty as charged. By letter dated October 11, 2018, the Claimant was

notified that he was being dismissed from the Carrier's service. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to discipline him. The Carrier denied the claim.

The Carrier contends that the instant claim should be denied in its entirety because substantial evidence in the record supports the finding of guilt, because the Claimant was afforded a fair and impartial investigation, because there is no merit or mitigating value to the Organization's assertions, because the requested remedy is not appropriate, and because the discipline imposed is commensurate with the seriousness of the proven offenses, and was not arbitrary, capricious, or excessive. The Organization contends that the instant claim should be sustained in its entirety because the Carrier failed to satisfy its burden of proof of proving the Claimant guilty in light of the heightened standard that applies to charges involving "moral turpitude," because un rebutted testimony establishes that the drugs were planted in the Claimant's car unbeknownst to the Claimant, and because the discipline imposed was greatly excessive.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the evidence and testimony in this case, and we find that the Carrier has failed to meet its burden of proof that the Claimant was guilty of violating the Carrier's Drug and Alcohol-Free Workplace Policy and Guidelines when crack cocaine was found in the Claimant's vehicle parked on Carrier property. The Carrier charged the Claimant with possession of illegal substances on the Carrier's property, but the facts that were developed at the hearing make it clear that the Carrier only searched

the Claimant's vehicle because the Carrier's security had apparently received a call from the Claimant's former girlfriend who admittedly planted the crack cocaine in the Claimant's vehicle. Ms. Hill, the Claimant's former girlfriend, testified at the hearing that she bought the crack cocaine to "get back at him." She testified that that was the "sole purpose" for her purchase of the crack cocaine. Ms. Hill testified that she had previously been a drug user and that she and the Claimant had a fight and she wanted to get back at him by planting the drugs in his car and calling his employer. She testified that she and the Claimant had been fighting for a couple of months. She used an extra set of keys to the Claimant's vehicle and planted the crack cocaine in his car.

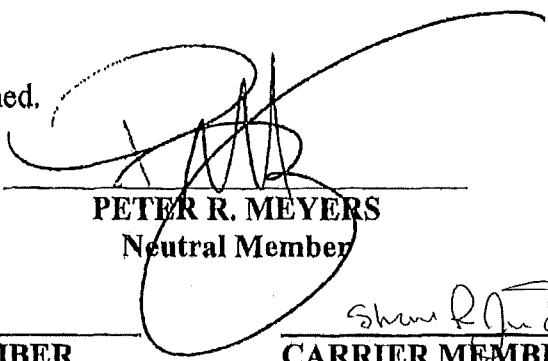
This Carrier certainly has a legitimate right to have rules that prohibit its employees from having illegal drugs on Carrier premises. The Carrier, for obvious reasons, can prohibit drug usage by its employees while they are working, employees being under the influence of drugs while they are working, employees having possession of drugs while on duty or on Carrier premises, and many other misbehaviors on the part of its employees related to drugs and alcohol. But this is an unusual case. The Claimant in this case did not actually possess the controlled substance on his person while he was at work and was apparently not even aware that the drugs were in his vehicle at the time that his girlfriend called Carrier security and had the car searched while the Claimant was at work. The girlfriend admitted in sworn testimony to planting the drugs in the Claimant's vehicle. The Claimant denies any knowledge of the drugs being in his vehicle in the parking lot. There is no way that the Claimant can be found guilty of being in possession of those drugs while on Carrier property given the facts that were elicited at

the hearing.

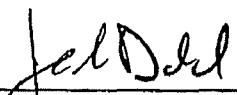
It is fundamental that the Carrier bears the burden of proof in all discipline cases. The Carrier has simply failed to meet its burden of proof in this case given these peculiar circumstances. Therefore, this Board has no choice but to sustain the claim and reinstate the Claimant. The Claimant will comply with all return-to-work procedures, including drug and alcohol testing and the Carrier has the right to require the Claimant to be assessed by a Substance Abuse Professional ("SAP") before assigning him to work on property. The Claimant's return to active duty and pay shall not be delayed or diminished as a result of complying with the Carrier's SAP assessment.

AWARD:

The claim is sustained.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER
DATED: June 27, 2019



CARRIER MEMBER
DATED: June 28, 2019

dissent attached

Carrier Member's Dissent to SBA No. 986/Award No. 330

The Carrier dissents to the Board's findings in the above-referenced matter. This Board has exceeded the scope of its authority by substituting its judgment for that of the Hearing Officer when it held that the Claimant was not aware of, and thus not responsible for, the illegal drugs he transported on to company property in his personal vehicle.

The Hearing Officer heard the testimony of the witnesses, including the girlfriend who belatedly claimed to have planted the drugs in the vehicle. The Hearing Officer was in the best position to make credibility determinations, taking into account factors such as bias, self-interest, demeanor and testimonial capacity. The Hearing Officer resolved the credibility question and determined the girlfriend's testimony was not credible, which is not surprising given the inconsistencies in her testimony. Clearly, the Hearing Officer's rejection of the self-serving story is not per se arbitrary, unreasonable or capricious.

The only way for this Board to sustain the claim was to reject the credibility determination made by the Hearing Officer in violation of the firmly established, long-standing arbitral precedent that an appellate board may not resolve pure credibility questions. The principal is well established, it is understood and acknowledged by the parties and it should have been dispositive in the instant matter.

At least the Board had the wisdom to acknowledge that the Carrier has the right to prohibit employees from having illegal drugs on its premises. There is no dispute that the Claimant violated this prohibition. The Board's decision to reinstate the Claimant despite this fact is erroneous. I respectfully dissent.



Sharon Jindal
June 28, 2019